



# IP CASE EXPRESS



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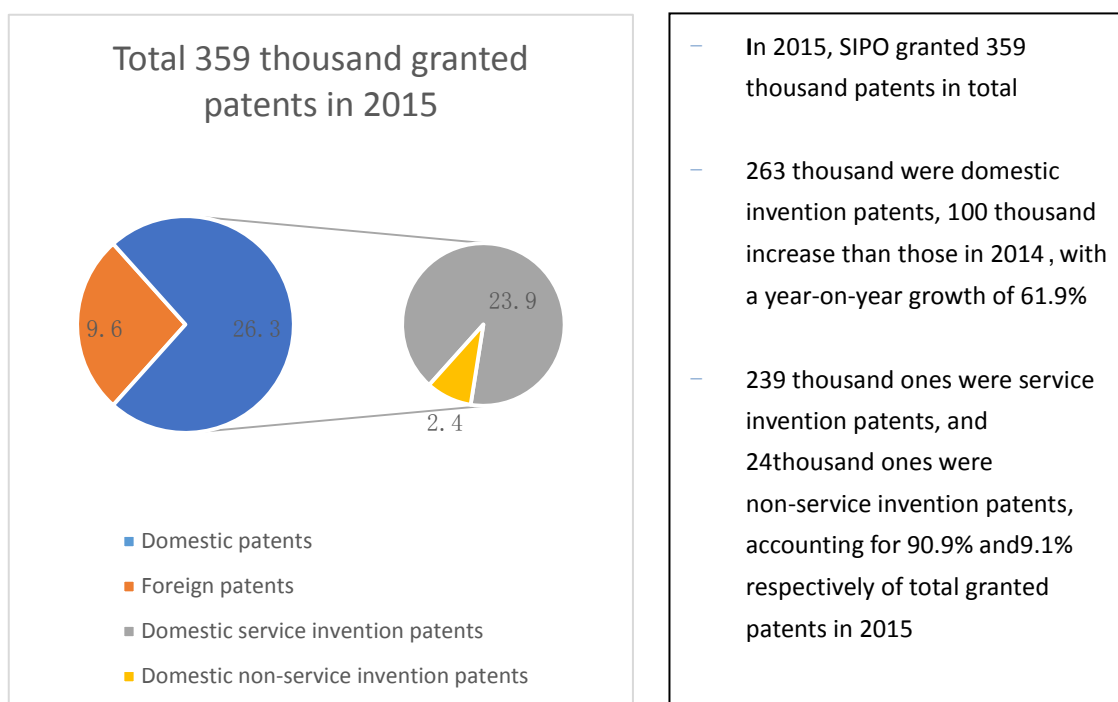
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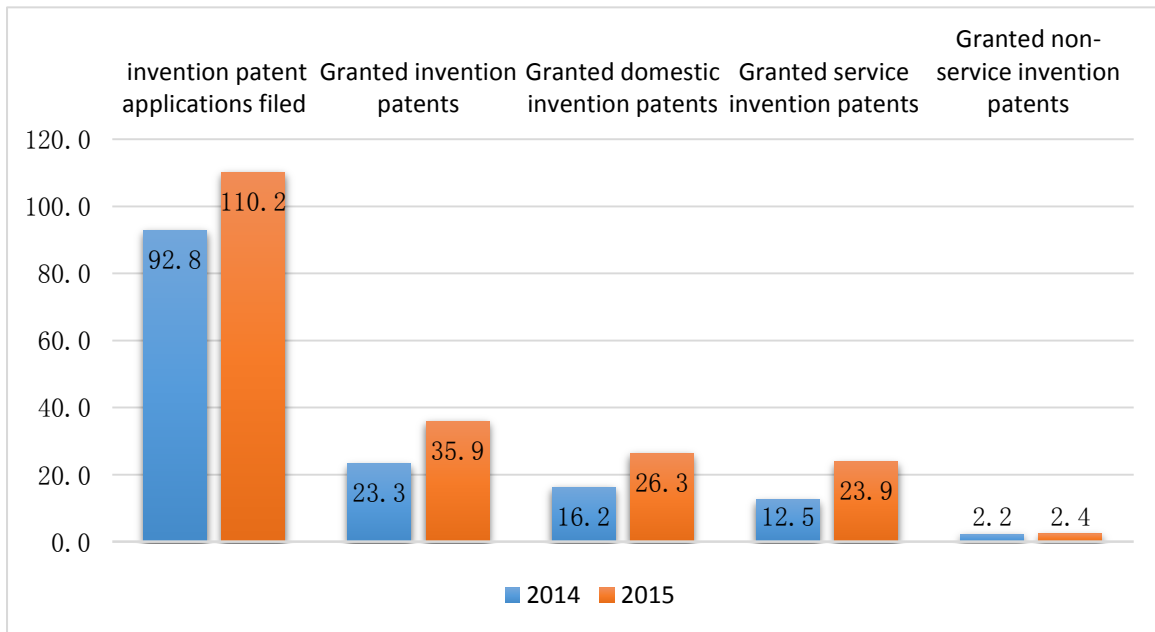
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In this edition, we browsed and analyzed IP-related court judgments and adjudications together with the key statistics recently, and we would like to share with you noteworthy statistics and our comments on some significant cases.

