

Practical Experiences in the Enforcement of Breeders' Rights in China

Seminar on the enforcement of plant breeders' rights under the UPOV
convention

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- protect the rights in new varieties of plants
- **Definition:** The new plant variety means a cultivated plant variety, or a developed one based on a discovered wild plant, which is new, distinct, uniform and stable, and whose denomination is adequately designated under the Chinese regulations on the protection of the new varieties of plants.
- **Purpose:** To encourage the breeding and variety selection and use of new varieties of plants, and to promote the development of agriculture and forestry.

- As a novel type IP rights, PVP is a **natural consequence** of scientific advance and commercialization in agricultural and forestry fields.
- Variety rights holder has an **exclusive right** in their protected variety, its exclusive right granted by authority to the breeder on his plant variety **in line with laws**.

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- It is prerequisite to accurately **comprehend global and national situation** in order to protection IPRs in agricultural and forestry field.
- While protecting breeders' rights timely and precisely, also need to **prevent abuse of the rights** and to **balance the interests** between rights holders and the public.
- While sustaining sound competitive order in seeding market, attentions should also be given to promote variety selection with seed production and trading in seeds, especially Germ plasm resources.

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PVP basic framework in China

- International Treaty
- China became the 39th member state of UPOV, participating in the 1978 UPOV text on April 23, 1999.
- **PVP legislation mode**
- Although all countries provide patent protection on methods of producing plant varieties, China, as majority of countries and international organizations, promulgates specific law to protect plant variety itself
- *Regulations of the People's Republic of China on the Protection of New Varieties of Plants* (1997)
- *Applying for Variety Rights* (1999)
- *Implementing Rules on Regulations of the People's Republic of China on the Protection of New Varieties of Plants* (1999)
- *Seed law of the People's Republic of China* (2000)
- Adopts revised seed law 2016

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- **Ji--- by Supreme People's Court of the P. R. China**
- *Circularize on Initiating trial of Cases involving disputes over New Varieties of Plants* promulgated (2001)
- *Judicial interpretation on Several Issues in Trials of Cases of New Varieties of Plants Disputes* (2001)
- *Judicial interpretation on several issues concerning the application of law in the trial of New Varieties of Plants infringement Disputes* (2007)

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- as regards patent law
- Article 25.4 of Patent Law in the P. R. China : **Patent rights shall not be granted for animal or plant varieties**, however, **methods for** manufacturing plant varieties are patentable.
- Method patents protect products resulted from such method, including known products, **unpatentable new products and products for which patents shall not be granted**, e.g. plant varieties.
- “**Genetic Resources Protection System**” has been added during the 3rd amendment to the Patent Law in the P. R. China.

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- Rights of New Varieties of Plants **do not refer to variety examination(approval) and registration** , hence, it is essential to accurately recognize new varieties of plants under examination.
- **Main crop and forest tree varieties** shall be subject to verification at the national or provincial level prior to their popularization. **Applicants may directly apply for verification** at the provincial or national level.
- **According to regulation**, the production ,**sale** and **dissemination** of a new plant variety in respect of which variety rights have been granted is **subject to review and approval** under the provisions of relevant national laws and regulations on seeds.

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Judicial Protection on PVP

- Disposing cases of disputes on new varieties of plants **equitably** and **efficiently** is of great significance **in promoting breeders' enthusiasm** for **innovation** and **maintaining sound competition order** in seeding markets.
- **Fundamental Status of Judicial Protection on PVP**
 - Characteristics of Disputes under Judicial Protection on PVP
 - Case study Latest Development of Judicial Protection on PVP

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Identification of plaintiff and defendant

- **Identification of variety right holder**
 - **One new plant variety shall be granted only one** set of variety rights.
 - If two or more applicants apply separately for variety rights in respect of the same new plant variety, the variety rights shall be granted to the person **who applies first**; in the case of a **simultaneous application**, the variety rights shall be granted to the person **who has first accomplished** the breeding of the new plant variety concerned.
- **Identification of plaintiff**
 - Identity of **variety right holder** can be confirmed by **certificate of right, recent vouchers of annual fee payment,**
 - **the interested party** needs to submit evidence of rights' origin, e.g. certificate of grant, licensing contract, certificate of inheritance, etc.

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- **Identification of plaintiff**

- Interested party of variety right holder include **licensees** of exploitation license contracts of new varieties of plants, **legitimate heir of assets** of variety right, etc.
- The licensee of an **exclusive licensing** contract can solely lodge a lawsuit to the people's court.
- The licensee of an **no-exclusive licensing** contract can file a class-action lawsuit **together with** variety right holder, or file a lawsuit **when variety right holder withdraw claim**.
- The licensee of a **general licensing** contract can file a lawsuit **after the explicit authorization** by variety right holder.

