



## Featured Article

# Leveraging Administrative Adjudication for Effective Patent Enforcement in China's Dual Track Protection System

In the realm of patent infringement disputes, within the current framework of the Chinese Patent Law and its associated legal provisions, right holders have the option to seek remedies through administrative adjudication or judicial litigation. These parallel avenues of the recourse form a foundational protective mechanism, establishing a "dual-track" system of administrative and judicial protection.

## 1. Overview of the Protection of Administrative Adjudication on Patent Infringement Disputes in Recent Years

According to the data released by the China National Intellectual Property Administration (the "CNIPA") in March

2022, over the past three years, intellectual property offices nationwide have concluded a staggering 126,800 cases of patent infringement disputes, with an average annual growth rate of 16.3%. This remarkable achievement effectively harnesses the swift and efficient administrative protection of intellectual property rights while embracing the

advantages of diverse resolutions to address conflicts and disputes.<sup>1</sup>

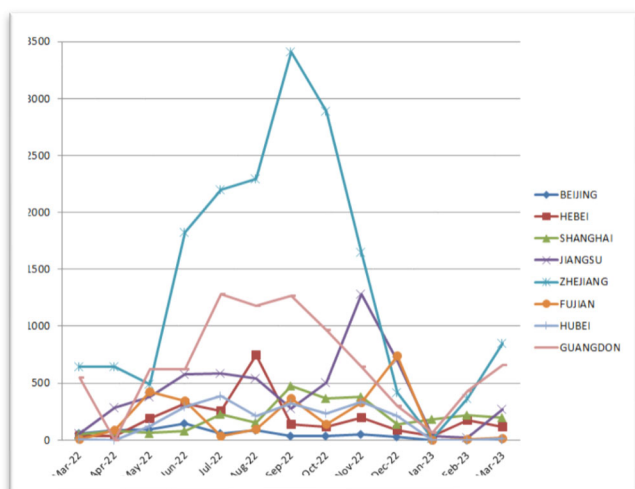


Figure 1: Figure of the number of patent infringement dispute cases registered in different regions

In addition, the author conducted statistical analysis based on the patent enforcement data disclosed by the CNIPA from March 2022 to March 2023, covering a period of nearly one year. During 2022, intellectual property offices across the country initiated 57,901 cases of patent infringement disputes, and successfully concluded 56,225 cases.<sup>2</sup> These figures demonstrate that administrative adjudication has become an indispensable means for parties in resolving patent infringement disputes. It also alleviates the burden on judicial litigation, mitigating

issues such as lengthy litigation proceedings in civil lawsuits.

Moreover, the author conducted an analysis of the provinces and cities with a prevalence of patent infringement disputes. Notably, Zhejiang, Guangdong, and Jiangsu provinces, known for their dynamic economies and abundance of small and medium-sized enterprises ("SMEs"), take center stage. When it comes to patent infringement disputes between SMEs, administrative adjudication emerges as a highly sought-after option. With its attributes of speed, accuracy, and practicality, it becomes the preferred avenue, effectively saving time and financial resources in the dispute resolution process, and facilitating the swift attainment of commercial objectives through litigation.

## 2. Characteristics of Administrative Adjudication for Patent Infringement Disputes

According to Article 65 of the current Patent Law (revised in June 2021),<sup>3</sup> the

1 . "Strengthening Administrative Protection of Intellectual Property Rights Administrative Adjudication of Intellectual Property Rights is carried out in an all-round way", official we-chat account of the CNIPA, March 22, 2022.

2. The CNIPA of the website, <https://www.cnipa.gov.cn/col/col89/index.html>, access time: on May 10th, 2023.

3. Article 65 of the Patent Law provides that: "Where any exploitation of the patent, that is, infringement of the patent right, without the permission of the patentee, leads to a dispute, the parties concerned shall settle the dispute through consultation; Where consultation is unwilling or fails, the patentee or interested party may bring a suit before a people's court or request the administrative department for

local patent administrative office is granted the power of administrative adjudication in patent infringement disputes, establishing the administrative procedures for such disputes as a statutory procedure and an administrative ruling. Specifically, administrative adjudication refers to the specific administrative act conducted by administrative bodies to adjudicate specific civil and economic disputes that are closely related to administrative activities and unrelated to contracts in accordance with legal authorization and statutory procedures. Administrative adjudication is also called administrative justice.<sup>4</sup> However, administrative adjudication differs from the exercise of administrative power by administrative offices as a general law enforcement act. It is a system where administrative offices, acting as third parties, use judicial procedures to solve specific civil disputes. It involves the exercise of judicial power and possesses quasi-judicial characteristics.<sup>5</sup>

#### (1) Prerequisite for Filing an Administrative Adjudication Case

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patent affairs to handle the matter."