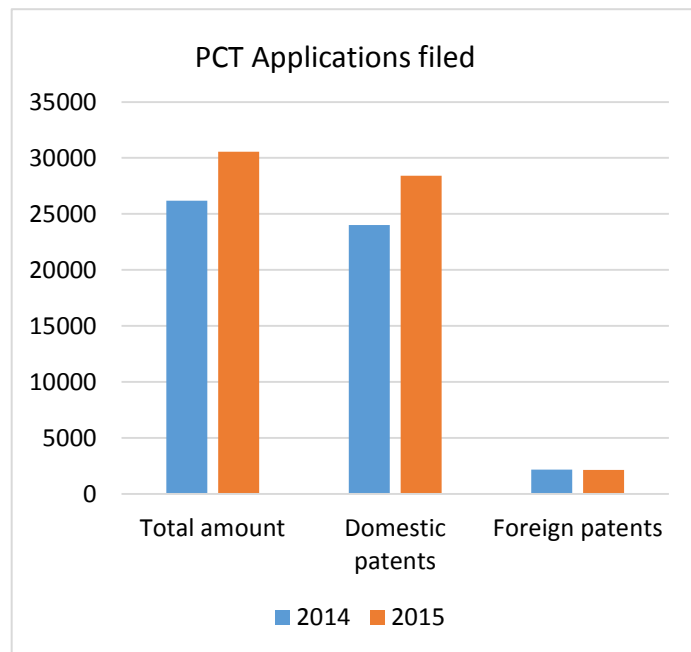
## I. Statistics

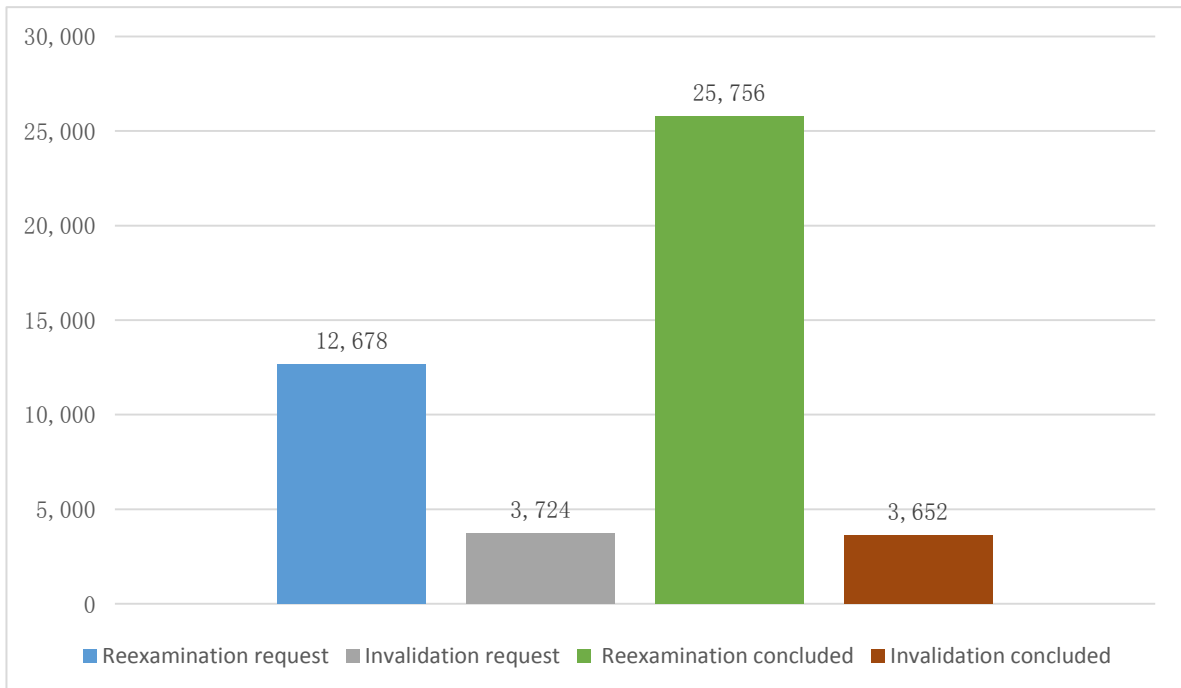
### 2015 China's Patent-related Statistics





