



IP CASE EXPRESS

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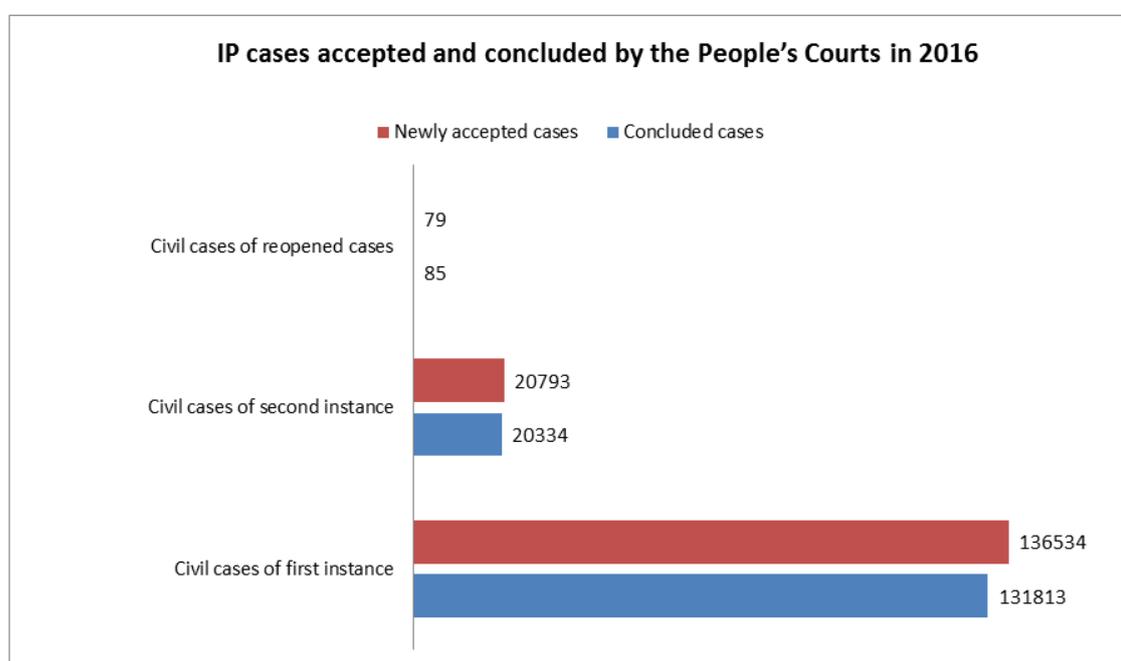
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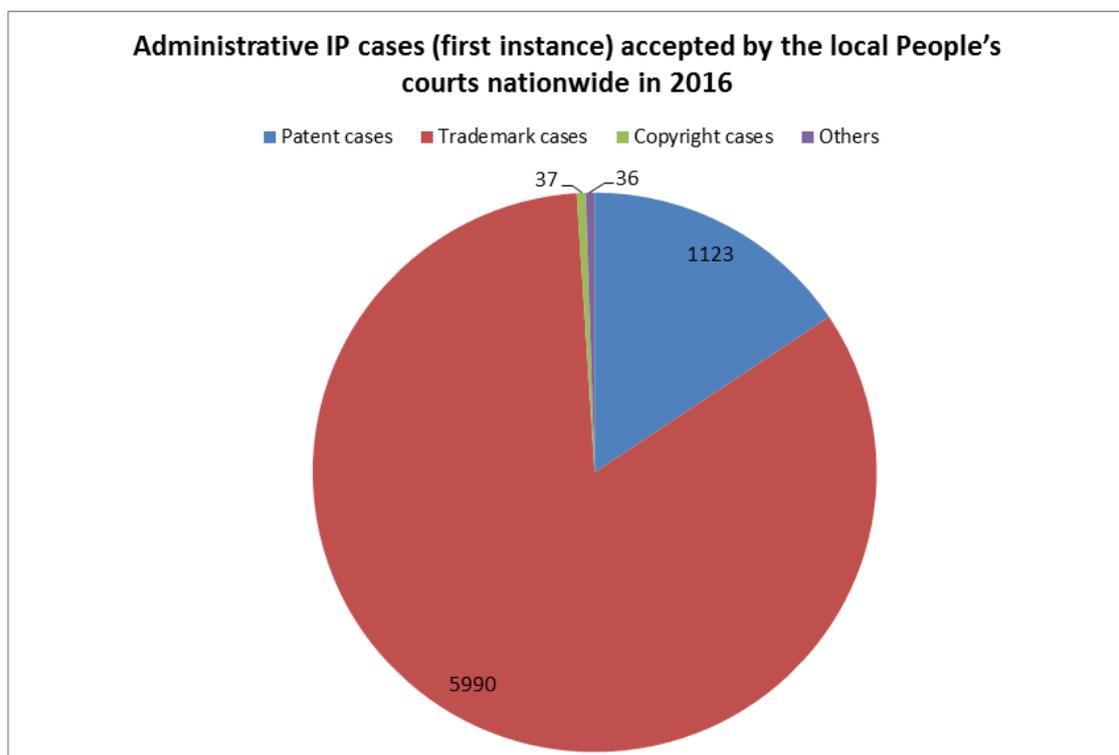
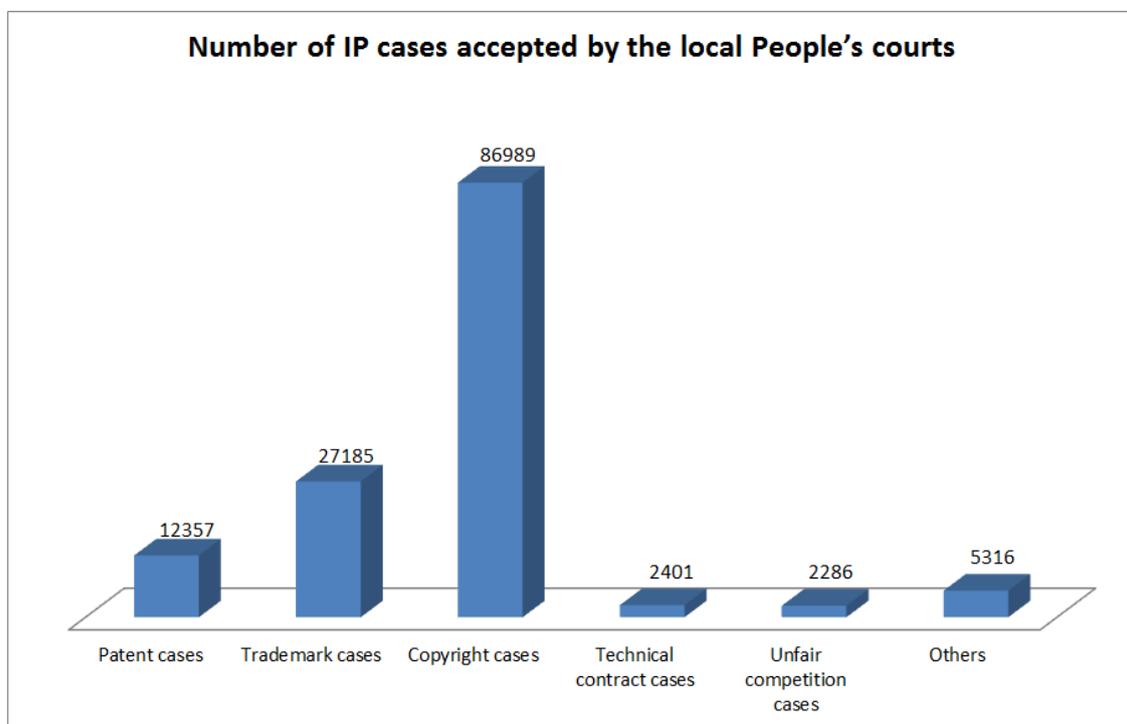
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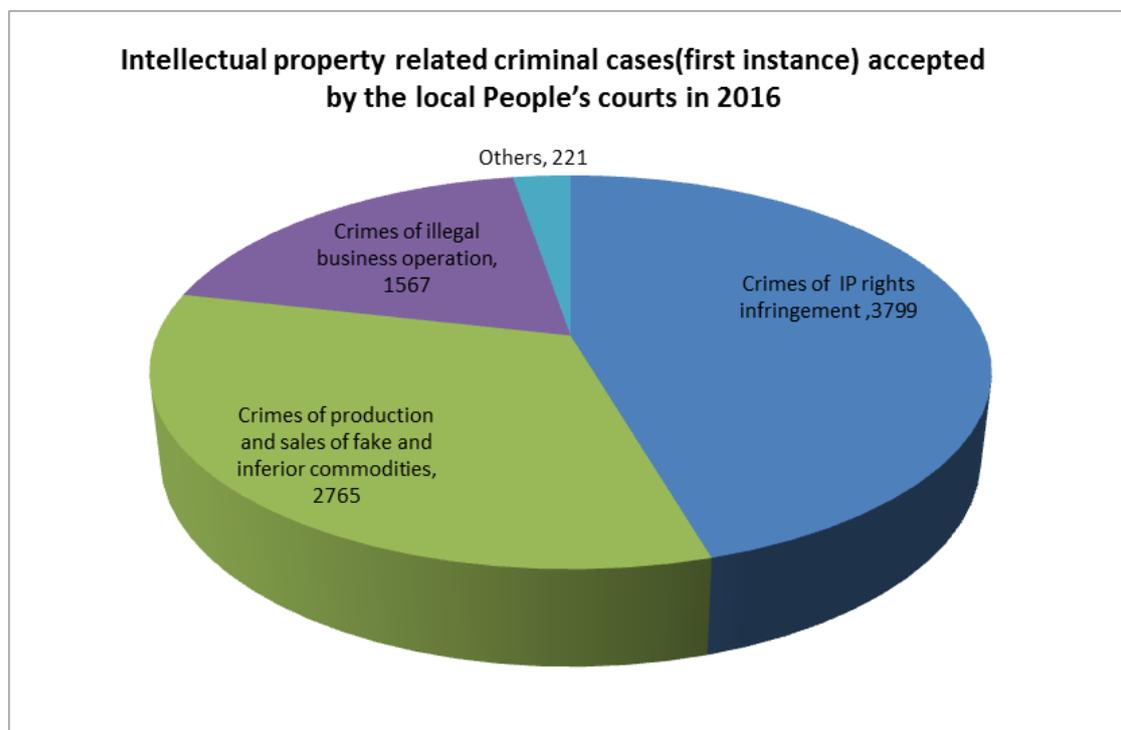
