Uncertainty in Application of Law and Value Guidance of Judicial Adjudication

— On Adjudication of Cases

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I. Is the application of law uncertain?

In the judicial field of intellectual property law and competition law, uncertainty in application of law is more obvious in some cases. In recent years, the Red Can case (*Guangzhou Pharmaceutical Group v. JDB Group*) [1], the Jordan case [2], the "If You Are The One" case [3], etc. have provoked heated debates in academic and judicial circles and even among the public: people discussed about them and tried to predict the outcomes from the very beginning to the end of the lawsuits. The first two cases were long-drawn and eventually decided by the highest judicial authority — the Supreme Court; however, the judgments in the first and the second instance, or even retrials were greatly different and hardly predictable for the public.

Let's take a look at *Guangzhou Pharmaceutical Group v. JDB Group*. The key issues lied in whether, after JDB obtained a license for the "Wong Lo Kat" trademark from Guangzhou Pharmaceutical Group, its long-used red-can package for herbal tea constitutes packaging or decoration peculiar to well-known goods defined in the Anti-Unfair Competition Law of China, and if yes, who is entitled to the red-can package. In the trial, both parties agreed that the "red can" constituted "packaging and decoration peculiar to a well-known good", but disputed on whether it belongs to the user who has used the package for a long time, i.e. JDB, or shall be returned, together with the "Wong Lo Kat" trademark, to Guangzhou Pharmaceutical Group after the termination of the trademark licensing contract between the two parties.

In this regard, the first-instance court held that "JDB manufactured the red-canned herbal tea bearing the 'Wong Lo Kat' trademark under the license from Guangzhou Pharmaceutical Group. JDB and its affiliates have indeed contributed to the reputation of the 'Wong Lo Kat' red-canned herbal tea. However, the resulting goodwill is attached to the well-known product, the 'Wong Lo Kat' herbal tea, and shall be enjoyed by its owner Guangzhou Pharmaceutical Group". "In addition to the 'Wong Lo Kat' trademark, the peculiar packaging and decoration attached to the well-known product in suit shall also be returned to the owner of the 'Wong Lo Kat' trademark, Guangzhou Pharmaceutical Group. As for the investment and advertising expenses spent on the 'Wong Lo Kat' red-canned herbal tea by JDB and its affiliates during the term of the trademark licensing contract, they had gained enormous profits during the said term. Even if not all their investments had been covered, the result should be foreseeable when the contract was signed. Therefore, they shall bear the consequences."

The second-instance court, however, decided that "in consideration of the history and development of the 'Wong Lo Kat' red-canned herbal tea, the background for cooperation between the two parties, consumer's cognition and the principle of fairness, since Guangzhou Pharmaceutical Group and its predecessor, as well as JDB and its affiliates, all contributed to the formation and development of the packaging and decoration of the product in suit and its goodwill, awarding the related rights and interests to either party will result in extreme unfairness, and is likely to impair the public's interests. Thus, the rights and interests related to the packaging and decoration peculiar to the well-known product in suit shall be jointly enjoyed by Guangzhou Pharmaceutical Group and JDB under the principle of good

faith, and on the premise of valuing the consumers' cognition and not impairing the legitimate rights and interests of others."

As for the second-instance judgment, positive and negative voices were heard with widely divergent comments. Through analysis, it will be agreed that though unexpected, the judgment is reasonable. In regard to the ownership of a new object resulting from accession, in principle, the following conventional rule of civil law applies, that is, "where there are stipulations, such stipulations shall prevail; and if there is no such stipulation, the ownership shall be determined according to the provisions in the laws." If there is neither a stipulation nor a legal provision, the ownership of the new object does not necessarily belong to the owner of the original object, but has to be decided on a case-by-case analysis under the principle of fairness. Thus, in the case concerning the rights and interests related to the red-can packaging, awarding the ownership to both parties with reference to the civil law principle is definitely a good and reasonable choice and a showing of some judicial wisdom when there lacked an explicit legal provision and were divergent possibilities. This case confirms the aforementioned point of view that uncertainty in the application of law exists in the field of intellectual property law and competition law. As we all know, the development of human society is inseparable from legal regulation. The value of laws lies in its predictability, as they clearly tell the public which acts are legal and which are not, thereby providing a guidance of right acts for the public. All the cases still undergo examination after the judgment, those resulting in strong social repercussions and poor public acceptance can only be settled through retrial. Therefore, studies on the judicial process, the application of law in the judicial process and how judicial decisions are actually formed are helpful to overcome judicial deviation as much as possible and ensure the correct direction of adjudication.

II. In which cases may the application of law be uncertain?

In judicial practice, the cases heard by judges can be divided into simple cases and complicated cases. Simple cases are normal in judicial trial, but complicated cases do not take a large portion. In order to further analyze the impact of the disputes between parties on the case trial, the Justice Cardozo once divided cases into three types in the book entitled the Nature of Judicial Process and the Growth of Law. The first type is the cases "where the controversy turns not upon the rule of law, but upon its application to the facts. Those cases, after all, make up the bulk of the business of the courts." "[T]hey leave jurisprudence where it stood before." The second type is the cases where "the rule of law is certain, and the application alone doubtful." "Often these cases and others like them provoke difference of opinion among judges. Jurisprudence remains untouched, however, regardless of the outcome." The third type is the cases where "there remains a percentage, not large indeed, and yet not so small as to be negligible, where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law. These are the cases where the creative element in the judicial process finds its opportunity and power." [4]

It can thus be seen that in justice, laws have set forth clear provisions concerning rights and obligations, as well as liabilities, involved in a great majority of cases. In these cases, disputes are raised because of a party's misunderstanding of law or when a party breaks the law on purpose for various reasons. The application of law in these cases is quite certain, and the judging outcomes are basically predictable. They constitute the fundamentals of the predictability of law. As stated above, however, there are a very small number of cases in which a plurality of judging options all seems well justifiable, and the final judgment will have a significant impact on the society. As said by the Justice Cardozo, "there are cases where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law", which would surely draw great attention from the judiciary. Since legal loopholes need to be filled in due to lack of clear legal provisions, or new routes for solution are in need due to the non-compliance between existent judging rationale and social demands, judges shall take comprehensive consideration of the factors such as the legislative purpose, legislative tenet, basic principles and economic & social development on a case-by-case basis so as to make a judgment as appropriate through repeated proof. During the judicial process as mentioned above, the judicial wisdom of judges has been tested and burnished.

