NTD Intellectual Property Attorneys

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In this edition, we continue to browse IP-related court judgments and adjudications published at the Supreme Court's official website (http://www.court.gov.cn/zgcpwsw/) recently, especially those judgments and adjudications made by the Supreme Court and the 32 high courts nationwide, and would like to share with you our comments on some significant cases.

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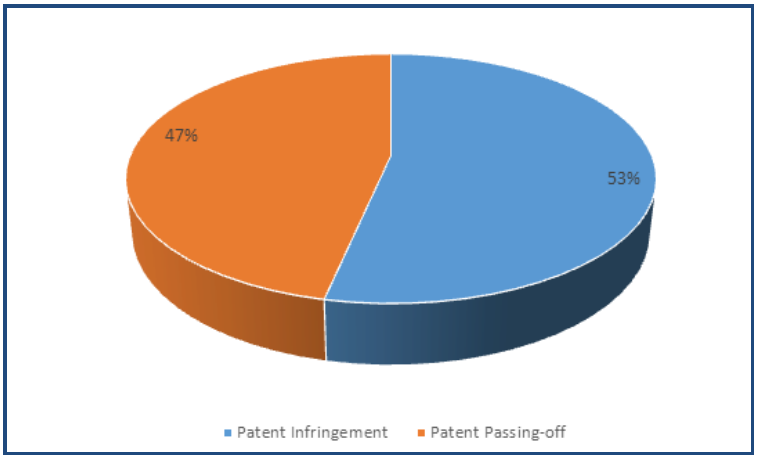
I. Statistics

Statistics on Patent Administrative Enforcement Cases Handled in China in the First Half of 2015

- **In the first half of 2015, a total of 10,190 patent administrative enforcement cases were handled nationwide, increased 107.7% compared to the same period last year. Among these cases, 5,437 are patent dispute cases (including 5,332 patent infringement cases), with a year-on-year growth of 167.6%; 4,753 are patent passing-off cases with a year-on-year growth of 65.4%.**



- **Compared to last year, the structure of patent administrative enforcement cases in China shows some changes. In 2014, the ratio between the volume of patent dispute cases and volume of patent passing-off cases is roughly 0.51:1, while this ratio for the first half of this year has risen to 1:14:1, with the volume of patent dispute cases exceeding that of patent passing-off cases for the first time.**

- **From January to June 2015, there is a general trend of increased administrative enforcement of patents by local patent administrative authorities nationwide. Of the 21 provinces (including autonomous regions and municipalities) whose case volume has outnumbered that of the same period of last year, 12 provinces' year-on-year growth rate has surpassed 100%, and five provinces (including municipalities) has handled over 100 patent dispute cases, the five provinces being Zhejiang, Guangdong, Jiangsu, Shandong and Chongqing. Geographically speaking, 5,892 patent administrative enforcement cases occurred in Eastern China, ranking no.1 and accounting for 57.8% of the total number nationwide, followed by Southern China (1,140 cases) and Central China (1,100 cases).**

From: ***Official Website of State Intellectual Property Office of People's Republic of China***

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II. Comments on Typical Cases

Patent

Microchip Technology Incorporated v. Patent Reexamination Board of SIPO, Shanghai Haier Integrated Circuit Co., LTD

- **Invalidation Regarding Utility Model Patent**
- **The Supreme Court [Case No.: (2013) Zhi Xing Zi No. 102]**
- **Beijing High Court [Case No.: (2011) Gao Xing Zhong Zi No. 833]**
- **Beijing No. 1 Intermediate Court [Case No.: (2010) Yi Zhong Zhi Xing Chu Zi No. 1933]**

Rule:

Whether a claim is supported by the specification should be judged from the viewpoint of those skilled in the art. Those skilled in the art can read the patent document wholly and integrally to comprehend the technical solutions defined by the document, and are able to correct some obvious mistakes and interpret related technical features correctly.

Remarks**:**

The present case relates to the comprehension and application of Article 26.4 of the Chinese Patent Law. According to provision of Article 26.4, claims should be based on the specification and state the protection scope of the patent at issue. That claims should be based on the specification means that claims should be supported by the specification. Each technical solution protected by each claim should be concluded or can be generally concluded by those skilled in the art from the sufficient disclosure of the specification, and cannot go beyond the scope of the disclosure. Strictly speaking, if certain specific concept cannot achieve the effect of the invention, such summarization usually will be regarded as not supported by the specification.