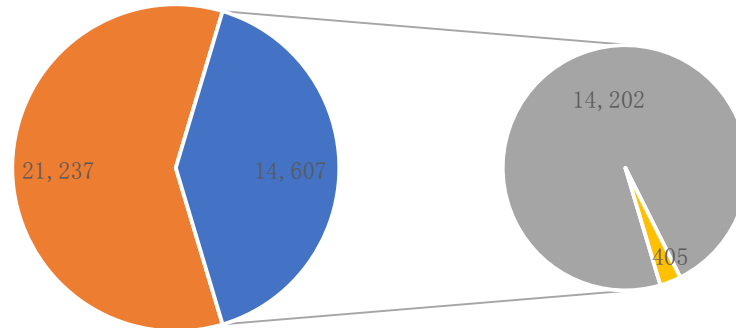
- In 2015, SIPO received 30,548 PCT applications, with a year-on-year growth of 16.7%
- 28,399 applications came from China, accounting for 93.0% of this kind of application, with a year-on-year increase of 18.3%
- 2,149 applications came from foreign countries, accounting for 7.0% of this kind of application, with a year-on-year decrease of 0.6%.



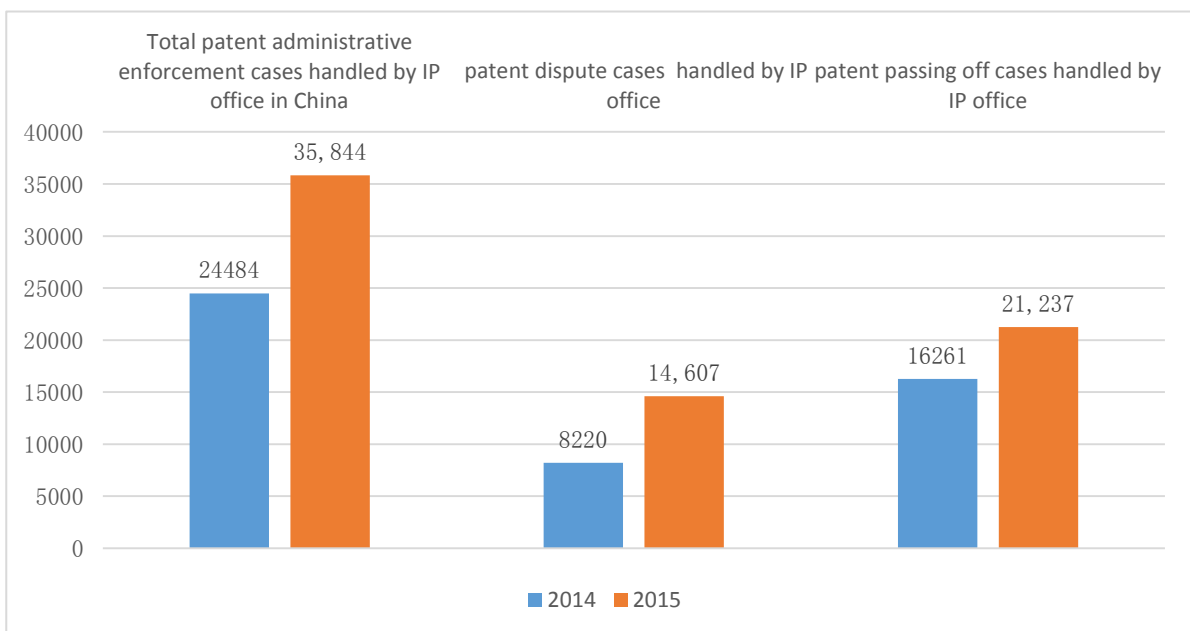


In 2015, Patent Reexamination Board of SIPO received 12,678 reexamination applications in total and concluded 25,756 cases as well as received 3,724 patent invalidation applications and concluded 3,652 this kind of cases.

Total 35, 844 patent administrative enforcement cases handled by IP office in China



- patent dispute cases
- patent passing off cases
- cases including patent infringement disputes
- Others



In 2015, total 35, 844 patent administrative enforcement cases were dealt in China, with a year-on-year growth of 46.4%, among which 14,607 ones were patent dispute cases, including 14,202 patent infringement disputes, with a year-on-year growth of 77.7%, and 21,237 ones were passing off patent ( fake replicas of the granted patents) cases, with a year-on-year growth of 30.6%.