III. Why is the application of law uncertain?

Grounds for the uncertainty in the application of law are obvious. To be specific:

1. Guidance, generality and hysteresis

As far as a statutory law system is concerned, statutory law *per se* is composed of not only a set of rules but also a set of concepts. [5]

First of all, during law formulation, its text is often drafted in a guided, generalized and even vague manner. Guidance and generality are inherent characteristics of the statutory law. As for vague expression, there is a view that "to trace the origin, the reason for interpreting laws is the use of vague wordings in legal provisions". "If precise words in a legal provision are used for guaranteeing the certainty in law, then vague expressions are utilized by legislators for the pre-regulation of 'critical' circumstances. Facing the pressures such as keeping up with social development, maintaining social order and preventing crimes, it is difficult for legislators to fully foresee what will happen. Therefore, the legislators need to employ some legislative techniques to maximize the efficacy of laws and regulations." [6] This explains why the Supreme People's Court always releases corresponding judicial interpretations for specific application of law after an important underlying law is promulgated. In some sense, when formulating a law, the legislators leave a room for judicial interpretations intentionally. Let's take the Patent Law for example. Patent Law is a highly professional law that had been revised thrice ever since its promulgation in 1984 and is undergoing the fourth revision. Correspondingly, the Supreme People's Court formulated the Judicial Interpretation (I) and (II) for the Patent Law respectively so as to cope with new situations and address new issues encountered in patent trials at different periods to standardize the application of the patent law. [7]

Second, different interpretations may lead to different results. There are various interpretation methods for laws, including, among other things, literal interpretation, teleological interpretation, systematic interpretation, historical interpretation, restrictive interpretation or extensive interpretation. "Law interpretation is an integral part of justice" [8]. In a specific case, the process of law interpretation is just the process of law application. Although strict interpretation rules should be abided by at the time of law interpretation, its outcome, in fact, can be divergent due to personal differences and other reasons. Legal interpretations, or even literal interpretations may lead to several results. In such a case, it is inevitable that different conclusions may be drawn though the same law is applied.

Finally, some legal provisions had been out-of-date at the time of promulgation. Take the revision to the Anti-Unfair Competition Law (AUCL) for example. In order to cope with various and constantly emerging Internet-related unfair competition conducts, especially to reduce the reliance on the general provision (Article 2 of the AUCL) [9] in the trial of Internet-related cases, a "special provision" for Internet-related cases (Article 12 of the AUCL) was added through the revision to the AUCL, [10] which triggered great debates in various circles. [11] One of the major reasons was that three Internet-related unfair competition conducts explicitly regulated by the "special provision" for Internet-related cases had been already "antiquated" at the time of revision to the AUCL, and the other was that there lacked a clear line drawn between the miscellaneous provision of the "special provision" for the Internet-related cases and the general provision (Article 2 of the AUCL). Through repeated discussion, the legislators finally explained that law revision needs to summarize and affirm the current trial experiences, and to show the expandability of the future application of law by setting miscellaneous provisions. As for the relationship between the miscellaneous provision and the general provision, it is a problem to be addressed in future judicial practice. Notably, ever since the revision to the AUCL in 2013, the new "special provision" for Internet-related cases has not demonstrated its value in practice. To the contrary, the general provision is still used in the trial of new types of cases relating to big data or cloud computation, [12] which is out of legislators' anticipation.

2. Intangibility of objects of rights or rights and interests

Intellectual property rights comprise patent rights, trademark rights, copyrights, new plant variety rights, and exclusive rights to integrated layout designs, etc. Except copyrights for works which are acquired automatically at the completion of the works, other intellectual property rights are granted upon compliance with statutory requirements. Different from tangible property which usually has a clear physical boundary, objects of intellectual property rights are intangible such that the boundary of rights and the boundary of infringement are hard to delimit.

Take patent rights for example. Article 59 of the China's

Patent Law reads "the scope of protection of the patent for invention or utility model shall be determined by the terms of the claims. The specification and drawings may be used to interpret the claims." The patent system uses words as the first choice to describe the technical solutions of a patent for invention or utility model. Obviously, inherent polysemy and ambiguity in words give rise to claim construction issues. In lawsuits in relation to patent grant and invalidation, as well as patent infringement, claim construction has a direct impact on the decision on patentability or the scope of protection of a patent, and is in close association with the vital interests of the patentees and accused infringers, as well as the public. As a result, claim construction has always been the focus and key issue in disputes. Although the patent law has established a set of rules for claim construction, inclusive of the principle of compromise, the ponderance of internal evidence, the principle of interpretation according to ordinary understanding, the doctrine of consistent interpretation, and the doctrine of estoppel, the interpretation of the same claim among different parties may diverge or even oppose to each other due to different standpoints, perspectives, knowledge backgrounds and conflicting interests, especially when a claimed solution may be the same as or equivalent to the prior art or the accused infringing technical solution. To this extent, it is really hard to accurately predict the final judgments on infringement. Similarly, boundaries for the rights and interests under the protection of law are ambiguous in the field of competition law. *Guangzhou Pharmaceutical Group v. JDB Group* is a good example.

3. Unpredictability of new technological developments

With the advent of the Fourth Industrial Revolution, new technologies and new business models have given rise to various disputes and spurred new demands for legal adjustments. The existing laws, however, can hardly provide adequate rules.

For instance, the current patent law encounters many new issues concerning the application of law in disputes over standard-essential patents (SEPs) in the wireless communication field. Although the International Organization for Standardization requires the holders of SEPs to make a commitment to offer a license to use the SEPs on fair, reasonable and non - discriminatory (FRAND) terms, various parties apparently hold divergent standpoints and have different understandings as to the definition of FRAND. The battle between "patent hold-out" and "patent hold-up" arising from SEPs has brought great controversy over the application of injunction, specifically the exceptions to injunction, which is different from traditional patent infringement cases in which injunction is applicable. Here is another example. Whether live sports images are eligible for copyright protection seems to be a legal issue concerning copyrightable objects. It is actually a new challenge for the application of copyright law caused by the rapid development of Internet industry and live sports broadcasting technologies. [13] Similarly, another issue is concerning the copyright protection of live video game images. A fierce debate arose as to whether online games shall be protected separately in virtue of game elements or live video game streaming images shall be protected as a whole under copyright law. [14] At present, disputes over whether artificial intelligence creations are eligible for copyright protection are also severe. [15] Due to lack of clear legal provisions, the courts' judgments in cases related to new technological revolution are in great conflict, although the judicial exploration in those judgments is of notable significance. In the future, in the new technological fields of artificial intelligence, big data, cloud computing, etc., unpredictability of new technological development is the kernel of conflict, and the uncertainty in the application of law and judicial judgments will become more conspicuous.