In the present case, the Supreme People's Court holds the opinion that Article 26.4 of the Chinese Patent Law should not be comprehended mechanically, and should be judged from the viewpoint of those skilled in the art. Those skilled in the art can read the patent document wholly and integrally to comprehend the technical solution defined by the document, and they are able to correct some obvious mistakes and interpret related technical features correctly. If those skilled in the art regard such specific concept as not able to achieve the purpose of the invention, there is no need to determine the patent at issue to be against Article 26.4 of the Patent Law based on the ground that said specific concept cannot support the claim. In the present case, those skilled in the art can fully understand the function of the filter by reading the specification. Although there is no

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concrete limitation for the filter in the claims and the specification, those skilled in the art are clear about the setting, structure and function of the filter. Therefore, claim 1 of the patent at issue can be supported by the specification, and thus conforms to the provision of Article 26.4 of the Patent Law.

Copyright

Brother Industries Ltd. v. Ningbo Supreme Co., Ltd & Hangzhou Rongjian Sewing Equipment Co., Ltd

- **Regarding Computer Software Copyright Infringement**
- **Zhejiang High Court [Case No.: (2014) Zhe Zhi Zhong Zi No. 233]**
- **Hangzhou Intermediate Court [Case No.: (2013) Zhe Hang Zhi Chu Zi No. 28]**

Rule:

When determining the amount of the statutory compensation, such factors should be taken into consideration like types and market value of the softwares involved, business scales of the infringer and the IP right owner, and the nature, circumstances and consequences of the infringing acts. The IP right owner's claim for reasonable expenses on safeguarding its legal rights should also be supported.

Remarks:

The plaintiff of this case Brother Industries Ltd is a Japanese enterprise specialized in manufacturing and developing sewing machine equipment and related software. It owns copyright to the computer software—the controlling software (version of "ver6_3_03") loaded in the break control box (kx-430d) in the knot sewing machine (ke-430d) that the plaintiff sells. On January 31, 2013, Brother Industries Ltd brought a lawsuit against Supreme Company and Rongjian Company on the grounds of infringement on its rights of signature, amendment, reproduction and publishing to the involved software.

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In the first instance court trial, the plaintiff Brother Industries Ltd applied to the court to obtain, from the National Tax Bureau, the infringer's VAT tax record during the period that the infringement occurred. The record shows that the sales amount is higher than the statutory compensation of RMB 500,000. Thus, the plaintiff applied to the court to calculate the compensation amount based on the infringer's illegal gains. The court holds that the VAT tax record can prove the infringer's infringing scale, but is not sufficient to directly prove the specific illegal gains that the infringer obtained from the infringing acts because the sewing machine and the software in the control box are sold as a whole, which makes it hard to calculate the value of the computer software separately. Thus, the copyright owner's losses and the infringer's illegal gains cannot be determined. When determining the amount of the statutory compensation, the selling price of the sewing machines involved can be taken into account as a factor. After fully considering types and market value of the softwares involved, business scales of Brother Industries Ltd and Supreme Company, and the nature, circumstances and consequences of Supreme Company's infringing acts, the first instance court in the end granted statutory compensation in the amount of RMB 500,000 and also supported the plaintiff's claim for reasonable expenses on safeguarding its legal rights in the amount of RMB151, 849. This first instance court's ruling is also supported by the appellant court.

Trademark

Exxon Mobil Corporation v. Jiangmen Aekson Chemical Co., Ltd et al.

- **Regarding Trademark Infringement**
- **Beijing High Court [Case No.: (2014) Gao Min Zhong Zi No. 1790]**
- **Beijing No. 2 Intermediate Court [Case No.: (2013) Er Zhong Min Chu Zi No.17478]**

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Rule:

When defining the relevant public for a well-known trademark, characteristics of the industry in which the well-known trademark owner is doing business should be considered; when leveraging the well-known trademark owner's burden of proof with respect of the advertising and promotion of its trademark, the actual position of the well-known trademark owner in the corresponding market should be taken into account.

Remarks:

This case involves infringement of well-known trademarks and unfair competition of enterprise names.

Exxon Mobil Corporation is an internationally famous company in the petroleum and chemical industry and it owns many registered trademarks in China such as "ExxonMobil", "Exxon" and "埃克森". "ExxonMobil" and "埃克森美孚" are also trade names of Exxon Mobil Corporation that have been used for many years.

When determining whether the trademark "ExxonMobil" of Exxon Mobil Corporation is a well-known trademark, the court comprehensively considers the characteristics of the industry in which the trademark owner is doing business and its strengths in the markets. In view that petroleum and chemical products designated by Exxon Mobil Corporation's trademarks are mainly applied in industry, rather than civilian life, especially not necessities for daily life, the relevant public in this case should be defined as customers and distributors in the petroleum and chemical industry. They are mainly enterprises, rather than families or individuals. Since the evidence submitted by Exxon Mobil Corporation in relation to the sales, marketing and promotions, market rankings and media reports have shown the Exxon Mobil Corporation's leading position in the petroleum and chemical industry; further, in light of the limitation of the relevant public in the chemical industry, the court, instead of requesting the trademark owner to provide abundant evidence in respect of advertising and promotion, based on the submitted evidence recognized "ExxonMobil" as a well-known trademark. Besides, considering "ExxonMobil" and "埃克森美孚 (ExxonMobil in Chinese)" have formed a sole and direct relationship with each other, the marks "埃克森", "Aekson 埃克森漆 & device", "Aekson" and "aikesen" used by the defendant constitute imitations of Exxon Mobil Corporation's well-known trademark "ExxonMobil".