Source: State Intellectual Property Office of the P.R.C

## II. Comments on Typical Cases

### Patent

### Zibo Ruibang Automatic Equipment Co., Ltd. v. Zibo Qiangfeng Environment Protection Equipment Co., Ltd. and Shandong Hongxin Chemicals Co., Ltd.

- Shandong Higher People's Court Civil Judgment (2015) Gu Min San Zhong Zi No.22
- Shangdong Zibo Intermediate People's Court Civil Judgment (2013) Zi Min San Chu Zi No.100
- 



#### Rules:

1. **The scope of protection of patent for invention or utility model shall be determined by the terms of the claims; and the description and appended drawings may be used to interpret the content of the claims; As regards claims, they could be interpreted by the court resorting to the description and the appended drawings, related claims, and the prosecution history. Where there are special definitions on the wording of**

**claims, such special definitions shall prevail.**

2. **After the publication of the application for a patent for invention, the applicant may require the entity or individuals exploiting the invention to pay appropriate of fees; Any person, who, for production and business purpose, uses, offering to sell, or sells a patent infringement product, without knowing that it was made and sold without the authorization of the patentee, shall not be liable to compensate for the damage of the patentee if he can prove that he obtains the product from a legitimate channel.**

#### Facts:

On September 25, 2010, Zibo Ruibang Automatic Equipment Co., Ltd. ("Ruibang Company") filed with the State Intellectual Property Office the applications for utility model and invention relating to "plastic gloves production line gloves snatching device." The patent application for utility model was granted on May 8, 2011, with the patent number ZL201020541198.1 and entitled "Plastic Gloves Production Line

Gloves Snatching Device.” The patent application for invention was published made public on February 16, 2011. On March 27, 2013, to avoid double patent, Ruibang waived the utility model patent ZL201020541198.1. On the same day, such technology was granted patent for invention with patent number ZL201010290827.2 and entitled “Plastic Gloves Production Line Gloves Snatching Device.”

On May 8, 2012, Shandong Hongxin Chemicals Co., Ltd. (“Hongxiny”) signed a Product Purchase and Sale Contract with Zibo Qiangfeng Environment Protection Equipment Co., Ltd. (“Qiangfeng”). Both parties agreed that Hongxin would buy 25 sets of “standard counting machines” at the unit price of 10,800 Yuan; that Qiangfeng would installment deliver the goods, and Hongxin would make payment by installments. Each set of such counting machines was made of a gloves snatching device, a one-off outgoing unit, power distribution components and testing components.

On the ground that Qiangfeng and Hongxin infringed its patent right, Ruibang initiated a civil action before the court and requested the remedies as follows:

Firstly, to order Qiangfeng to stop manufacturing and selling products that infringing Ruibang’s r patent for invention; pay 2,240,881 Yuan to Ruibang as fees for exploiting the invention during its temporary protection period; secondly, to order Hongxin to immediately stop using and dismantle the infringing products that were being used by it, and pay 700,000 Yuan to Ruibang y as fees for exploiting the invention during its temporary protection

period; thirdly, order Qiangfeng and Hongxin to compensate Ruibang with 150,035 Yuan for the latter’s reasonable expenses arising from investigation and stopping infringement; fourthly, order Qiangfeng and Hongxin to bear all the litigation fees and evidence preservation fees incurred in this case.

The first-instance court trying this case was the Intermediate People’s Court of Zibo Municipality of Shandong Province and the second-instance court trying this case was the Shandong Provincial Higher People’s Court. On March 31, 2015, Shandong Higher People’s Court made the final judgment.

### **Remarks:**

The judgment over this case makes a clear and explicit judicial decision on the interpretation of claims and the payment of fees for exploiting patents during their provisional protection periods.

#### **I. About the explanation of claim 1**

According to the judicial interpretation of the Supreme People’s Court, claims could be interpreted by description and attached drawings, related claims, and prosecution history. The interpretation of technical feature “vertical setting of the rotating frame” in claim 1 by the second-instance court in this case fully demonstrated the essence of judicial interpretation of the Supreme People’s Court.

Firstly, claim 1 states “the rotating frame, as part of the façade rotating and snatching device, shall have the same setting and movement orbit as the facade rotating and

snatching device;” secondly, through “...vertical rotating and snatching movement can be completed when the main shaft brings the façade rotating and snatching device to rotate in the façade space” in description and the appended drawings, it can be identified that the façade rotating and snatching device completes the rotating and snatching movement by rotating in the façade space. Combined with the contents in the invalid decision about sustaining the validity of the patent, the second-instance court finally decided that the “rotating frame” of the “vertical setting” was set in front of the main shaft, and the rotation of the main shaft brought the rotating frame to rotate vertically in the façade space (that is, vertical plane).