IV. Role of a judge

By comparing the judging rationale of civil law judges and common law judges, it is found that they are common in terms of finding facts, accurately applying laws and making an impartial judgment, while different from each other only in the routes for the application of law. Civil law judges will first resort to provisions in the statutory law, whereas common law judges mainly start with precedents for the judging rules established in the precedents are laws. As far as the judging attributes are concerned, there are no essential differences therebetween.

Simple cases are mostly related to disputes over facts. It is quite clear what legal provisions are applicable and the trial is relatively simple. As for complicated cases, the trial is somewhat complex due to a huge number of interests or great controversies involved, and great social attention. Through observation and comparison, it is found that there are no essential differences between the judicial laws in various jurisdictions across the globe. Interestingly, Justice

Cardozo described the judicial process as follows: a judgment made by a judge is undoubtedly like a "compound" containing various chemical components, that is, a judge "must balance all his ingredients, his philosophy, his logic, his analogies, his history, his customs, his sense of right, and all the rest, and adding a little here and taking out a little there". [16] It can thus be seen that the judiciary makes the originally ambiguous boundaries of rights and acts clearer with the help of experience accumulated through case trials and constant efforts to explore the certainty in the application of law.

As a matter of fact, it is not hard to get your foot in the door of intellectual property law and competition law as the abstract legal systems and legal provisions are clearly stated. But in solving a specific issue concerning the application of law in a specific case, sometimes it is unlikely to locate a clear legal basis, or it seems that any judgment can be reasonable. The underlying reasons may be that legal provisions are too general, or there are loopholes in law, or the law is not adapted to the changing situations, such that judges get stuck with the dilemma of multiple judging options. Especially "when the conventional application of law may lead to unfair outcomes, and the pursuit of fairness may deviate from conventions" [17], the judges are often bothered by innermost entanglement and pressure. Unlike scholars or lawyers, judges when hearing a case have to bear pressure resulting from facing up to the demands for substantive justice, rather than formal justice; or in other words, how does a judge do before hitting a gavel? [18] Thus, the plight of a judge does not come from finding of facts, but resolving the conflict between legal logic and value judgments in each case. Value judgments vary from person to person, so the diversities in value guidance are inevitable.

V. What information do judges want to convey to the public?

Law is a code of conducts that functions to provide general guidance, while the public is more likely to learn about the laws through cases. In some sense, justice is "law in action". [19] What information do judges want to convey to the public? This is a judicial inquiry facing them. The aim of judgment is to settle a dispute, and more importantly, to provide correct guidance on conducts for the public. This is the mission that the judicature undertakes and the significance it embodies as well. In judicial practice, there are multiple factors that affect and determine the value orientation of judicial adjudication. To be specific:

1. Original intent of legislation. The original intent of legislation refers to the factors that play a decisive role in the judicial process, which are mainly embodied as the intent of legislation, the spirit of legislation, the basic principles, the public interest, and judicial policies in various periods.

By looking into the provisions on the intent of legislation, we find that intellectual property law attaches importance to the protection of rights and the stimulation of innovations, whereas anti-unfair competition law places emphasis on encouraging free competition and regulating the order of market competition. [20] Nowadays, intellectual property as a core competency has long become a crucial tool for competition in international and domestic markets, and there has never been a time when intellectual property and market competition have been so closely bound. Broad consensus has been reached on strict protection of intellectual property rights. In 10 April, 2018, Chinese President Xi Jinping delivered a keynote speech at the opening ceremony of the Boao Forum for Asia Annual Conference 2018, indicating that "strengthening intellectual property protection is the most important part of improving property rights protection system and also the greatest incentive to promote China's economic competitiveness". Intellectual property rights are statutory exclusive rights, which prohibit others from using an invention without the permission of right holders. Nevertheless, it should be noted that no exercise of rights should be absolute, and one of the basic legal principles is that the abuse of rights shall be prohibited. In a specific case, the key to make an appropriate judgment among multiple intricate options is to bear in mind the original intent of legislation, accurately understand and grasp such key principles and spirits as protecting rights, safeguarding good faith, regulating competition order and fostering the balance of interests. In doing so, the judgments will not go too far away off the track.

Take a series of cases concerning the works entitled "*Candle in the Tomb*" for example. [21] The defendant, Zhang Muye, transferred all his economic rights under copyright (including, but not limited to, the right of dissemination via information network, the right of book and Ebook publication, and the right of adaptation) except those moral rights to the plaintiff, Shanghai Xuanting Entertainment Information Technology Co., Ltd. (hereinafter referred to as Xuanting Co.). Upon agreement between both parties, Zhang

Muye agreed not to use the "*Candle in the Tomb*" as a title or a chapter heading of similar works under his real name or pseudonym (Article 4.2.5 in the Agreement). Xuanting Co. paid him RMB 1,500,000 as consideration. Then Xuanting Co. made huge efforts for commercial promotion of the novel series "*Candle in the Tomb*", including novel competition, publication of printed books, as well as comics, film, web series and games adaptation, in such a way that the novel series "*Candle in the Tomb*" enjoyed great popularity in the market and generated enormous economic benefits. Later, without the permission of Xuanting Co., Zhang Muye authorized another company to adapt his work "*Candle in the Tomb: Weird Cases in the Wild*" into a web series under the same name and broadcast the same via online video websites. In the lawsuit, the defendant raised the non-infringement defence, mainly arguing that the transfer agreement between both parties shall be invalid; the plaintiff has no right to restrict Zhang Muye from writing other works entitled "*Candle in the Tomb*"; and even if "*Candle in the Tomb*" constitutes a name peculiar to well-known works in the sense of the Anti-Unfair Competition Law, the resulting rights and interests shall be attributed to the author of the works, Zhang Muye, rather than Xuanting Co.