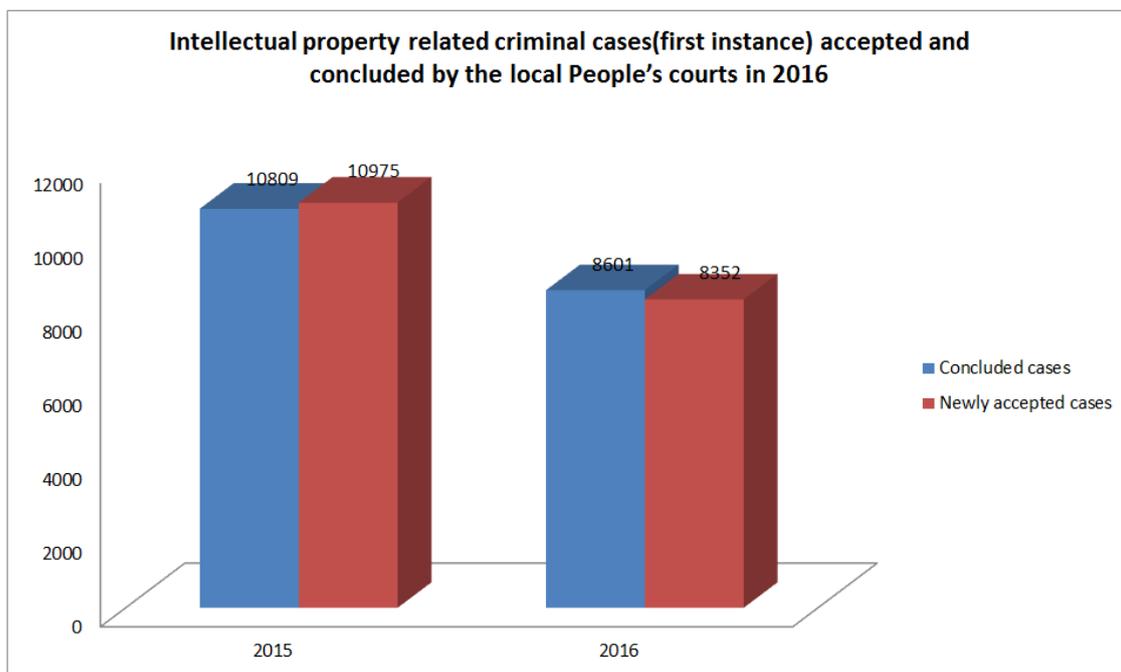
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In this edition, we browsed typical IP-related court judgments and adjudications released by the Supreme People's Court together with the key statistics in 2016, and we would like to share with you noteworthy statistics and the brief analyses of the typical cases.