## **II. Whether the fees for exploiting the invention during the provisional protection periods are appropriate or not**

The judgment made by the second-instance court in this case is consistent with the judgment opinion in No. 20 guidance cases that were released by the Supreme People’s Court in 2013. It held that patent applicant did not have the right to request other people to stop exploiting the invention of an application that is still in the provisional protection period; and other

people’s behavior of exploiting the invention during the provisional protection period was not a behavior prohibited by the Patent Law.

Now that manufacturing, selling and importing products that are accused to infringe another party’s patent during the provisional protection period is not prohibited by the patent law, the following behavior of using, offering for sale of or selling such products, even without the license of the patentee, shall be approved. Therefore, the patentee does not have the right to stop other people from further using, offering for sale of and selling products that are accused to be infringing patent right and are manufactured, sold and imported during such provisional protection period.

Of course, that does not mean a denial of the patentee’s right to require those who exploit the invention to pay an appropriate fees according to Article 13 of the Patent Law. For products that are accused of infringing another party’s patent right that are manufactured, sold and imported during such provisional protection period, under the circumstance that they can prove the legal source of such products, the sellers and users shall not be be liable to pay the appropriate fees.

Author: Lisa Dong  
Translator: Iris Wan  
Proofreader: Gavin Jia



## Trademark

### Lin Dongliang v. Juqiang (Guangzhou) Machine Co., Ltd.

- Supreme People's Court Civil Judgment (2015) Min Ti Zi No.49
- Fujian Higher People's Court Civil Judgment (2013) Min Min Zhong Zi No.548
- Fujian Fuzhou Intermediate People's Court Civil Judgment (2012) Rong Min Chu Zi No.632



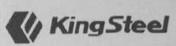
#### Rules:


**The Classification of Goods (& Services) just lists some superordinate concepts of goods and services. It is impossible for it to list every specific product or service existing in reality. Given that, the above Classification shall be used merely as a reference for judging classes of related goods and services, but should not be used mechanically as the main basis of judgment.**

#### Facts:


Lin Dongliang is the registrant of trademarks No. 1752465 “钜钢 STEELKING” , No.

8173544 “钜钢” and No. 8173498 “STEELKING” . Such trademarks are designated to be used on “injection molding machines” and “plastic injection molding machines” in sub-class 0726. Juqiang (Guangzhou) Machine Co., Ltd. obtained license to use trademarks No. 583755 “钜钢（繁体）” and No. 583756

“”, and both trademarks are designated to be used on “machines for making shoes” in sub-class 0713. Juqiang (Guangzhou) Machine Co., Ltd.

used trademark “” on the injection foam molding machines for making shoes and injection molding machines it produced and sold. Lin Dongliang sued that such act of Juqiang (Guangzhou) Machine Co., Ltd. infringed his exclusive right to use a registered trademark.

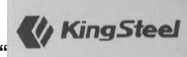
The first-instance court held that injection molding machines and plastic injection molding machines could be used, but were not limited to the shoe-making industry. Although the accused-to-be-infringing products of Juqiang (Guangzhou) Machine Co., Ltd. were mainly used in the shoe-making industry, the molds could be changed in order to produce different plastic products, so they had overlapped or basically had the same functions, purposes, production departments, sales channels and target consumers with those of injection

molding machines and plastic injection molding machines, and could be identified as the same goods. Therefore, the act of Juqiang (Guangzhou) Machine Co., Ltd. of using trademark “” fell into the scope of Lin’s exclusive right to use a registered trademark, so it constituted infringement.

The second-instance court held: Goods recorded in sub-class 0713 in International Classification of Goods and Services for the Purpose of the Registration of Marks (version 2007) are machines that make different parts of a shoe into a finished shoe with physical crafts. Injection molding machines and plastic injection molding machines were prominently different from the shoe-making machines of similar group 0713 in that they used molds to inject melting plastic under high pressure for the purpose of molding. Obviously, shoe-making machines should not cover injection molding machines or plastic injection molding machines. The injection foam molding machines for making shoes and injection molding machines should fall into the sub-class 0726. It therefore constituted infringement.