It is true that the title of the novel series "*Candle in the Tomb*" had enjoyed great popularity. To put it simply, the dispute between both parties lied in whether the author, Zhang Muye, can overturn the agreement and enjoy the achievements after he transferred the economic rights of his novel series "*Candle in the Tomb*" to Xuanting Co. and the novel series made a tremendous commercial hit through deliberate operations by Xuanting Co. The cause of action is a dispute over unfair competition, but the validity of the agreement on the transfer of economic rights is also involved, which aroused great concerns among the public. In this regard, the court held that: first of all, the transfer agreement bans Zhang Muye from using "*Candle in the Tomb*" as the title of a work or the heading of main chapters, but does not limit Zhang Muye's right to create similar grave robbing suspense works or any other works under his real name or pseudonym. The agreement is only directed to the titles and headings of works, but not to the creation and contents created by Zhang Muye. It neither stands in violation of the legislative intent of encouraging creations of the copyright law nor breaches the prohibitory provisions on the transfer of copyright. Hence, the transfer agreement is valid and enforceable. Second, the terms on rights and obligations of both parties in the transfer agreement are in line with the principle of fairness. According to the agreement, Xuanting Co. needs to invest a huge amount of money in the purchase and promotion of the work at the early stage. If the work makes a commercial hit, it surely can bring higher returns; but if the promotion goes in vain, Xuanting Co. alone has to bear the commercial lost. When signing the agreement, Zhang Muye should be quite clear of the legal consequences of the transfer of economic rights gained from his works, and as having obtained RMB 1,500,000 as consideration, he has no right to breach the agreement by claiming that he shall be entitled to all the rights and interests relating to "*Candle in the Tomb*" after the commercial success of Xuanting Co. It can thus be seen that the judgement in this case clearly defined the author's creative contributions and Xuanting Co.'s commercial contributions to the well-known novel series "*Candle in the Tomb*", as well as the ownership of its relevant rights and interests, and meanwhile the public, especially the film and television industry, are informed that both parties should comply with contracts and abide by the principle of good faith without violating the prohibitory provisions of the Copyright Law.

There is another example, Guiding Case No. 86 heard at the Supreme People's Court. [22] Tianlong Co. and Xunong Co. were respectively licensed with the exclusive right to exploit the new plant varieties of the male parent C418 and female parent Xu 9201A of the three-line hybrid japonica rice "9You418". Both parties used the propagating material of the patented varieties of the opposite party without permission, and cultivated and produced seeds of the "9You418" variety. Due to market competition and conflicting interests, the parties mutually instituted separate lawsuits against each other on the grounds of new plant variety infringement. It is known that both the male and female parents are required for seed production of hybrid japonica rice. In this case, both parties, though willing to continue production, could not reach a compromise on mutual licensing. After repeated mediations, the first-instance court could do nothing but order both parties to cease infringement.

Formally speaking, a judgment that both parties shall "cease the infringement" was indeed supported by law. [23] However, it resulted in that the "9You418" variety could not be produced any longer, which was not the intent of the parties, and also seriously affected the further promotion of that variety. In such a judicial plight, the second-instance court tried the following means to figure out a proper judging

route. First, the legislative intent shall be analyzed. The legislative intent of the Regulations of the People's Republic of China (PRC) on the Protection of New Plant Varieties is "to encourage the breeding and use of new plant varieties, and to promote the development of agriculture and forestry" (Article 1). Second, legal system resources shall be utilized. The above regulations stipulate, besides the exclusive right to new plant varieties, the compulsory license system, that is, "where the national interest or public interest so requires, the examining and approving authorities may make a decision to grant compulsory licenses to exploit new plant varieties" (Article 11). Tianlong Co. and Xunong Co. instituted civil infringement lawsuits rather than apply for compulsory license. Since both parties could not reach a compromise on mutual license, the "9You418" variety, which had been widely planted in Jiangsu, Shandong and Anhui provinces, had to be given up, and the public interest, such as national food production and security, would be impaired. Generally speaking, the public interest is the common welfare enjoyed by an unspecified number of subjects under certain social conditions or within a particular scope. Since this concept is extremely ambiguous and broad, public interest clauses are rare and seldom applied in judicial practice. However, the above analysis showed that the court correctly recognized the public interest involved in said case. Accordingly, the second-instance court revised the judgment, deciding that Tianlong Co. and Xunong Co. both should have the right to use the variety of the other party without permission, and should mutually exempt each other from licensing fees, since the male and female parents have essentially the same value.

2. Judicial policies. Among those foresaid factors, judicial policies have a significant influence on adjudication. Judicial policies refer to the macro orientation and basic attitudes towards intellectual property judicial protection in different periods as reflected in judicial policy documents issued by the Supreme People's Court, and are specific embodiment of national intellectual property policies in the judicial field. It shall be noted that judicial policies are characterized by its attachment to specific stages, and shall be timely adjusted with the economic, social and scientific development and with the changes of intellectual property policies in China.

Take the Fangjue case for example. [24] The "CONCH" trademark was registered by Conch Group for use on cement in Class 19 and determined as a well-known trademark as early as 2004. To strengthen the intellectual property protection, Conch Group also registered the "CONCH" trademark in 112 countries and regions, including Europe, U.S., Africa (inclusive of Gabon), Southeast Asia, as well as Taiwan, Hong Kong and Macao of China. Cement products under the "CONCH" trademark have entered into the Gabonese market at least since 2010. In the present case, the Conch Group applied for intellectual property protection with the Zhenjiang Customs when it found the accused infringing "CGNAH" cement manufactured by Fangjue Co. was loaded onto the same boat at Zhenjiang Port as its own "CONCH" cement was to be shipped to Gabon. Pursuant to the provisions of the Customs Law of the PRC and the Regulations of the PRC on the Customs Protection of Intellectual Property Rights, during its intellectual property administrative law enforcement on the exported goods, Zhenjiang Customs determined that Fangjue Co. constituted trademark infringement and decided to impose such administrative penalties as confiscation and fine on Fangjue Co. As being not satisfied with the decision, Fangjue Co. filed an administrative lawsuit against Zhenjiang Customs, requesting the court to decide trademark infringement does not occur and rescind the aforesaid administrative penalties according to the judicial policies on foreign OEM trademark infringement.

In China, judicial policies relating to foreign-related OEM trademark infringement were formed under special circumstances. To be specific, ever since the reform and opening-up, China has become a "world factory", and the foreign-related OEM trade has taken a great proportion of the foreign trade for a long time. In consideration of the high degree of dependence of Chinese enterprises on the OEM trade, a principle was established that OEM-related trademark infringement shall be judged on a case-by-case basis. In judicial practice, local courts tend to make non-infringement judgments in this type of disputes, and such a tendency gradually becomes a mindset. In recent years, as China has made vigorous efforts to implement the innovation-driven strategy and strengthen the overseas intellectual property portfolio in key industries, the quality of China's exports has risen steadily. "Made in China" has played an active role in meeting demands of foreign consumers by virtue of its price-performance ratio. In the meantime, China's exports have been facing an increasingly severe problem of infringement and counterfeiting, which inflicts serious damage to the Chinese products in the overseas market,