I. **Statistics**







Source: Supreme People's Court of China

II. TOP 10 IP Cases released by the Supreme People's Court in

2016

1. Series of Administrative Cases of “QIAODAN” Trademarks

01	<p>Series of retrial cases in connection with administrative disputes over trademarks filed by Michael Jeffrey Jordan against the China Trademark Review and Adjudication Board of the State Administration for Industry and Commerce and Qiaodan Sports Co., Ltd.</p> <p>[Supreme People's Court Administrative Judgment (2016) ZuiGaoFa Xing Zai No. 15, No. 20, No. 25, No. 26, No. 27, No. 28, No. 29, No. 30, No. 31, No. 32]</p> <p>[Case Summary]</p> <p>Michael Jeffrey Jordan, a former NBA basketball star and the applicant of the retrial, applied in 2012 to the China Trademark Review and Adjudication Board for cancelling the trademarks of “乔丹” and “QIAODAN” in connection with goods in different classes registered by Qiaodan Sports Co., Ltd. (hereinafter referred to as “Qiaodan”). The China Trademark Review and Adjudication Board rendered a ruling rejecting the application in 2014. Dissatisfied with the ruling, the applicant instituted an administrative proceeding. In 2015, dissatisfied with the judgment of the second instance of the administrative disputes over 68 trademarks awarded by the Beijing Higher People’s Court, the applicant filed an application for a retrial with the Supreme People's Court. In December 2015, the Supreme People's Court reviewed and ruled 10 cases. At the same time, the Supreme People's Court rejected the application for retrial in another 50 cases filed by the applicant, and ruled that the review of the 8 cases would be suspended. After the trial of the Supreme People's Court, a collegiate bench composed of 5 members in which the Chief Judge Tao Kaiyuan served as the deputy president was established to hear the 10 cases. After discussions, the Supreme People's Court Judicial Committee made the following judgments: (I) in respect of the three cases relating to the trademarks of “乔丹” (ZuiGaoFa Xing Zai (2016) No. 15, No. 26 and No. 27), considering the registration of the trademark in dispute has undermined the prior rights of name of Applicant “Jordan” and violated the relevant provisions of Article 31 of the <i>Trademark Law of the People's Republic of China</i> (amended in 2001), which provides for that “no trademark application shall infringe upon another party’s existing prior rights”, the trademark shall be cancelled. Therefore, the rulings awarded by the China Trademark Review and Adjudication Board and the judgments of the first instance and the second instance were revoked, and the China Trademark Review and Adjudication Board was ordered to rehear the trademark in dispute. (II) In respect of the four cases relating to the pinyin trademark of “QIAODAN” (ZuiGaoFa Xing Zai (2016) No. 20, No. 29, No. 30, No. 31) and the three</p>
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	<p>cases relating to the trademark of pinyin “qiaodan” combined with devices (ZuiGaoFa Xing Zai (2016) No. 25, No. 28, No. 32) (totally 7 cases), considering the applicant was not entitled to the rights of name of “QIAODAN” or “qiaodan”, the registration of the trademarks in dispute did not infringe upon the rights of name of the applicant. Nor did the trademarks in dispute fall under the circumstances prescribed in Paragraph (8) of Section 1 of Article 10 of the <i>Trademark Law of the People's Republic of China</i>, which read “those detrimental to socialist morals or customs, or having other unhealthy influences” or Section 1 of Article 41 thereof, which read “the registration of a trademark was acquired by fraud or any other improper means”. Therefore, the judgment of the second instance was sustained, and the application of the applicant was rejected.</p> <p>[Typical Significance]</p> <p>Through public hearing and rulings of the series of administrative dispute cases “QIAODAN” trademarks, the Supreme People's Court has provided equal protection to the legitimate rights and interests of both the Chinese right holder and the foreign right holder, further building China’s image as a responsible country committed to strengthening the judicial protection of intellectual property. In the judgment, the Supreme People's Court emphasized the significance of the principle of good faith to the regulation of trademark application and registration. This is of positive significance to purify the trademark registration and use environment, protect the legitimate rights and interests of consumers, and carry forward and practice the core socialist values. In the judgment, the Supreme People's Court also stated the applicable legal criteria of the protection of prior rights of name prescribed in the <i>Trademark Law of the People's Republic of China</i>, which will have a significant impact on the judgment criteria of similar cases.</p>
<p>2. Case of Dispute over Infringement upon “Qingfeng” Trademark and Unfair Competition</p>	
<p>02</p>	<p>Retrial of dispute over infringement upon trademark rights and unfair competition between Beijing Qingfeng Steamed Dumpling Shop and Shandong Qingfeng Catering Management Co., Ltd.</p> <p>[Supreme People's Court Civil Judgment (2016) ZuiGaoFa Min Zai No. 238]</p> <p>[Case Summary]</p> <p>Beijing Qingfeng Steamed Dumpling Shop (hereinafter referred to as “Qingfeng Steamed Dumpling Shop”) filed a civil action against Shandong Qingfeng Catering Management Co., Ltd. (hereinafter referred to as “Qingfeng Catering”) on the grounds of trademark infringement and unfair competition. Qingfeng Steamed Dumpling Shop claimed that XuQingfeng, Legal Representative of Qingfeng Catering who had been fully aware of the popularity of the trademark and trade name of Qingfeng Steamed Dumpling Shop for his extensive experience in the catering service sector, used the</p>

trade name of “Qingfeng” to establish the catering company and used the logos of “Qingfeng” and “Qingfeng Catering” in his official website, shops, menus and advertising materials. This constituted an infringement upon the trademark rights of Qingfeng Steamed Dumpling Shop and unfair competition. Qingfeng Catering argued that it had the right to register the name of its legal representative as the trade name and to use the enterprise name registered with the business and commercial administration according to law; the trademark of Qingfeng Steamed Dumpling Shop was not a well-known trademark. In addition, the logo used by it was neither identical with nor similar to the registered trademark of Qingfeng Steamed Dumpling Shop. In the judgment of the first instance, the Intermediate People's Court of Jinan Municipality, Shandong Province held that Qingfeng Catering used “Qingfeng” in consistence with its use environment, and the font, size and color were not highlighted. This was a fair use of its trade name. At the time Qingfeng Catering registered and used its trade name, the operating area and goodwill of Qingfeng Steamed Dumpling Shop did not cover or impact Jinan and Shandong. There was no evidence that the trade name registered by Qingfeng Catering had caused confusion among the public. Therefore, it did not infringe upon the trademark rights of Qingfeng Steamed Dumpling Shop. Thus, the claim of Qingfeng Steamed Dumpling Shop was rejected. In the judgment of the second instance, the Shandong Higher People's Court upheld the judgment of the first instance. Qingfeng Steamed Dumpling Shop filed a request for retrial with the Supreme People's Court. The Supreme People's Court held that Qingfeng Catering constituted an infringement upon the trademark rights of Qingfeng Steamed Dumpling Shop and unfair competition, revoked the judgments of the first instance and the second instance, and ordered Qingfeng Catering to immediately stop the infringing acts and the use of “Qingfeng” as trade name, and to compensate Qingfeng Steamed Dumpling Shop for economic losses and reasonable costs in the amount of 50,000 yuan.