In the retrial, the Supreme People’s Court held: Injection foam molding machines for making shoes and injection molding machines of different models had become necessary equipment for many shoe-making enterprises. Injection foam molding machines for making shoes and injection molding machines of different models and with the functions of injection machines could inject, through injection or pouring, rubber and plastic materials to different shoe molds and made them into

soles, shoe accessories and shoes. Therefore, it conformed to the objective reality to classify such type of machines and equipment as shoe-making machines. According to a series of industry standards that had been released by competent departments since 1992, injection foam molding machines and injection molding machines of different models for making shoes could also be classified as shoe-making machines. The injection foam molding machines for making shoes and injection molding machines of different models that were produced and sold by Juqiang (Guangzhou) Machine Co., Ltd. were shoe-making machines. Therefore, the

use of trademark “” on injection molding machines for making shoes by Juqiang (Guangzhou) Machine Co., Ltd. was proper and correct use of such trademark, and it did not constitute infringement.

**Remarks:**

Classification of Similar Goods and Services is an important tool to judge similar goods/services. Although related judicial interpretations clearly provide that such Classification is just a referential tool to judge whether goods or services are similar, in practice, the trademark administrative examination organ and the people’s courts give efficacy to such table as prima-facie evidence, that is, unless there is contrary evidence, such Classification shall be applied to identify whether goods or services are similar or not.

However, the goods and services listed in such Classification cannot cover all the goods and services in the commercial



society. Listed in such table are just basic and traditional goods or services, as well as the superordinate concepts of a category of goods or services. What if specific goods or services do not have directly corresponding items in such Classification, or have some characteristics of goods or services of more than one class? How to judge the classes of such goods or services then? **When classifying goods or services in this case, the Supreme People's Court mainly took into consideration the following factors: (1) the physical attributes of goods (machinery); (2) goods functions and purposes (necessary machines for making shoes); (3) related national and industry standards; (4) whether the**

**defendant was out of bad faith. When it comes to a judge if goods or services are the same or similar, the characteristics of the goods and services themselves shall be the basis, and the above factors shall be taken into full consideration to survey individual cases accordingly, instead of simply and mechanically applying the provisions of the Classification of Similar Goods and Services.**

Author: Nathan YANG  
Translator: Nathan YANG

## Copyright

### Rhino Software Inc. v. Geobyev Company

- *Jiangsu Higher People's Court Civil Judgment (2015) Su Zhi Min Zhong Zi No.00108*
- *Jiangsu Suzhou Intermediate People's Court Civil Judgment (2014) Su Zhong Zhi Min Chu Zi No.00325*



#### Rules:

**1. Evidence in civil actions follows the standard of high probability. The plaintiff used telnet order to check and get connected to the remote server port of the domain name of the accused-to-be-infringing server so as to check information on related software used by such server. Such way of detection and detection results were objective, and preliminary burden of proof had been completed. Though the defendant claimed that it did not infringe the plaintiff's right, it just made a simple denial instead of providing related counterevidence like the server log, so the defendant's claim was not supported by the people's court.**

**2. The defendant claimed that it had never used the software involved in the case, and such claim went against its demur that it used a 30-day free trial version of the software. The defendant could not cite two contradictory claims of demur at the same time, so the defendant's claim that it used a 30-day free trial version of the software was not supported.**

#### Facts:

The plaintiff is the copyright owner of Serv-U FTP software series. The plaintiff's agent, under the supervision of the notaries, had a remote visit to the defendant's server 21 port through a local computer terminal, and got evidence on the software version used by the defendant's server. The people's court identified that the WINDOWS system had FTP and TELNET orders itself; that with Telnet protocol (standard protocol and main method of the Internet remote login service), one could get connected to the server in the terminal user's computer through Telnet program, enter order in the Telnet program, and visit the port designated by the server. Generally, the software will send back information on software version number. Such information is for notification only, and cannot let the user directly log in the system without being verified. Based on that technical feature, the first-instance and second-instance courts

both held that the way and results of detection were objective and legal, and should be ascertained as convincing. However, since the defendant adduced evidence to prove that the plaintiff also provided the trial version of the software which was allowed to use for 30 days, and it did not constitute infringement if such software was in trial use, the first-instance court held that the evidence preserved by the plaintiff through notarization could not prove whether the software used by the defendant was still in the period of trial use or had been expired; that the plaintiff knew that the evidence at such single time point was feasible and it was capable of supplying more evidence, yet it failed to adduce evidence to prove it, so the plaintiff did not adduce sufficient evidence. The plaintiff's claims were rejected, in refusal of which the plaintiff instituted an appeal. In the appeal, the plaintiff claimed that the software used by the defendant was the plaintiff's software version of five years ago, and violated common sense and business practices which, according to high probability, could prove that the defendant did not use it to try or evaluate the software. The second-instance court held that the plaintiff got feedback from the server involved in this case through notarized evidence collection, and proved that 21 port had software service involved in this case, that is, it completed preliminary evidence adduction. The defendant claimed that it did not infringe against the plaintiff's rights, but it should provide related evidence including the server log to oppose against it, yet it did not do that, but simply denied it, so the defendant's claim was not supported by the court. The defendant claimed that it had never used the software involved in this case, which went against its demur that it

used a 30-day free trial version. The defendant could not cite two contradictory demur claims at the same time. Therefore, the demur that it used a 30-day free trial version was not supported by the people's court.