and blemishes the international prestige of "Made in China". To this end, Chinese government has launched the "Clean Breeze" Initiative since 2015 to maintain the reputation of "Made in China" abroad. In a three-year plan, major merchandise exported to Africa, Arabia, Latin America, as well as countries and regions along the routes of the "Belt and Road" Initiative has been overhauled. Under such circumstances, Zhenjiang Customs carried on administrative law enforcement on intellectual property rights in the Fangjue case. The difficulty lied in how to accurately apply China's judicial policies concerning foreign-related OEM trademark infringement. In the end, the court dismissed the claims of Fangjue Co. and upheld the decision on administrative penalty made by Zhenjiang Customs. The court expounded the grounds for judgment as follows: in view of malicious trademark squatting and copycat branding at home and abroad, Chinese manufacturers, which accept overseas orders, shall reasonably avoid using trademarks that have a certain influence in China, especially well-known trademarks, under the principle of good faith and for the purpose of showing respect for others' intellectual property rights. The judgment in this case is of great significance for enhancing intellectual property protection in exports, strengthening punishment for infringement and counterfeiting, encouraging enterprises, especially export enterprises to do business honestly and lawfully as well as with better awareness of intellectual property protection, and protecting the prestige of "Made in China" in the world. [25]

3. Judicial precedents. Compared with civil law, adherence to precedents is a unique system of common law. As stated above, rules embodied in precedents are laws. To ensure similar judgments are made in similar cases, adherence to precedents becomes a rule, rather than an exception. However, precedents are not followed rigidly. "[W]hen a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment." In the judicial process there is "a spirit and a tendency to subordinate precedent to justice". [26] It can be seen that the precedent system, on the one hand, constrains the discretion of judges and guarantees the stability of the application of law, and on the other hand, provides flexibility to comply with the development of society, which is a complete connotation of the system of precedent.

Although China is a civil law country, the guiding case system similar to judicial precedents has become increasingly recognized in recent years, and particularly, enormous judgments have been publicized on line for easy retrieval and research of precedents. Notably, in order to cooperate with the judicial accountability system, promote unified application of laws, and achieve judicial justice, the Supreme People's Court released the Provisions of the Supreme People's Court Concerning Work on Case Guidance on 26 November, 2010, wherein Article 7 reads "people's courts at all levels should refer to the Guiding Cases released by the Supreme People's Court when adjudicating similar cases". [27] It was the first time that the Supreme People's Court has made a definite requirement for making reference to the Guiding Cases and given a special meaning to the term "refer to". [28] In China, except guiding cases, other types of judicial precedents have no binding force. However, in face of multiple adjudication options in a specific case, especially when a party concerned explicitly provides a precedent and requests a reference to it, the judges shall explain why the precedent is fully applicable, partially applicable or not applicable at all. Of course, the judges' option manifests the selection of judicial values, that is, what do the judges want to tell to the public? In view that the Supreme People's Court has decided non-infringement of trademark in the PRETUL case and Dongfeng case, the judges in the Fangjue case must provide clear and reasonable argumentation and reasons for the establishment of trademark infringement.

4. Common sense. The value of common sense is easily overlooked in comparison with judicial logic. In history, legal theories formalism emphasized that "a law shall be regarded as a system of rules that are systematically consistent and complete in the sense of dogmatics", and "each judicial act is the result of a judgment made of pure deductive reasoning", which is the classical judicial logic syllogism: law is the major premise, specific facts are minor premise, and then the judgment is made as a conclusion.

In judicial practice, it is very effective to judge simple cases based on judicial logic. However, the application of logical reasoning alone in intricate cases is very likely to lead to irrational results. In the Guiding Case No. 86 as mentioned above, the first-instance court ordered both parties to cease infringement as the judges could not find a proper judging rationale. They had no way out but simply followed the judicial logic. Justice Holmes once said: "the life of the law has not been logic; it has been experience", and he

even believed that "judgment or intuition" and "discernment and insight" in each case are all about experience. [29] From some perspective, "discernment and insight" of judges are more important and sometimes even decisive in making a correct judgment. Common sense plays an equal function as experience. In the rules of evidence, well-known common sense can even be considered as facts that need not be proved by evidence. There is a view that "there is no substitute for it, with all respect to the splendid law books and reports. It has been said: 'the law is common sense as modified by the legislative.' 'A judge will never go far wrong if he applies this test: Does my proposal action square with good, common sense?'" [30]

As history has repeatedly proven, any judgment that deviates from common sense is less acceptable to the public and prone to cause social repercussions because there should be no essential difference between the fairness and justice pursued by the judiciary and those understood by the public. If they are too far from each other in terms of value orientation, it is very likely that either law or the understanding of law goes wrong.

Of course, as for common sense, since "it is arguable", and "(both parties stand) in opposition in terms of interests and the judgment", "(judges) shall have justified reasons" for the determination of common sense and "it is wise for them to be highly alert on the application of argumentative resources, in addition to the legal provisions and formal logic". [31] However, this sets high requirements for judges' capabilities in judgment, as well as judges' judicial responsibilities. If both requirements are satisfied, a classical judgment will come into being.

5. Jurisprudence/legal philosophy. Jurisprudence is the discipline that studies the most basic and general issues of law, such as legal system and legal phenomena, whereas legal philosophy is concerned with providing a general philosophical analysis of law from the perspective of philosophy and by philosophical means. As to whether jurisprudence and legal philosophy overlap or are parallel subjects, it is not the focus of researches on adjudication. In fact, the judiciary pays little attention to the development in these fields, which seems to explain that jurisprudence/legal philosophy and judicial practice are isolating from each other.

In recent years, jurisprudence/legal philosophy is losing its influence on branches of law, which has caused concerns and discussions, such as what can jurisprudence/legal philosophy do for branches of law? Scholars have provided lots of diversified opinions and analyses. [32] As a matter of fact, as to adjudication, we may also ask a similar question: what can jurisprudence/legal philosophy do for adjudication? As stated above, value judgment in adjudication shall be in line with the original legislative intent. Although branches of law provide specific guidance for how to accurately comprehend the legislative purpose, the spirit of legislation, the basic principles, the public interest, and judicial policies in a specific period, we still need to trace back to jurisprudence/legal philosophy. On the whole, the science of law is a practicable applied subject. It seems that we cannot feel the direct impact of jurisprudence/legal philosophy on judicial practice, or the decisive role that jurisprudence/legal philosophy plays. However, in each tricky case, the judges' consideration on the application of law or on how to present the reasoning, are in essence, conscious or unconscious. First of all, all cases can be eventually reduced to the most basic issues of jurisprudence/legal philosophy, such as the nature of law, the function of law and the characteristics of justice. Second, in intricate cases, the interpretation of laws and the method chosen for law interpretation depend, to a large extent, on the analyzing tools provided in legal philosophy. Some scholar holds a view that "the main task of legal dogmatics is to interpret and systemize the existing laws, and the methodology of jurisprudence is to provide methodological support for the interpretation and systemization", "judicial adjudication is most of all subjected to the methodology of jurisprudence, which, under normal circumstances, is aimed to clarify the meaning of legal rules and discover the intrinsic value judgments in the legal system", and since "intricate cases are exactly an important tool for testing legal philosophy", "legal philosophy exerts a role indirectly, rather than directly, to influence practice through the 'branches of law' dogmatics". [33]