[Typical Significance]

This case deals with the exercise of trademark rights and other rights, such as the conflict of name rights. The Supreme People's Court confirmed in this case that citizens are entitled to legal rights of name and the fair use of their name, provided, however, that when using their name as a trademark or trade name, they may not violate the principle of good faith. It is bad faith to register a trade name identical with others or highlight in the similar goods or services the trademark or trade name identical with or similar to the trademark of others while being aware of the high popularity or influence of the registered trademark or trade name of others. Such act is free ride on other's registered trademark or trade name, which is easily to cause confusion among public. It does not belong to fair use and has constituted trademark infringement and unfair competition. The Supreme People's Court further pointed out that in this case, where the registered trademark has a high level of popularity, Qingfeng Catering has used it in such a manner as to confuse the relevant public in respect of its relationship with Qingfeng Steamed Dumpling Shop and associated the goodwill created by it with only

	<p>the “Qingfeng” brand. In fact, this act will just help Qingfeng Steamed Dumpling Shop promote its popularity, but is not conducive to its own business development. On the contrary, after changing its trade name, it can enhance its goodwill and visibility, build its own brand and make win-win achievements through business operation with integrity and advertising.</p>
<p>3. Case of Trademark Infringement of “Fei Cheng Wu Rao”</p>	
<p>03</p>	<p>Retrial of dispute over trademark infringement between Jiangsu Broadcasting Corporation and Shenzhen Zhen’ai Network Information Technology Co., Ltd. and Jin Ahuan</p> <p>[Guangdong Higher People’s Court Civil Judgment (2016) Yue Min Zai No. 447]</p> <p>[Case Summary]</p> <p>On February 16, 2009, Jin Ahuan applied to the Trademark Office of the State Administration for Industry & Commerce of the People's Republic of China for the registration of the “Fei Cheng Wu Rao” trademark. The application was approved on September 7, 2010 in respect of Class 45, including “dating services and marriage agencies”. Jiangsu Satellite TV under Jiangsu Broadcasting Corporation (hereinafter referred to as “JSBC”) ran a TV program for marriage and dating entitled “Fei Cheng Wu Rao” (literally: "Not Sincere, Don't Disturb", known in English as If You Are the One) in 2010. Shenzhen Zhen’ai Network Information Technology Co., Ltd. (hereinafter referred to as “Zhenai.com”) recommended contestants to the program, provided advertising and marketing services, and recruited contestants in Shenzhen, with the registration site located in Nanshan District in Shenzhen City. Jin Ahuan brought a lawsuit before Nanshan District People’s Court of Shenzhen City against JSBC and Zhenai.com on the ground of trademark infringement, requesting the court to order Jiangsu Satellite TV to immediately cease the use of “Fei Cheng Wu Rao” on its TV program. The court of the first instance held that although relating to marriage and dating, the “Fei Cheng Wu Rao” program was a television program after all. Therefore, the relevant public generally didn’t think there were specific connections between them. The program was not likely to confuse the public and therefore, did not constitute infringement. In the judgment of the second instance, the Shenzhen Intermediate People's Court held that the program had constituted infringement as its services are “dating and matchmaking”, which have constituted same services with the designated services of Jin Ahuan’s trademark in view of the program’s introduction, opening remarks, concluding remarks, qualifications for application, the interactions between the male and female contestants in the program, SARFT’s documents and media comments. In the retrial, the Higher People’s Court of Guangdong Province held that the TV program of If You Are the One differed greatly from the designated services of “dating and matchmaking” Jin Ahuan’s trademark in terms of service purposes, contents, methods and objects. With the general knowledge, the public can clearly</p>

	<p>distinguish the contents of TV entertainment programs and matchmaking services in real life. Therefore, they did not constitute similar services. The use of the logo “If You Are the One” by JSBC did not constitute infringement upon the registered trademark rights of Jin Ahuan. Thus, the judgment of the second instance was revoked while the judgment of the first instance sustained.</p> <p>[Typical Significance]</p> <p>This case deals with the relationship between a television program and the trademark. Given the high visibility and popularity of the allegedly infringing TV program, the case has received widespread attention. Whether the name of the TV program has been used by means of a trademark, how to treat the relationship between a TV program and its contents and theme, and how to determine the type of services of the TV program? These issues were thoroughly analyzed in the retrial. The judgment held that it was wrong to separate a certain form of expression or a theme of the TV program from the program in a simple, isolated manner. Instead, the entirety and main features of the program should be analyzed so as to grasp the nature of its behaviors and make a reasonable determination. At the same time, based on the purposes of the <i>Trademark Law of the People's Republic of China</i>, the judgment examined the likelihood of confusion and misrecognition of the relevant public as a criterion for determining possible trademark infringement. The retrial held that the protection range and protection intensity of the registered trademark shall correspond to the contribution made by the owner of the registered trademark to the prominence and visibility of the trademark, which has reflected the judicial policy of harmony between the intensity of judicial protection of intellectual property and the degree of innovation.</p>
<p>4. Case of Patent Invalidation of “ThermostableGlucoamylase”</p>	
<p>04</p>	<p>Retrial of Administrative Dispute over Invention Patent Invalidation between the Patent Reexamination Board of SIPO and Novozymes and Jiangsu BoliBioproducts Co., Ltd.</p> <p>[Supreme People's Court Administrative Judgment (2016) ZuiGaoFa Xing Zai No. 85]</p> <p>[Case Summary]</p> <p>This case involves the patent for invention (hereinafter referred to as the “Patent”) granted by the State Intellectual Property Office (SIPO) on June 28, 2006. Entitled “thermostableglucoamylase”, the patent is owned by Novozymes. On March 11, 2013, at the request of Shandong Longda Biotechnology Co., Ltd. and Jiangsu BoliBio products Co., Ltd., the Patent Reexamination Board of SIPO (hereinafter referred to as the “Patent Reexamination Board”) made a decision on the review on invalidation of the No. 17956 Announcement of null and void patent for invention (hereinafter referred to as the “disputed decision”). Based on the amended</p>