Based on that, the second-instance court decided to revoke the first-instance judgment, and identified the defendant to commit copyright infringement, and judged that the defendant should pay RMB 30,000 yuan to the plaintiff for the latter's economic losses and rational expenses for protecting its own rights.

#### **Remarks:**

Evidence in civil actions follows the standard of high probability, and that is a realistic choice to enable the Chinese courts to examine and judge contradictory evidence to meet the requirement on reliable proof at the technical level. However, the courts in Chinese have not provided specific judgment guideline on how to thoroughly implement the standard of high probability. **From this case, we can roughly see the judges' way of thinking:**

- 1. A judgment shall be made in accordance with the law based on facts that can be proved by the evidence.** That makes the quantity and types of evidence much influential on high probability. Generally speaking, the more the evidence, the easier it is to form an evidence chain, and the higher the probability thus proved; the greater the probative effect of the evidence, the higher the probability thus proved. The method adopted by the plaintiff to collect evidence from the defendant's server through the terminal computer and under notary supervision was accepted by the people's court. Based on the

objectiveness of the source of software used to collect evidence, and the rationality and legality of the way selected to collect evidence, etc., the judge acknowledged that the notarized evidence carried much weight. Meanwhile, it acknowledged the truthfulness of evidence collected remotely based on the genuine software provided by the plaintiff. Both the first-instance and the second-instance courts held that the defendant used the plaintiff's software involved in this case.

**2. Faced with contradictory evidence, judges have to complement what is missing in the evidence chain based on their social experience, logic reasoning and empirical law.** Under the circumstance that the defendant claimed that it had never used the software involved in this case and that it used the free trial version software, the judge, following the law of non-contradiction in formal logic, determined that only one of the two contradictory demur claims was truthful. Then the judge excluded the possibility that the defendant used free trial version software because the defendant had been ascertained to actually use the software involved in this case. Meanwhile, the plaintiff provided evidence to prove that the software involved in this case was its 6.4 version software released five years ago, and such software had been replaced by new versions later; and that the software had been updated to V12 version. The claim that the defendant used a free trial version went against common sense and business practices. Obviously, the judge took into consideration the reasonable factor of such business practice to identify that the plaintiff's claim was of high probability.

By adopting the standard of high probability, the people's courts actually make it easier for the right owners to adduce evidence, and objectively encourage the right owners to protect their rights. However, the right owners cannot fully rely on the standard of high probability, because such standard depends on the judge's subjective judgment, and is quite uncertain. In this case, if the plaintiff conducted remote evidence collection at two time points that were separated by over 30 days and had the process notarized, it could prove that the defendant actually used the software involved in this case beyond the time limit, and then prove the defendant's demur that it used a free trial version software to be untenable. As the first-instance court commented in the judgment: "Rhino Software Inc. should have known that the probative effect of evidence collected at a single time point is of feasibility, and it had the conditions and capability to further check and verify and collect evidence, but it had not adduced any evidence on whether Geobyev Company used the software beyond the time limit and claimed that Geobyev Company should bear the burden of proof of non-infringement. Its claim was held to be untenable by the first-instance court. Whether Geobyev violated the licensing protocol and infringed software copyright should be a fact where Rhino Software Inc. should bear the burden of proof and be capable of proving." Although the second-instance court corrected such view, the plaintiff could have predicted and avoided such evidence deficiency in the process of preparing evidence instead of relying on the second-instance trial for remedy.

Author: Richard Hu  
Translator: Richard Hu

## Unfair Competition

### K. D. F. Distribution (Shanghai) Co., Ltd. v. Aquatherm Pipe System (Shanghai) Co., Ltd.

- *Shanghai Intellectual Property Court Civil Judgment (2015) Hu Zhi Min Zhong Zi No.161*
- *Shanghai Xuhui Civil Judgment (2013) Xu Min San (Zhi) Chu Zi No.1017*



#### **Rules:**

**To judge whether the use of others' trademarks in promotion and publicity constitutes "false advertisement" as provided in Law of the People's Republic of China against Unfair Competitions, such factors as daily life experience, general attention of the public concerned, misunderstood facts and the actual situation of the objects promoted shall be taken into comprehensive consideration.**