As a matter of fact, it is observable in all the fields of adjudication that any judgment that triggered strong social reaction resulted from rigid adjudication and oversimplified application of logic. Although the "branches of law" dogmatics is responsible for providing specific theoretical guidance for trials of specific cases, judging notions, standpoints and methods underlying jurisprudence/legal philosophy will eventually cast an influence on the orientation and rationale of the overall adjudicative argumentation and reasoning. The relationship between jurisprudence/legal philosophy and judicial practice is not plain to see. However,

in some intricate cases, especially when the judges are in a dilemma over how to decide in face of multiple value orientations and options, it will be helpful to think about those fundamental questions in the application of law, such as the judicial goals, purposes and functions by tracing back to jurisprudence/legal philosophy. As a scholar said, theories are not applied directly; but once applied, theories will "directly affect the judgment in a case". In this sense, strengthening the interaction between judicial practice and jurisprudence/legal philosophy serving as guiding disciplines and reinforcing judges' speculative capabilities in terms of jurisprudence/legal philosophy are definitely of practical significance for making jurisprudence/legal philosophy an important factor that affect and determine the value orientation of adjudication.

VI. Conclusion
What can judges do for the society?

This topic derives from my judicial practice and reflections for a long time. The author presided over the trial in the aforesaid Guiding Case No. 86 and the Fangjue Case. The second instance of the "Candle in the Tomb" case was heard in the Jiangsu High Court that the author works for. While hearing cases, especially those heatedly-discussed ones, those questions that always haunt me are what the judges should tell to the public, and further, what judges can do for the society.

When this article is about to be finished, the Intellectual Property Court of the Supreme People's Court concluded *Dunjun v. Tengda*, [34] which involves the infringement of a process patent exploited by multiple entities in the field of network communications. In the previous SEP infringement case *IWNCOMM v. Sony*, Beijing IP court and Beijing High Court also delved into the same issue in their judgments. Sony was ordered to pay IWNCOMM the damages of RMB 8,629,173 plus a reasonable expense of RMB 474,194 in the first and the second instance. As for the type of infringement, however, the first-instance court held that Sony's act did not constitute joint infringement, but constituted contributory infringement, whereas the second-instance court decided that Sony committed direct infringement at least during the design, R&D or sample testing phase, but as to the end users' use, Sony's act did not constitute contributory infringement. The underlying rationale of the second-instance judgment was that the process patent "exploited by multiple entities" indicates that a plurality of entities participates in the exploitation of the process patent. But in IWNCOMM *v. Sony*, "no single entity instructs or controls the others in the exploitation of the patent in suit, and no multiple entities coordinate to exploit the patent in suit". [35] However, in *Dunjun v. Tengda*, the Supreme People's Court analyzed in the second-instance judgment that "according to the general rule for judging patent infringement, i.e., the accused infringing technical solution exploited by the accused infringer covers all the technical features of a patent claim is the necessary condition for patent infringement, and the manufacturing or selling of the accused infringing product by means of which the patented process can be directly exploited can hardly be determined as patent infringement. Meanwhile, the interests of the patentee cannot be sufficiently protected if only the exploitation of the patented process during testing the accused infringing product is considered as infringement. The reasons are that the testing is neither the major nor direct reason for the gains obtained through infringement. In addition, it is unlikely to prevent further infringement on the patented method on a larger scale by ordering the infringer to cease testing. What's more, the patentee cannot succeed in claiming that the end users who directly exploit the patented method though not for the purposes of production and business operation infringe its patent." After careful reconsideration, the second instance court set up a standard for determining direct infringement, namely the "irreplaceable substantive action" test. To be specific, "when the accused infringer incorporates the substantive parts of the patented method into the accused infringing product for the purpose of production and business operation, if such act or the result of such act plays a substantive role in full coverage of all the technical features of a patent claim, that is, if end users naturally reproduce the patented process during their ordinary use of the accused infringing products, it shall be deemed that the accused infringer has exploited the patented process and infringed the right of the patent holder". Once the judgment in *Dunjun v. Tengda* was pronounced, it drew great attention and was widely accepted by the public, since the judging standard solved the long-standing problem that process patents exploited by multiple entities can hardly be protected in the field of network communications. Some commentator believed that it "further improved the rules for patent infringement determination" in a bid to satisfy the requirements for industrial innovations and substantive pro-

tection, and will have a significant impact on the development of wireless communications industry, as well as the drafting and examination of process patents "exploited by multiple entities". [36]

Justice Holmes once said "the law embodies the story of a nation's development through many centuries". [37] Indeed, countless "stories and legends" of classic cases underlie the development of the times. At present, as the "regulator" of social relations, laws are confronted with more complicated economic, social, and technological development needs. In this sense, the value guidance of judicial adjudication will be more crucial as it is not only directly related to the duties and missions of the judiciary, but also goes along with the judges throughout their career. ■

The author: Judge of the Intellectual Property Tribunal of the Jiangsu High People's Court

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* This article only represents the author's personal views, not the work unit where she serves.

[1] *Guangzhou Pharmaceutical Group v. JDB Group*. First instance: the Civil Judgment No. Yuegaofaminsanchuzi 2/2013; and second instance: the Civil Judgment No. Minsanzhongzi 3/2015.

[2] *Michael Jeffrey Jordan v. the Trademark Review and Adjudication Board of the State Administration for Industry and Commerce of China and Qiaodan Sports Co.* See the Administrative Judgment No. Zuigaofaxingzai 27/2016 for details.

[3] *Jiangsu Broadcasting Corporation, Shenzhen Zhenai Information Technology Co., Ltd. v. Jin Ahuan*. See the Civil Judgment No. Yueminzai 447/2016 for details.

[4] Benjamin N. Cardozo (US). The Nature of Judicial Process and the Growth of the Law (May 2012 edition, pp. 81-82), translated and compiled by Zhang Wei. Beijing Publishing House.