claim submitted by Novozymes on November 10, 2011, the Patent Reexamination Board declared that the claims were partly valid and partly null and void. The partly rights in dispute in this case and the relevant claims are as follows: “6. An isolated enzyme with glucoamylase activity is at least 99% homologous with the full length sequence shown in SEQIDNO: 7, whose isoelectric point is less than 3.5 as measured by isoelectric focusing. ... 10. The enzyme isolated according to any of the claim 6-9 is derived from filamentous fungal *Talaromyces*, which is a *T.emersonii* strain. 11. The enzyme under Claim 10 is derived from the filamentous fungus *T.emersonii*CBS793.97.12. A cloned DNA sequence, whose DNA sequence coding is based on an enzyme exhibiting glucoamylase activity. The DNA sequence is composed of: (a) the glucoamylase encoding part of the DNA sequence shown in SEQIDNO: 33; (b) the DNA sequence shown in positions 649–2724 in SEQIDNO:33 or its complementary strand; 13. The DNA sequence under Claim 12 is derived from filamentous fungal *Talaromyces*, which is a *T.emersonii* strain. 14. The DNA sequence under Claim 13 is derived from filamentous fungal *T.emersonii*CBS793.97.....” the disputed decision held that considering the glucoamylase activity of the enzyme derived from *T.emersonii*CBS793.97 has been proven in the specification, the technical personnel in the field can forecast its derivation from the *T.emersonii* strain and the glucoamylase activity of the polypeptide that is at least 99% homologous with the full length sequence shown in SEQIDNO: 7. Thus, Claim 10 and Claim 11 can be supported by the specification; the technical program of paragraphs (a) and (b) of under Claim 12 as quoted in Claim 13 and Claim 14 can also be supported by the specification. The disputed decision held that the claims were valid. The first instance held that although the claims in dispute were limited to specific strains, due to the way the homology and openness were written, the defined amino acid sequence and DNA sequence included other sequences that may lead to various variations. In the absence of the support of sufficient experimental data in the patent specification, the summary of the disputed claims is clearly not covered by the specification. The court of first instance revoked the disputed decision, which was sustained by the court of second instance. The Patent Reexamination Board of SIPO and Novozymes filed a request for retrial. The Supreme People's Court revoked the judgments of the first instance and the second instance and sustained the disputed decision.

[Typical Significance]

In accordance with Section 4 of Article 26 of the *Patent Law of the People's Republic of China*, the claims shall be supported by the description. The technical solution for which protection is sought in each of the claims shall be a solution that a person skilled in the art can reach directly or by generalization from the contents sufficiently disclosed in the description, and shall not go beyond the scope of the contents disclosed in the description. The Supreme People's Court held in this case that in respect of the SEQIDNO: 7 with a total length of 591 amino acids, despite differences in five or six amino acid positions from the sequence which is at least 99% homologous

with it, the enzyme further defined in Claim 10 and Claim 11 is derived from the *T.emersonii* strain and the specific strain of *T.emersonii*CBS793.97, except for their homology characteristics. Ordinary technicians of the field generally recognize species as the basic unit of taxonomy, for the same species will exhibit a high degree of similarity in some basic characteristics. The gene sequence of an enzyme encoded in the body of the same species of fungus or the same fungus is generally determined, with the exception of very few highly homologous variant sequences occasionally. Accordingly, the enzymes encoded by the gene are also determined and very few. In this case, more than 99% of homology and the dual limitation of the origin of the strain have limited the scope of protection under Claim 10 and Claim 11 to extremely limited species of enzymes. Moreover, Claim 10 and Claim 11 cover the isoelectric points and the function of glucoamylase activity defined in Claim 6. Therefore, as the glucoamylase activity of the above SEQIDNO:7 has been proven by the Cases 1-4 of the specification, the scope of protection under Claim 10 and Claim 11 is supported by the specification. The technical solution of Sections 12 (a) and (b) quoted in Claim 13 and Claim 14 can also be supported by the specification. In the present case, the Supreme People's Court specified that the claims of biological sequences with the use of homology and the limitation of origin and functions must be supported by the specification. This judgment rule and the standard for granting patents for inventions of biological sequences are of great significance to guiding the preparation and review of patent applications relating to proteins and gene. They can also help promote the innovation and development of the biotechnology industry.

5. Administrative Case in Respect of Trademarks of “LAFITE” and “LafeiZhuangyuan”

Retrial of administrative dispute over trademarks filed by Château Lafite Rothschild against China Trademark Review and Adjudication Board of the State Administration for Industry and Commerce and Nanjing Golden Hope Wine Co., Ltd.

[Supreme People's Court Administrative Judgment (2016) ZuiGaoFa Xing Zai No. 34]

[Case Summary]

05 No. 4578349 trademark “LafeiZhuangyuan” (Disputed Trademark) was filed on April 1, 2005 in respect of class 33 goods “wine and alcohol (drinks)”, and the registrant was Nanjing Golden Hope Wine Co., Ltd. (hereinafter referred to as “Golden Hope”). The trademark of “LAFITE” (Cited Trademark) was filed on October 10, 1996 in respect of class 33 goods “alcoholic beverages (excluding beer)”, and the registrant was Château Lafite Rothschild (hereinafter referred to as “Château Lafite”). Château Lafite filed a dispute application with the China Trademark Review and Adjudication Board of the State Administration for Industry and Commerce (hereinafter referred to as “TRAB”) in respect of the Disputed Trademark. The TRAB rendered a judgment to revoke the registration of the Disputed Trademark (Decision on the Dispute over No. 4578349

Trademark “LafeiZhuangyuan” (Shang Ping Zi [2013] No. 55856) (hereinafter referred to as “No. 55856 Decision”). Dissatisfied with the decision, Golden Hope filed an administrative litigation. The Beijing First Intermediate People's Court held that given the coverage of relevant media and the presence in the Chinese market of “LAFITE” wine of Château Lafite prior to the registration of the Disputed Trademark, the relevant public in China had known “LAFITE” as “拉斐”, “拉菲特” or “拉菲” and it enjoyed high reputation in China. The registration of the Disputed Trademark had violated Article 28 of the Trademark Law of the People's Republic of China (amended in 2001). Therefore, the No. 55856 Decision was sustained. Golden Hope refused to accept the judgment and filed an appeal. The Beijing Higher People’s Court at the second instance held that it was difficult to determine the popularity of the Cited Trademark in the Chinese mainland before the date of filing of the Disputed Trademark, and the relevant public has been able to distinguish the Cited Trademark from “LAFITE”. The Disputed Trademark has been registered and used for ten years. To maintain the established and stable market order, the registration of the Disputed Trademark was maintained and the judgment of the first instance and the No. 55856 Decision were revoked. Dissatisfied with the judgment, Château Lafite filed an application for retrial with the Supreme People's Court. The Supreme People's Court rendered a retrial on December 23, 2016 and finally revoked the judgment of the second instance and sustained the judgment of the first instance and the No. 55856 Decision.