4. Zhang Guangjie, *Introduction to Chinese Law*, Fudan University Press, 2005.

5 Luo Kaiyuan, "On the Nature of Administrative Adjudication", *Journal of Law*, 2019, No.08 (1), pp. 85-86.

6. "Article 8. To request the department for the administration of patent affairs to settle a patent infringement dispute, it shall meet the following

Patent infringement disputes fall under the category of civil infringement disputes, and the Patent Law provides a dual-track protection system, offering two avenues of remedies: administrative adjudication and civil litigation. The choice between the two is left to the discretion of the parties involved. To ensure a harmonious coexistence and prevent redundant efforts while conserving administrative and judicial resources, it is essential to establish a seamless connection between administrative adjudication and civil litigation. This will enable an efficient and coordinated approach to resolving patent infringement disputes.

To this end, Article 8 of the Measures for Patent Administrative Enforcement, issued by the CNIPA, provides relevant provisions on the conditions for filing a case.<sup>6</sup> One such condition, stipulated in point (5), "(5) the parties have not filed a lawsuit with a people's court regarding the patent infringement dispute," serves as a prerequisite for opting for administrative adjudication as a means to resolve patent infringement disputes. If a party has previously filed a lawsuit with the people's court concerning the same patent

requirements: (1) The person making the request is the patentee or an interested party; (2) there is a definite party to the claim; (3) There are clear matters of the claim and specific facts and reasons; (4) cases accepted and within the scope of jurisdiction of the department for the administration of patent work; (5) the party concerned has not brought a suit in a people's court for the patent infringement dispute."

infringement dispute, it is deemed that the administrative remedy has been waived. Consequently, the local patent administration office will no longer accept a request for administrative adjudication for the same case.

Based on the provisions of Article 8 of the Measures for Patent Administrative Enforcement, the author believes that the parties, given their right to voluntarily choose between the dual-track protection, should carefully consider the specific demands of their case and factors such as the enforcement practices of the administrative office responsible for the patent matters. At the same time, they should conduct a thorough comparison between administrative adjudication and civil litigation based on the specific circumstances of the case, thus making a cautious decision on whether to opt for the administrative adjudication as a means to resolve patent infringement disputes.

## (2) Establishment "Technical Investigators" for Administrative Adjudication

In patent infringement disputes, the disputed legal facts revolve around whether there is an infringement and the subject matter is the "specific patent right," which is backed by a specific technical solution. The determination of whether the alleged infringing product falls within the

scope of protection of the patent right involves a dual process of technical and legal assessment. This process requires extensive examination of technical facts, based on the in-depth understanding and comparison of the technical scheme protected by the patent and the product accused of infringement. Moreover, complex technical facts may necessitate the use of auxiliary means such as inspection and appraisal. These factors contribute to the generally longer litigation period for patent cases in civil litigation.

According to the Provisions on the Participation of Technical Investigators in the Handling of Administrative adjudication on Patent Infringement Disputes and Layout Design of Integrated Circuits (Interim), issued by the CNIPA on May 7, 2021, hereinafter referred to as the Provisions,<sup>7</sup> the role of "technical investigators" can be introduced into the administrative adjudication of patent infringement disputes aiming to support for the identification of technical facts thereby addressing the challenges faced by administrative offices in patent cases. According to the Article 3 of the Provisions,<sup>8</sup> the technical investigators assume an independent and neutral role in the administrative adjudication of patent infringement disputes. They serve as auxiliary personnel without voting rights, providing assistance through consultation

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7. CNPIA website, [https://www.cnipa.gov.cn/art/2021/5/10/art\\_75\\_159232.html](https://www.cnipa.gov.cn/art/2021/5/10/art_75_159232.html), access time: on May 10th, 2023.

8. Article 3 Technical investigators are administrative adjudicators and do not have the right to vote on the outcome of the case.

and issuing technical investigation opinions.

In addition, the selection of technical investigators in the administrative adjudication for patent infringement disputes is independent and not determined by the choices of the parties involved. Instead, they are appointed by the office personnel handling the adjudication cases, ensuring a more objective and impartial adjudication process.

### (3) Scope of Validity of Administrative Adjudication

The administrative adjudication for patent infringement disputes is essentially an administrative ruling and a form of special specific administrative act. The territorial management of administrative enforcement is the general principle of administrative law, but administrative adjudication of patent infringement disputes is a special quasi-judicial administrative act, which legal power is granted by Article 65 of the Patent Law.

In the legal context of administrative adjudication of patent infringement disputes, the object of dispute is whether there is a legal fact of patent infringement, and the subject matter is a specific patent right. The patent administration department serves as "judge" and assumes a role of intermediary adjudication. The party concerned refers to the individual or organizations whose rights and interests

are affected by the administrative decision made by the patent administration office, including the patent holder and stakeholders related to the product accused of infringing. Meanwhile, patent infringement disputes usually go through the "oral trial", as a judicial procedure, rather than administrative law enforcement. Thus, it can be said that the adjudication of patent infringement disputes possesses a "quasi-judicial" nature in terms of the roles assigned to the participants and the procedural aspects.