#### **Facts:**

K. D. F. Distribution (Shanghai) Co., Ltd., that is, the plaintiff in this case, was established in 1998. On February 28, 2002, the Trademark Office approved its

registration of "洁水" trademark in class 17 on the goods of plastic pipes, boards, rods and strips etc.. According to an exclusive sales agreement signed in 2006, it became the general sales agent in the China region of Aquatherm GmbH, and had been promoting and selling the pipe products of Aquatherm GmbH using the trademark "洁水." Aquatherm GmbH stopped its cooperation with K. D. F. Distribution (Shanghai) Co., Ltd. on June 30, 2013, and started to cooperate with Aquatherm Pipe System (Shanghai) Co., Ltd., that is, the defendant in this case. From July 1, 2013, Aquatherm Pipe System (Shanghai) Co., Ltd. used such wording as "German aquatherm 阔盛 (formerly known as German 洁水)" and "the former agent once used German '洁水' to promote the products in China and from July 1, 2013, the German headquarters decided to start using Chinese sign '阔盛' in market promotion in China." Then K. D. F. Distribution (Shanghai) Co., Ltd. sued the defendant, claiming that the defendant used the trademark "洁水" for false promotion, thus it constituted unfair competition and trademark infringement; and requested Aquatherm Pipe System (Shanghai) Co., Ltd. and its sales agents to stop infringing its exclusive right to use the trademark "洁水," to apologize openly, to eliminate

influences, and to compensate for its economic losses.

In this case, the first-instance court was the Xuhui District People's Court of Shanghai Municipality, and the second-instance court was the Shanghai Intellectual Property Court. On July 28, 2015, the Shanghai Intellectual Property Court made the final judgment. The first-instance court and the second-instance court did not support the claims of K. D. F. Distribution (Shanghai) Co., Ltd., but held that the use of the trademark “清水” by Aquatherm Pipe System (Shanghai) Co., Ltd. in promotion and advertisement was proper use of such trademark; and the promotion contents conformed to the fact, and would not mislead the public to confuse the products run by the plaintiff with those run by the defendant or cause misunderstanding of the relationship between both. Therefore, it did not constitute false promotion or trademark infringement. Finally, the court rejected all claims raised by K. D. F. Distribution (Shanghai) Co., Ltd.

#### **Remarks:**

**I. To judge if the use of another party's trademark constitutes false promotion in product promotion and advertisement, specific articles and promotional materials using the trademark shall be interpreted as a whole based on the life experience and general attention of the public concerned instead of considering them separately.**

In this case, the court held that, according to the context of the promotional material of Aquatherm Pipe System (Shanghai) Co., Ltd., the public concerned, with general

attention, could find that it mainly explained the change in the agent of Aquatherm GmbH in the China region; that K. D. F. Distribution (Shanghai) Co., Ltd. stopped serving as the agent of such company's products; and that Aquatherm Pipe System (Shanghai) Co., Ltd. began to serve as such company's agent. Moreover, after July 2013, trademark “阔盛” instead of trademark “清水” was used to promote such company's products. Therefore, the public concerned would not confuse the products run by the plaintiff with those run by the defendant just because the trademark “清水” was used in the promotional material, neither would they misunderstand the relationship between the plaintiff and the defendant.

**II. To judge if it constitutes false promotion, the misunderstood facts and the actual situation of the object to be promoted have to be taken into consideration.**

In this case, the court held that K. D. F. Distribution (Shanghai) Co., Ltd. used the trademark “清水” only to promote and publicize the products of Aquatherm GmbH when serving as the latter's agent; and that the trademark “清水” had built an intimate relationship with the products of Aquatherm GmbH. It therefore misled the public concerned into thinking that the trademark “清水” pointed to the products of Aquatherm GmbH. Based on the above facts, when the agent of Aquatherm GmbH changed and the former agent's trademark “清水” was no longer used to promote the products of Aquatherm GmbH, it was necessary to reveal the above important facts to the public concerned so as to ensure their right to know. Therefore, as the





new agent, Aquatherm Pipe System (Shanghai) Co., Ltd. inevitably cited the former agent's trademark “清水” to reveal the above facts, and the specific way of using the trademark “清水” by Aquatherm Pipe System (Shanghai) Co., Ltd. in its promotion conformed to the fact, and would not cause misunderstanding in the public concerned. Therefore, the use of the trademark “清水” by Aquatherm Pipe System (Shanghai) Co., Ltd. does not constitute false promotion.

### III. Foreign companies are advised to use

**their own registered trademarks instead of trademarks registered by their agents when using Chinese trademarks in the Chinese market, or they will be unable to use original Chinese trademarks to sell products once the agency relationship is broken, which will not only influence their sales performance greatly, but also be likely to cause legal disputes.**

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