[Typical Significance]

This case involves the judgment of the similarity between Chinese and English trademarks and the establishment of a stable market order. The Supreme People's Court held that considering the high popularity of the Cited Trademark in the case and the strong objective connection between “拉菲” and “LAFITE” for years of business operation of Château Lafite, the Disputed Trademark and the Cited Trademark constituted similar trademarks in respect of same or similar goods and has therefore violated the provisions of Article 28 of the Trademark Law of the People's Republic of China. In addition, in respect of a trademark that has been registered and used for a period of time, the long-term use is not the only factor to determine whether a high level of market popularity has been established and the relevant use group has been formed. Instead, we should examine whether through the behaviors of use, the relevant public can distinguish it from relevant trademarks and whether such behaviors can easily confuse the public. This situation does not exist in this case. The retrial focused on the components and overall similarity of the trademarks, the identification of the corresponding relationship of the prominence and popularity and stability of relevant trademarks, and relevant public groups, based on which the standard for judging the similarity of the Chinese and English trademarks. This is of great guiding significance.

6. Case of Infringement upon Design Patent of “Beauty Apparatus”

Case of repeal in respect of design patent infringement filed by Matsushita Electric Industrial Co., Ltd. against Zhuhai Kingdom Electric Co., Ltd. and Beijing Likang Fuya Commercial Co., Ltd.

[Beijing Higher People’s Court Civil Judgment (2016) Jing Min Zhong No. 245]

[Case Summary]

06

Matsushita Electric Industrial Co., Ltd. (hereinafter referred to as “Matsushita”) obtained a design patent called “Beauty Apparatus” on September 5, 2012, of which the publication number is CN302065954S. Matsushita claimed that the KD-2331 Kingdom Ion Face Steamer produced, sold and offered for sale by Zhuhai Kingdom Electric Co., Ltd. (hereinafter referred to as “Kingdom”) and sold by Beijing Likang Fuya Commercial Co., Ltd. (hereinafter referred to as “Likang”) infringed its design patent. It raised the following claims: the two defendants cease the infringement; destroy all the promotional materials of the alleged infringing product and delete the promotional contents of the alleged infringing products; Kingdom destroys all the molds and special production equipment in question and all the infringing products in stock, and recovers all the unsold infringing products from the sales outlets and destroys them; Kingdom pays RMB 3 million as compensation for the economic loss of the plaintiff; and the two defendants together pay RMB 200,000 as compensation for reasonable costs. The Beijing Intellectual Property Court at the first instance held that considering the differences between the alleged infringement product and the patented design in dispute do not have a substantial influence on their overall visual effects, they are similar in design. Without the permission of Matsushita, Kingdom has made, sold and offered for sale the alleged infringement product; without the permission of Matsushita, Likang has sold and offered for sale the alleged infringement product. The existing evidence can prove the profits of Kingdom from selling and offering for sale the alleged infringement product, and it is reasonable for Matsushita to claim a compensation of 3 million yuan according to the sales volume and average price available online. In addition, Likang did not cease the sale after receipt of the notice of the legal action, and shall share the costs reasonably incurred by Matsushita for stopping such infringement. Accordingly, the first instance ruled that the two defendants shall cease their infringement; Kingdom shall make compensation for economic losses in the amount of RMB 3 million; Kingdom and Likang shall be jointly and severally liable for the reasonable costs of RMB 200,000. Dissatisfied with the judgment, Kingdom and Likang filed an appeal. The Beijing Higher People’s Court held that the alleged infringing product was covered by the patent protection. In respect of the amount of compensation, through notary evidence, Matsushita retrieved on part of the e-business platforms that a total

	<p>of 18,411,347 sets of infringing product of the same type had been sold at the average price of RMB 260, based on which it claimed the compensation. According to the total sales volume of the alleged infringing product multiplied by the average price of the product, the amount of compensation will be still far higher than RMB 3 million even if a lower reasonable profit of the alleged infringing product is calculated. With the support of the above evidence, the amount of compensation (RMB 3 million) claimed by Matsushita is very reasonable. The court of first instance has fully supported the request of Matsushita for compensation for economic losses on a factual and legal basis. Thus, the appeal was rejected and the judgment by the court of first instance sustained.</p> <p>[Typical Significance]</p> <p>The patent involved in the case is a design patent for a “beauty apparatus”, with an extremely high market value. The high amount of compensation fully reflects the concept of judicial protection that the infringement for compensation fully demonstrates and realizes the market value of intellectual property. The judgment of the court of second instance further specifies the rules for examining and verifying the benefit evidence in patent infringement civil cases, which is of great demonstration significance to similar cases. The judgment of the court of second instance held that considering the difficulty in burden of proof and the fact that the accounts and documents relating to the patent infringement are mainly in the possession of the infringer, if the right owner within the scope of its ability to prove fully presents evidence relating to the benefits made by the infringer and fully explains the reasonableness of the amount of economic losses claimed by it, but the infringer is unable to present any contrary evidence to overrule the claim of the right holder, the people's court may, on the basis of the claim and the evidence provided by the right holder, confirm the benefits obtained by the infringer from the infringement.</p>
<p>7. Case of Infringement upon Design Patent of “Pen”</p>	
<p>07</p>	<p>Case of dispute over design patent infringement lodged by Shanghai M&G Stationery Inc. against Ningbo DeLi Group Co., Ltd. and Jinan Kunsen Commercial and Trading Co., Ltd.</p> <p>[Shanghai Intellectual Property Court Civil Judgment (2016) Hu No. 73 Min Chu No.113]</p> <p>[Case Summary]</p> <p>Shanghai M&G Stationery Inc. (hereinafter referred to as “M&G”) is the holder of the patent for design of “Pen” (AGP67101) numbered ZL200930231150.3, which was filed on November 26, 2009 and granted on July 21, 2010 and is currently valid. Jinan Kunsen Commercial and Trading Co., Ltd. (hereinafter referred to as “Kunsen”) operated the “M&G Kunsen Franchised Store in Tmall to sell the DeLi A32160 gel ink</p>