Furthermore, the subject matter addressed in the administrative adjudication for patent infringement disputes is a "specific patent right." The nature of patent rights themselves is territorial, as the scope of protection granted to patent rights holders is limited to specific countries, and the corresponding patent rights are universally applicable within the legal jurisdiction of that country. According to the fundamental principles of patent law, once a patent infringement dispute enters the administrative adjudication, the administrative decision made by the patent administration office naturally applies nationwide. In other words, the administrative decisions made by the patent administration office wherever it is located shall be effective throughout the country, regardless of the geographical limits of the administrative office.

### (4) Remedies for Administrative Adjudication



According to the relevant provisions of Article 65 of the Patent Law, it is stipulated that if "establishing an infringement is confirmed," the party concerned can initiate an administrative lawsuit within fifteen (15) days. This serves as a remedy available to the party in case of dissatisfaction with administrative adjudication decision.

In addition, in actual administrative adjudication cases, there will still be the situation of "determining that the infringement is not established," but the current Patent Law does not have direct provisions regarding this. However, the author believes that because the administrative adjudication of patent infringement disputes has a "quasi-judicial" nature, it should follow the general remedy procedure of civil litigation. Therefore, a dissatisfied party can directly initiate a civil lawsuit with a people's court within the statutory time limit.

### 3. Typical Cases and Analysis of Administrative Adjudication on Patent Infringement Disputes

Based on the analysis of the "Ten Typical Cases of Patent Administrative Protection" recently published by the CNIPA, this article will take the giant pharmaceutical company, Bayer AG, as an example to examine its utilization of the administrative adjudication procedure in patent infringement disputes in China. Bayer AG, as the patent right holder,

actively engages in patent enforcement and seek rapid decisions through this process. This enables them to effectively combat similar products from competitors and prevent the loss of market share.

**[Case 1]** The Nanjing Intellectual Property Office of Jiangsu Province handled the patent infringement dispute case of "Substituted Oxazolidone and Its Application in the Field of Blood Coagulation," which was selected as "Top Ten Typical Cases of Patent Administrative Protection in 2022".

**Case Summary:** The petitioner, Bayer Intellectual Property GmbH, is the patentee of the invention patent entitled "Substituted Oxazolidone and Its Application in the Field of Blood Coagulation" with patent number ZL00818966.8. On December 2, 2019, the Nanjing Intellectual Property Office accepted the case. Due to the impact of the COVID-19 pandemic, the case was suspended on February 3, 2020, and resumed on May 7, 2020. The petitioner alleged that the respondent, Nanjing Hencer Pharmaceutical Co., Ltd., exhibited and promoted "Rivaroxaban tablets" and "Rivaroxaban API" on its official website and at the 18th World Pharmaceutical API China Exhibition, which constituted the unauthorized offer for sale of their patented products. The petitioner further claimed that these exhibited products fell within the scope of protection of Claims 1, 2, and 6 of the

patent, thus constituting patent infringement.

Following the trial, the Nanjing Intellectual Property Office issued an administrative adjudication decision on May 25, 2020, confirming that the products exhibited by the respondent fell within the scope of protection of the petitioner's patent rights, and ordered the respondent to cease all infringement activities. Dissatisfied with the administrative decision, the respondent filed an administrative lawsuit with the Nanjing Intermediate People's Court of Jiangsu Province. In the first-instance judgment, the court dismissed the respondent's claims. Dissatisfied, the respondent appealed to the Supreme People's Court. On June 22, 2022, the Supreme People's Court made a final ruling, rejecting the respondent's appeal and affirming the original judgment.

**[Case 2]** The Shijiazhuang Intellectual Property Office of Hebei Province handled the patent infringement dispute case of "Substituted Oxazolidone and Its Application in the Field of Blood Coagulation," which was selected as "Top Ten Typical Cases of Patent Administrative Protection in 2020".

**Case Summary:** The petitioner, Bayer Intellectual Property GmbH., is the patentee of the invention patent entitled "Substituted Oxazolidone and Its Application in the Field of Blood Coagulation" with patent number ZL00818966.8. The petitioner alleged that

the accused infringing product of the respondent, Shijiazhuang SDYANO Fine Chemical Co., Ltd., has the same name, CAS number, and chemical structure as the patented invention. The petitioner filed a request for the handling of a patent dispute with the Shijiazhuang Intellectual Property Office of Hebei Province, seeking confirmation that the Rivaroxaban compound produced and sold by the respondent infringes upon their invention patent rights. The petitioner requested an immediate cessation of the production, sale, offer for sale, and use of the compound that infringes upon the petitioner's patent rights. On March 26, 2020, the Shijiazhuang Intellectual Property Office accepted the case for processing.