[5] Liang Huixing. How to study law—From five characteristics of law. Retrieved from https://m.sohu.com/a/290923614_773108.

[6] Zhang Yujie. Research on the Use of Ambiguous Words in Legal Documents (July 2018 edition, p. 1). China University of Political Science and Law Press.

[7] The Judicial Committee of the Supreme People's Court adopted, at the 1480th meeting, the Interpretation on Several Issues Concerning the Application of Law in the Trial of Dispute over Patent Infringement (No. Fashi 21/2009) on 21 December, 2009, and, at the 1676th meeting, the Interpretation (II) on Several Issues Concerning the Application of Law in the Trial of Dispute over Patent Infringement (No. Fashi 1/2016) on 25 January, 2016.

[8] Kong Xiangjun. Methods of Interpreting and Applying Law (May 2017 edition, p.76). China Legal Publishing House.

[9] Article 2 of the AUCL reads: Operators shall, in their production and distribution activities, adhere to the principles of free will, equality, fairness and good faith, and abide by laws and business ethics.

[10] Article 12 of the AUCL reads: An operator engaging in production and distribution activities online shall abide by the provisions of this Law. No operator may, by technical means to affect users' options, commit the following acts of interfering with or sabotaging the normal operation of online products or services legally provided by another operator: (1) inserting a link or forcing a URL redirection in an online product or service legally provided by another operator without its consent; (2) misleading, defrauding, or forcing users into altering, shutting down, or uninstalling an online product or service legally provided by another operator; (3) causing in bad faith incompatibility with an online product or service legally provided by another operator; and (4) other acts of interfering with or sabotaging the normal operation of online products or services legally provided by another operator.

[11] Zheng Youde and Wang Huotao (2018). Discussion on difficulties in the top-level design and implementation of the newly revised Anti-Unfair Competition Law. *Intellectual Property, 1*.

[12] Take *Taobao (China) Software Co., Ltd. (Taobao) v. Anhui Meijing Information Technology Co., Ltd. (Meiijng)* for example. The court held that although data in *Business Advisor* come from original user data, they have already formed into an online big data product through the in-depth development by Taobao, and the big data product has become an important economic right of Taobao. Meijing used *Business Advisor* as a tool to obtain commercial benefits directly without making any labor, which constituted unfair competition, and shall be liable for compensation. Article 2 of the AUCL is a general provision for unfair competition acts and shall apply to judge the accused unfair competition acts when the acts of the operator do not fall within the scope of regulation specially specified under Articles 6 to 12 of the AUCL. First instance: the Civil Judgment No. Zhe8601minchu 4034/2017; and second instance: the Civil Judgment No. Zhe01minzhong 7312/2018.

[13] As for live sports broadcast images, the Beijing Intellectual Property Court concluded, in March 2018, *Beijing SINA Internet Information Service Co. v. Tianying Jiuzhou Network Technology Co., Ltd.* (a dispute over copyright infringement and unfair competition) [No. Jingzhiminzhongzi 1818/2015] and *CCTV International Network Co., Ltd. v. Beijing Baofeng Technology Co., Ltd.* (a dispute over copyright infringement) [No. Jingzhiminzhongzi 1055/2015]. The court held that the live sports broadcast images in suit are less original and do not constitute a work, and shall be protected under the AUCL.

[14] As for live video game images, the Shanghai Pudong Court concluded, on 13 November, 2019, *Blizzard Entertainment, Inc. and Shanghai EaseNet Network Technology Development Co., Ltd. v. Guangzhou 4399 Information Technology Co., Ltd. and 4399 Network Co., Ltd.* (a dispute over copyright infringement and unfair competition). The court held that as for whether dynamic video game images can be considered as works created by filmmaking methods, account shall be taken of whether the images are composed of a series of original pictures with or without accompanying sound. The game in suit, "Overwatch", is an online shooting game, which completely meets the requirement for originality under the Copyright Law as all the images are dynamic and continuous. Hence, the game in suit, "Overwatch", can be determined as a work created by a filmmaking method. First instance: the Civil Judgment No. Hu0115minchu 77945/2017.

[15] As for artificial intelligence products, the Beijing Internet Court concluded, on 7 May, 2019, *Beijing Feilin Law Firm v. Beijing Baidu Netcom Science and Technology Co., Ltd.* (a dispute over infringement of the right of attribution, the right of integrity and the right to disseminate information on the Internet). The court held that words automatically generated by software do not constitute a work.

[16] See supra note 4, pp. 3 and 80.

[17] Kong Xiangjun. Fundamental Issues on Application of the Intellectual Property Law (March 2013 edition, p. 157). China Legal Publishing House.

[18] As said by Justice Cardozo, "judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, nonetheless, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity." See supra note 4, pp. 127-128.

[19] Liu Xing. What is Law: Critical Reading of Anglo-American Jurisprudence (August 2015 edition, p. 87). China Legal Publishing House.

[20] For instance, Article 1 of the China's Patent Law reads "this law is formulated to protect the legitimate rights and interests of patentees, encourage inventions-creations, foster the application of inventions-creations, improve the innovative ability and facilitate scientific and technical progress and social and economic development." Article 1 of the China's Copyright Law reads "this law is enacted, in accordance with the Constitution, for the purposes of protecting the copyright of authors in their literary, artistic and scientific works and the copyright-related rights and interests, of encouraging the creation and dissemination of works which would contribute to the construction of socialist spiritual and material civilization, and of promoting the development and prosperity of the socialist culture and science." Article 1 of the AUCL reads "this law is enacted to safeguard the healthy development of the socialist market economy, to encourage and protect fair competition, to stop acts of unfair competition, and to defend the lawful rights and interests of operators and consumers."

[21] *Xuanting Co., Xuzhou Branch v. Beijing iQIYI Science & Technology Co., Ltd., Dongyang Uppictures Co., Ltd. and Zhang Muye* (a dispute over unfair competition). First instance: the Civil Judgment No. Su03minchu27/2017; and second instance: the Civil Judgment No. Suminzhong 130/2018. See anti-unfair competition protection of a series of works entitled "Candle in the Tomb", posted on WeChat Account "Jiangsu IP Vision" on 8 November, 2019. Retrieved from https://mp.weixin.qq.com/s/o7z9tqabChulvqdntaKxGA.