pen produced by Ningbo DeLi Group Co., Ltd. (hereinafter referred to as "DeLi"). M&G claimed that the product infringed its patent, and therefore filed a lawsuit with the court. The Shanghai Intellectual Property Court held that the shape of the main body of the penholder of the authorized design, the top shape of the penholder, the shape of the main body of the pen cap, the top shape of the pen cap, the length of the pen cap relative to the penholder, the way that the clip and cap are connected, the length of the cap beyond the clip and other design features overall determine the design style of the authorized design. These design features are also reflected in the allegedly infringing design. It can be determined that they are similar in overall design style and main design features. However, the four distinct design features between the allegedly infringing design and the authorized design have a limited overall visual effect, which are not enough to constitute substantial differences in respect of the overall visual effect. Moreover, no color protection is requested in the brief description of the authorized design, and no patterns formed by changes in light and shades are shown in the pictures or photos of the authorized design. Therefore, such elements as colors and patterns should not be considered in the infringement judgment. The colors, patterns and other elements of the allegedly infringing design in addition to the shape similar to the authorized design are additional design elements, which do not have any material effect on the infringement judgment. Therefore, the allegedly infringing product infringed the patent right in dispute, Deli and Kunsen shall cease such infringement and Deli shall compensate M&G for economic losses of RMB 50,000 yuan and pay RMB 50,000 yuan as the attorney's fees to the plaintiff. When determining the amount, the court took into consideration the following factors: 1. the plaintiff's patent is a design patent; 2. the patent is valid from November 26, 2009, and when the infringement occurred, nearly half of the term of protection had elapsed; (3) products such as pens have limited profits; 4. When consumers purchase pens, they consider their brand, refill quality, appearance and patterns, color, and other elements as well as their shape, namely, the profit from the use of design by Deli was only part of the profit of the allegedly infringing product.

[Typical Significance]

In this case, both the plaintiff and the defendant are a stationery production enterprise with great influence in China. The product involved in the case is a product commonly used in daily life, and its design infringement judgment is greatly influenced by subjective factors. This case explored the objective criteria for judging the design approximation. After considering both the similarity and the difference between the allegedly infringing product and the granted patent and analyzing the influence of the same design features and different design features on the overall visual effects, it came to the conclusion. The judgment of this case is of great significance to the determination of the similarity of the design of common products. In addition, based on the characteristics of the design patent and the specific circumstances, this case determined the amount of statutory compensation and the

	<p>amount of plaintiff attorney’s fees to be borne by the defendant, which is also of great guiding significance. Both the plaintiff and the defendant were satisfied with the judgment and therefore, no appeal was filed. The defendant initiatively enforced the judgment.</p>
<p>8. Case of Dispute over Copyright of “Big Head Son”</p>	
<p>08</p>	<p>Case of repeal in respect of dispute over copyright infringement between Hangzhou DatouErzi Cultural Development Co., Ltd. and CCTV Animation Inc.</p> <p>[Zhejiang Hangzhou Intermediate People's Court Civil Judgment (2015) Zhe Hang ZhiZhongZi No. 356]</p> <p>[Case Summary]</p> <p>In 1994, Cui Shiyu, the director of cartoon “Big Head Son and Small Head Dad” (1995 edition, hereinafter referred to as “Cartoon 1995 Edition”) went to Liu Zedai’s home to appoint him to create animated characters for the upcoming Cartoon 1995 Edition. Liu Zedai sketched with a pencil the front views of three animated characters on the spot: “Big Head Son”, “Small Head Dad” and “Apron Mother” and gave the draft to Cui Shiyu. At that time, the two sides did not entered into any written agreement on the ownership of the copyright of the work. After Cui Shiyu brought the draft back, based on the draft of the animated characters created by Liu Zedai, the art creation team of the Cartoon 1995 Edition further designed and recreated the animated characters to finally create the image of three main animated characters that met the animated characters: the standard design photo and subsequent reversed figures and scaled figures of “Big Head Son”, “Small Head Dad” and “Apron Mother”. Liu Zedai was not involved in the subsequent creation any longer. The draft of Liu Zedai is not available currently, as it has been created for a long period of time and transferred to several units. The Cartoon 1995 Edition was co-produced by CCTV and China Dragon TV and went on the air in 1995. In the end cast and crew credits, “character design: Liu Zedai” was shown. On December 14, 2012, Liu Zedai transferred the copyright of his three works (“Big Head Son”, “Small Head Dad” and “Apron Mother”) to Hong Liang, who then transferred the copyright to Hangzhou DatouErzi Cultural Development Co., Ltd. (hereinafter referred to as “DatouErzi Cultural Company”) on March 10, 2014. In 2013, CCTV Animation Inc (hereinafter referred to as “CCTV Animation”) produced the animated film entitled “New Big Head Son and Small Head Dad” (hereinafter referred to as Cartoon 2013 Edition), which was aired in CCTV, local TV stations and CCTV online. DatouErzi Cultural Company claimed that without the permission of the copyright owner and without any remuneration, CCTV Animation adapted the above art images to new characters and made them into cartoons, an act in violation of its copyright. Therefore, it filed a lawsuit to request CCTV Animation to cease the infringement, issue an apology in the newspaper, eliminate the impact, and compensate it for the economic losses and reasonable costs. Binjiang District People's</p>

	<p>Court of Hangzhou City held that as the trustee, Liu Zedai was entitled to complete copyright to his three works of art. By virtue of transfer, DatouErzi Cultural Company obtained the copyright to the works excluding personal rights. Without prior permission, CCTV Animation used relevant works and made profits from them in its Cartoon 2013 Edition and relevant exhibitions and publicity by means of adaption, infringing the copyright of DatouErzi Cultural Company. Therefore, it shall be liable for such infringement. In view of the actual circumstances of the case, Binjiang District People's Court of Hangzhou City held that an increase in the amount of compensation should be used as an alternative to the liability for the infringement, and judged that CCTV Animation shall compensate 400,000 yuan for each character. At the second instance, the Hangzhou Intermediate People's Court upheld the judgment of the first instance. The Higher People's Court of Zhejiang Province also rejected the request filed by CCTV Animation for a retrial.</p> <p>[Typical Significance]</p> <p>This case deals with the ownership of animated characters and images and the disputes caused by their subsequent use. As the Chinese people gain a deepening understanding of the value of excellent domestic cartoons, similar disputes have emerged one after another. In this case, the studio, TV stations, the creators participating in the design of characters and the other relevant parties did not have a clear understanding of their rights and obligations at the beginning, and therefore did not clearly define such rights and obligations. The court needs to reasonably and legally judge the ownership of the rights by applying legal rules after many years. The handling of this case is of great guiding significance to similar issues. Meanwhile, while asserting the fact of infringement and taking into consideration the creation backgrounds and the actual conditions of the case, the court used the increased amount of compensation as an alternative to the liability for the infringement. This considered the interests of the original author, subsequent works and the public and demonstrated the principle of fairness, fully striking a balance between the protection of the copyright owner and the encouragement of creation and dissemination of works.</p>
<p>9. Case of Infringement upon “Beauty Elm”, a New Variety of Plant</p>	
<p>09</p>	<p>Retrial of dispute over infringement upon a new variety of plant between Forestry Research Institute of Hebei and Shijiazhuang Lvyuanda Garden Engineering Co., Ltd. and Jiutai City Landscaping Management Office</p> <p>[Shandong Higher People's Court Civil Judgment (2014) Lu Min ZaiZi No. 13]</p> <p>[Case Summary]</p> <p>The Forestry Research Institute of Hebei (hereinafter referred to as the “Institute”) and Shijiazhuang Lvyuanda Garden Engineering Co., Ltd. (hereinafter referred to as</p>