After the trial, the Shijiazhuang Intellectual Property Office issued an administrative adjudication decision, ordering the respondent to immediately stop offering to sell, sell without the patentee's permission of the compound with the same structure as the patented invention, immediately remove the infringing products displayed on its official website.

**[Case 3]** The Shanghai Intellectual Property Office handled patent infringement disputes related to anti-tumor drug Sorafenib, which was selected as "Top Ten Typical Cases of Patent Administrative Protection in 2019".

**Case Summary:** Bayer Pharm AG, on January 12, 2000, filed a patent application

with the CNIPA entitled "Substituted Diphenyl Urea as RAF Kinase Inhibitors." The patent was granted on September 21, 2005 with patent number ZL00802685.8. In January 2019, Bayer Pharm AG filed a request for administrative adjudication of patent infringement disputes with the Shanghai Intellectual Property Office. The petitioner asserted that the respondent, Shanghai Acebright Pharmaceuticals Group Co. Ltd., without permission, offered for sale the raw material ( "API" ) for the patented product Sorafenib on its official website and at a large exhibition, which fell within the scope of protection of Claims 1 and 27 of the patent. The petitioner alleged that this constituted patent infringement.

After trial, in May 2019, the Shanghai Intellectual Property Office determined that the respondent had offered to sell Sorafenib and the product involved in the case fell within the scope of the patent, thereby constituting patent infringement. In accordance with the law, the office issued a decision ordering the respondent to stop offering to sell the infringing Sorafenib, remove the selling information on the website, and destroy all promotional materials printed containing the infringing product.

Through the above-discussed three typical cases where Bayer utilized administrative adjudication for patent protection in China, the company achieved its intended commercial objectives and provided valuable insights for patent protection

against domestic and overseas competitors in the same industry.

Firstly, the average time for case resolution of administrative adjudication ranged from 3 to 6 months, indicating a short processing period. For right holders who aim to quickly curb the market share of infringing "competing" products, using administrative adjudication to obtain a "ban" on the sale of these products is one of the preferred strategies for patent protection.

Secondly, the cost of safeguarding rights through administrative adjudication is relatively low. Compared to the fees in civil litigation, administrative adjudication falls under administrative procedures, allowing right holders to have greater control over the cost. This aspect presents a cost-effective option, particularly for SMEs with limited resources for intellectual property protection. In addition, when faced with multiple instances of patent infringement, choosing the low-cost administrative adjudication for rights protection provides cost advantages.

Finally, administrative adjudication helps establishment evidence of infringement. Favorable decisions through administrative adjudication can serve as evidence in the subsequent civil litigation proceedings, supporting the right holder's claim for infringement compensation. For a series of patent infringement cases, securing favorable administrative decisions can serve as



strong evidence in other related cases (civil litigation or administrative adjudication cases). For example, in 2022, the CNIPA made the first administrative decision on significant patent infringement dispute in China, *Boehringer Ingelheim Co., Ltd. v. Dongyang Co., Ltd.* (No. 1 [2021] and No. 2 [2021] of the CNIPA), as *Boehringer Ingelheim Co., Ltd.*, presented the administrative decisions of related patent ZL03819760X as crucial evidence. The administrative adjudication decision was used to establish that the facts of infringement of the respondent have been ascertained.

Meanwhile, administrative adjudication has its drawbacks. For example, first of all, due to its quasi-judicial nature, administrative adjudication decisions may lack strong enforcement measures, resulting in some cases where the decisions are not effectively enforced. Secondly, because patent infringement

disputes are heard by intellectual property offices in different regions, there may be inconsistencies in the expertise of personnel involved in the adjudication. Thirdly, the award of infringement compensation, which is of great concern to most right holders, does not fall within the statutory authority of administrative adjudication. The current Patent Law only gives the right to "mediate" the infringement compensation, but not the right to "adjudicate."

In the context of China's dual-track patent protection system, during the process of patent enforcement, right holders have the option to choose remedies between administrative adjudication or judicial litigation, or strategically combine both, based on litigation objectives. It is important to fully leverage the advantages of each procedure to serve the business purpose of the right holders to the maximum effect.

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MS. Zhu has strong skills in Intellectual Property prosecution and litigation , such as patent FTO, infringement analysis, patent invalidity, public opinions , patent application and legal opinions, and has in-depth legal, technical and commercial research in many technical fields such as display technology, new energy battery, new energy photovoltaic, semiconductor field and communication technology; Meanwhile, Ms. Zhu is good at enterprise intellectual property management of large transnational enterprises, and is good at formulating and implementing intellectual property strategies, as well as refining the whole process management of IP.