[22] *Tianjin Tianlong Seed Technology Co., Ltd. v. Jiangsu Xunong Seed Technology Co., Ltd.* (a dispute over infringement of new plant varieties). First instance: the Civil Judgment No. Ningminsanchuzi 63/2009, and the Civil Judgment No. Ningzhiminchuzi 069/2010; and second instance: the Civil Judgment No. Suzhiminzhongzi 0194/2011, and the Civil Judgment No. Suzhiminzhongzi 0055/2012. The case was selected as one of the Ten Major Innovative Cases on Judicial IP Protection in 2014 and published as the Guiding Case No. 86 by the Supreme People's Court on 9 March, 2017. See the public interest in new plant varieties infringement lawsuit, posted in WeChat Account "IP Vision" on 2 May, 2017. Retrieved from https://mp.weixin.qq.com/s/RaDG3SurKOoDGmGNd9E8pQ.

[23] Article 6 of the Regulations of the PRC on the Protection of New Plant Varieties reads: "the entity which or the person who has accomplished the breeding has an exclusive right to their protected variety. Except otherwise provided in these Regulations, no other entity or person shall, without the consent of the holder of the variety rights (hereinafter referred to as the "variety rights holder"), produce or sell for commercial purposes the propagating material of the said protected variety, or use for commercial purposes the propagating material of the protected variety in a repeated manner in the production of the propagating material of another variety."

[24] *Zhejiang Fangjue Import & Export Co., Ltd. v. Zhenjiang Customs and Anhui Conch Group Co., Ltd.* First instance: the Administrative Judgment No. Su11xingchu48/2016; and second instance: the Civil Judgment No. Suxingzhong 157/2017. See Judicial protection of overseas prestige of "Made in China", posted in WeChat Account "IP Vision" on 3 January, 2018. Retrieved from https://mp.weixin.qq.com/s/yHPp9e4cYOtW_EfeJnt01g.

[25] On 23 September, 2019, the Supreme People's Court made a decision on retrial in *Honda Motor Co., Ltd. v. Chongqing Hengsheng Xintai Trade Co., Ltd. and Chongqing Hengsheng Group Co., Ltd.* (a dispute over trademark infringement) (see the Civil Judgment No. Zuigao-

faminzai 138/2019) to revoke the second-instance civil judgment as the OEM act of the respondents constituted trademark infringement. There was a view that the above determination was totally opposite to the conclusion in the PRETUL case (2015) and Dongfeng case (2018) that the OEM act did not constitute trademark infringement, which indicated that the Supreme People's Court has greatly changed its view and made interpretations that comply with the original intent of laws to key terms like "use in the sense of trademark law" and "the public". "Determining OEM as trademark infringement — Comments on the judgment in Honda OEM case amended by the Supreme People's Court". Retrieved from https://mp.weixin.qq.com/s/lEaJqHoofIrBGOS_scIGDg

[26] See supra note 4, pp. 73, 74 and 79.

[27] Up to now, the Judicial Committee of the Supreme People's Court approved and published, in the form of the Announcement, 112 guiding cases in 21 batches. In addition, the Beijing Intellectual Property Court set up a case research base after its establishment. Parties concerned and their attorneys are allowed to submit effective judgments that are of significance in case guidance made by courts at all levels in China, including guiding cases and gazette cases released by the Supreme People's Court, as well as those that are widely recognized in judicial practice and play a trial guidance role.

[28] Hu Yunteng. How to make reference to guiding cases. Published in People's Court Daily on 1 August, 2018. Retrieved from https://mp.weixin.qq.com/s/xCTmMYNZmzrqEVdoxtpVeg.

[29] Kong Xiangjun. Judicial Philosophy (May 2017 edition, pp. 170-171, 176-177). China Legal Publishing House.

[30] Edward J Dewitt (US). Hu Xuemei and Han Chunhai (translators). Nine commandments for the new judge, posted in WeChat Account "Judge's Home" on 1 July, 2014. Retrieved from https://wk.baidu.com/view/afdbfc6ade80d4d8d15a4ff6?from=singlemessage.

[31] Liu Xing. Judicial Logic — Method and Fairness in Practice (November 2015 edition, p. 76). China Legal Publishing House.

[32] In what sense jurisprudence is helpful to branches of law, posted in WeChat Account "Chinese Legal Comments" on 5 October, 2017. Retrieved from https://mp.weixin.qq.com/s/Gw5cw_6HWawfpMkkXBe9BQ.

[33] Lei Lei (2018). In what sense legal philosophy is helpful to branches of law. *Peking University Law Journal, 5*.

[34] *Shenzhen Jixiang Tenda Technology Co., Ltd. v. Shenzhen Dunjun Technology Co., Ltd.* (a dispute over invention patent infringement) (see the Civil Judgment No. Zuigaofazhiminzhong 147/2019). The IP Court of the Supreme People's Court publicly announced an infringement dispute concerning a process patent exploited by multiple entities in the field of network communications, posted in WeChat Account "IP Court of the Supreme People's Court" on 10 December 2019. Retrieved from https://mp.weixin.qq.com/s/8SYGBttzsmsgALnYgfSw3Q.

[35] The second-instance court held that "the patent in suit is a typical process patent exploited by multiple entities. The implementation of the technical solution needs the work done by multiple entities in a cooperative or interactive manner. In the case, Sony only provides a mobile terminal with a built-in WAPI functional module without AP and AS devices, and the mobile terminal MT, the wireless access point AP and the authentication server AS are triadic safety infrastructures and must interact with each other for exploiting the patent in suit. In the case, no exploiter, including individual users, can exploit the complete patent in suit independently. Meanwhile, no single entity instructs or controls the others in the exploitation of the patent in suit, and no multiple entities coordinate to exploit the patent in suit. Without a direct exploiter, if the provision of one component is determined as contributory infringement, it does not meet the constituent elements of contributory infringement, and overly broadens the protection of right holders and improperly impairs the interests of the public. According to the provision of Article 21.1 of the Judicial Interpretation II, the acts of Sony do not constitute contributory infringement." *IWNCOMM v. Sony* (a dispute over invention patent infringement). First instance: the Civil Judgment No. Jingzhiminchuzi 1194/2015; and second instance: the Civil Judgment No. Jingminzhong 454/2017.

[36] Zhang Guangliang. Further improvement of rules for patent infringement determination — For the purpose of satisfying the requirements for industrial innovations and substantive protection. Published on 11 December, 2019 in People's Court Daily. Retrieved from http://rmfyb.chinacourt.org/paper/html/2019-12/11/content_163275.htm?div=-1&from=singlemessage&isappinstalled=0.

[37] Oliver Wendell Holmes Jr. (US). Ran Hao *et al.* (translator). Common Law (2006 edition, p.1). China University of Political Science and Law Press.