“Lvyuanda”) were the owners of the “beauty elm”, a new breed of plant. They claimed that the Jiutai City Landscaping Management Office (hereinafter referred to as “Jiutai Landscaping”) infringed their right of new varieties of plant by planting a large number of beauty elms in the green belt of the street managed by it, and requested the court to order Jiutai Landscaping to cease the infringement and pay the royalties. The Changchun Intermediate People's Court in Jilin Province and the Higher People's Court of Jilin Province successively rejected the request filed by the Institute and Lvyuanda at the first instance and the second instance, respectively. The Institute and Lvyuanda filed an application for retrial with the Supreme People's Court, which assigned the Shandong Higher People's Court to rehear the case. In the retrial, the Shandong Higher People's Court held that considering the beauty elm itself was a propagating material due to its asexual reproduction, the planting behavior of Jiutai Landscaping was a behavior of planting the authorized varieties of propagating materials. Although Jiutai Landscaping was a corporate institution with the function of urban landscaping, when judging whether its behavior has any commercial purpose, we should not consider its status only, but should consider its behavior and other relevant elements. In this case, Jiutai Landscaping planted a great number of beauty elms for street landscaping. However, it did not prove the legal source of the beauty elms, thus violating the provision of Article 10 of the *Regulations of the People's Republic of China on the Protection of New Varieties of Plants*, which reads “the use for propagating purposes by farmers”. It did not fall under the circumstance in Article thereof, which reads “the exploitation of the protected variety shall not require authorization from, or payment of royalties to, the variety rights holder for the following purposes”. Therefore, instead of purchasing the beauty elms from the owner, Jiutai Landscaping planted the elms without authorization, damaging the interests of the owner of the variety. More importantly, this use for propagating purposes was also driven by the commercial interests, and therefore shall be deemed a behavior for commercial purposes. Therefore, the court ruled that the act of Jiutai Landscaping constituted an infringement, and the application for the payment of species royalties filed by the Institute and Lvyuanda shall be supported. Nevertheless, considering the value of the species in dispute, the planting range of Jiutai Landscaping and the nature of public welfare of the planting and other relevant factors, the court determined the payment of royalties to be RMB 200,000.

[Typical Significance]

This case determines whether the acts of the government agency in performing its functions such as the production of the propagating materials of protected varieties constitute an infringement. The determination of the propagating materials of protected varieties and commercial purposes is of great typical significance and guiding significance, effectively protecting the legitimate rights and interests of the species owners.

10. Verdict of not Guilty of Wang Ziping in the Case of Infringement on Trade Secrets

10	<p>Case of appeal filed by Wang Ziping in respect of infringement on trade secrets</p> <p>[Jiangsu Higher People’s Court Criminal Judgment (2015) Su Zhi Xing ZhongZi No. 00012]</p> <p>[Case Summary]</p> <p>Jiangsu Goodeng Machine Co., Ltd. holding technology relating to the trenchless horizontal directional drilling rig. Jiangsu Goodeng Machine Co., Ltd. entered into the labor contract as well as the relevant confidentiality agreement with Defendant Wang Ziping. In April 2011, during the time when Defendant Wang Ziping was assigned by Jiangsu Goodeng Machine Co., Ltd. to Wuhan to attend an exhibition of trenchless horizontal directional drilling rigs, Wang Ziping left Jiangsu Goodeng Machine Co., Ltd. without going through normal resignation procedures, and copied the technical drawings on the computer to the U disk and brought it to Jiangsu Yuquan Machinery Manufacturing Co., Ltd. (hereinafter referred to as “Yuquan Company”) for the research and development of YQ3000-L horizontal directional drilling rigs. From May 2011 to July 2012, Yuquan Company produced and sold three YQ3000-L horizontal directional drilling rigs. The Yancheng People’s Procuratorate of Jiangsu Province accused Defendant Wang Ziping of infringing trade secrets. The Intermediate People’s Court of Yancheng City issued a criminal judgment on November 20, 2013 ((2013) Yan Zhi Xing Chu Zi No. 0004), pursuant to which, Defendant Wang Ziping was sentenced to 15 months in prison with a fine of RMB 10,000 for infringing trade secrets. The Jiangsu Higher People’s Court remanded the case for retrial on the grounds of some unclear facts and insufficient evidence. The Intermediate People’s Court of Yancheng City tried the case again and convicted Defendant Wang Ziping of infringing trade secrets without criminal penalties. In the second instance, the Jiangsu Higher People’s Court held that as there were some doubts about the existing evidence in respect of whether the technical information of the crawler walking device of Jiangsu Goodeng Machine Co., Ltd. had been publicly available and whether the amount of losses incurred by Jiangsu Goodeng Machine Co., Ltd. was more than 500,000 yuan. The evidences cannot exclude reasonable doubts and satisfy the standard of proof for criminal cases. Therefore, the court finally rendered a verdict of not guilty.</p> <p>[Typical Significance]</p> <p>This case reflects the concept of criminal evidence determination: in the conviction and sentencing of criminal cases of intellectual property, evidence shall be hard and sufficient and all facts found shall be beyond reasonable doubt. The court of second instance insisted on substantive examinations of the contents of the appraisal report, and corrected the misunderstanding that only the formal examination of the appraisal</p>
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	<p>report is necessary. Through examining the basic financial data of the financial appraisal report, it found significant doubts about the product market price evaluation based on which the amount of losses in the case was calculated. Through the examination of the technical information based on which the judicial technology identification was conducted, it found significant doubts about the technical data based on which the second technical identification was conducted. On this basis, the court finally rendered a verdict of not guilty. This case reflects that the judicial organ and the procuratorial organ have further unified their concept of criminal and judicial protection of intellectual property and the awareness of criminal evidence judgments thanks to the combination of civil, administrative and criminal cases relating to intellectual property. In the second instance of this case, the judicial organ and the procuratorial organ performed their duties according to law, the procuratorial organ proposed the acquittal, and the court of the second instance rendered a verdict of not guilty, achieving a good effect of trial. The judgment of the case fully demonstrates that the courts has followed the principal of compress and modesty of the criminal law and the criminal justice idea relating to standard for judging criminal evidence in the criminal trial of intellectual property while cracking down on all kinds of violations of intellectual property according to law.</p>

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