With respect to the unfair competition of the enterprise name, "埃克森美孚" is the Chinese trade name of Exxon Mobil Corporation. The trade name has been used and advertised in China for many years, and it has obtained certain reputation with public awareness among the relevant public. Therefore, "埃克森美孚" shall be protected as the enterprise name under Article 5.3 of the Anti-Unfair Competition Law. The defendant Jiangmen Aekson Chemical Co., Ltd registered and uses similar characters "埃克森" as its trade name. Such acts infringe the prior right of others under the guise of legitimate acts, which will cause confusion among the relevant public as to the source of goods or services or mislead the public to believe the two companies are associated. Thus the court holds the defendant's such acts constitute unfair competition.

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Unfair Competition

Beijing Qihu Technology Co., Ltd v. Beijing Baidu Netcom Science and Technology Co., Ltd and Baidu Online Network Technology (Beijing) Co., Ltd

- **Regarding Unfair Competition**
- **Beijing No. 1 Intermediate People's Court [Case No.: (2014) Yi Zhong Min (Zhi) Zhong Zi No. 8599]**
- **Beijing Haidian District People's Court [Case No.: (2014) Hai Min Chu Zi No. 4327]**

Rule:

Baidu sets promotion links of "Baidu Antivirus" when users search for "360 antivirus" in Baidu search engine, but not in users' searches for other antivirus products of the same kind. Baidu's such discriminatory act is deemed constituting unfair competition.

Remarks:

Beijing Qihu Technology Co., Ltd. ("Qihu") is the business operator of "360 antivirus", while Beijing Baidu Netcom Science and Technology Co., Ltd and Baidu Online Network Technology (Beijing) Co., Ltd. (collectively "Baidu") are co-operators of "Baidu antivirus". Qihu found that "Baidu antivirus" promotion links only shows up when users imput"360 antivirus" in the Baidu search engine, not when inputting names of other antivirus products or related keywords. Thus, Qihu sued Baidu on unfair competition grounds for their discriminatory acts.

The first instance court held that promotion links offer competitors equal business opportunities and provide more choices to consumers, thus shall not constitute unfair competition. Yet, the appellant court holds it constitutes unfair competition, and is in violation of provisions of Article 2.1 of the Anti-Unfair Competition Law, namely "business operators shall abide by the principle of voluntariness, equality, honesty and trustworthiness, and also adhere to established ethics in

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their business transactions." The appellant court rules that Baidu has conducted discriminatory acts against "360 antivirus", ruined the fair and free competition environment, and violated the principles of honesty and trustworthiness as well as established business ethics.

Whether the accused acts constitute unfair competition in this case, other factors should also be considered such as whether the discriminatory treatment has put Qihu's products in a disadvantage position, or whether it has unfairly brought Baidu's products competitive advantage position.

In this case, Baidu's acts of setting "Baidu antivirus" promotion links on the top of the search result page of "360 antivirus" should be deemed unfair.

First, Baidu is obviously taking advantage of the reputation of "360 antivirus" product to promote its own products, to increase the chance for its own product to be exposed to and accessed by the users. Such free riding acts should not be tolerated.

Furthermore, Baidu has unfairly robbed Qihu product's market share in the antivirus product market by using Baidu's own dominant position in the search engine market. Baidu's such acts will definitely divert some potential users with the intent to search Qihu products to use Baidu's antivirus product instead. Such bullying act not only has harmed Qihu's interests, but will also extend Baidu's dominant position in the search engine market to other markets, likely leading to monopoly, which is not conducive to a fair competition market order.

Moreover, the accused promotion links only pop up when users search for the "360 antivirus" product, but not in users' searches for other antivirus products of the same kind. That is, potential users of other antivirus products will not be disturbed and diverted by Baidu's promotion links, which will make Qihu's products in a disadvantage position.

Last, though the existence of promotion links can offer consumers more choices, and seemingly consumers are free to choose to use Baidu's antivirus product, yet Baidu has other methods to promote its product, that is, setting the accused promotion links is not the only and must choice. The promotion links forcedly put Baidu's product above the Qihu's "360 antivirus" product, forcing users searching for Qihu's product to see the Baidu's product first, thus actually have deprived consumers' freedom of choice.

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