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- **Identification of defendant in administrative lawsuit**

- **examining and approving authorities** ----the administrative departments of agriculture and forestry the People's Governments
- **The administrative departments of agriculture and forestry** under the State Council are jointly responsible, according to the division of their job responsibilities, **for the receipt and examination of applications for rights** in new varieties of plants, and for the grant of rights in new varieties of plants in respect of those new varieties of plants that conform to the provisions of these Regulations.
- The defendant shall be the examining and approving authorities in the cases of **disputes on enforcing a compulsory license**.

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Judicial protection on PVP

- The examining and approving authorities shall set up a **Re-Examination Board for New Varieties of Plants**.
- The re-examination board of administrative departments **shall be the defendant in the cases of disputes**
- on whether rights of new plant varieties **shall be granted**,
- on **declaring** nullity of granted right of new plant varieties,
- on **sustaining the rights** of new plant varieties,
- on **re-denominating** the new plant variety after PVP was granted.

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Judicial protection on PVP Causes of Action

- **The contract** of new varieties of plants is the most **typical and fundamental** legal form in breeding, producing, selling and propagating new varieties of plants.
- The dispute over **the agency contracts** of new varieties of plants is, in practice, accepted as the dispute over the contract of new varieties of plants.
- **The contract of breeding new varieties of plants** refers to the contract agreed by the parties on breeding new varieties of plants by cultivating or developing the newly wild plants.

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- Based on the right to **file an application** for variety rights in respect of a new plant variety and **the variety rights** may **be assigned** in accordance with the law.
- The contract of transferring **the right to apply** for new varieties of plants refers to the contract where both parties agree on transfer the right to apply for new varieties of plants to the third party.
- The contract of transferring **the right of** new varieties of plants refers to the contract where both parties agree to transfer the right of new varieties of plants to the third party.

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- **The contract of licensing** the right of new varieties of plants refers to the contract where the owner of the right of new varieties of plants licenses others to **produce or sell breeding materials** of granted varieties for commercial purposes.
- In practice, the acts of **counterfeiting the right** of new varieties of plants **shall be treated as the disputes on infringing** the right of new varieties of plants, **when identifying the cause of action.**
- The common forms of disputes include disputes **on ownership and on infringement** of the rights of new varieties of plants,
- i.e. the parties disputed over the right to apply for new varieties of plants, the right of new varieties of plants, and infringement of the right of new varieties of plants as well as related interests.

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Jurisdiction on PVP

- As the new type of IP cases, new plant varieties cases are dealt by the Supreme People's Court through the method of **collected jurisdiction**, i.e. under the jurisdiction of intermediate courts **in provincial capitals or other cities designated** by SPC
- By the end of 2014, 87 intermediate courts have jurisdiction over patent cases, **46 intermediate courts have jurisdiction over new plant varieties cases**, 46 intermediate courts have jurisdiction over integrated circuit layout design cases, and 45 intermediate courts have jurisdiction over cases involving the recognition of well-known trademark. And 164 basic level courts have jurisdiction over general IP cases, and 6 basic level courts have jurisdiction over the cases involving utility models and industrial designs.

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Judicial protection on PVP

- **IP court in china**
- Since the establishment **by the end of 2014**,
- the IP courts in Beijing, Shanghai and Guangzhou have been **proceeding with the trial work methodically and undertaking the mission of the pathfinder and pioneer**, manifesting some initial success and a good start.
- As of December 31, 2015, the three courts have handled a total of 15,772 civil and administrative IP cases.

The "Three-in-One" Reform

The "three-in-one" reform refers to the type of **adjudication whereby civil, administrative and criminal cases are combined to one trial**.

It purports to **unify adjudicating standards**, optimizes allocation of judicial resource, and improves trial quality.

As of November 2015, the pilot reform of "three-in-one" adjudication has been carried out in **6 high courts, 95 intermediate courts, and 104 basic courts**.

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Transparency

Early in 2006, we established “Chinese IPR Judgments and Decisions Website” and uploaded the judgments.

SPC has established the Chinese courts’ judgment website.

By the end of 2015, the number of effective judgments and decisions rendered by the courts of all levels totaled 154,532.

In IPR protection week, SPC releases 10 “major cases”, 50 “typical cases” of IP protection by Chinese courts.

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Determine the infringement

- **Determine the infringement**
- without the consent of the variety rights holder, no other entity or person shall 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.

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- **Exception**

- **Without prejudice** to other rights of the variety rights holder under these Regulations, the exploitation of the protected variety **shall not require authorization** from, **or payment** of royalties to, the variety rights holder for the following purposes :
 - (i) exploitation of the protected variety **for breeding and other scientific research activities**;
 - (ii) the use for propagating purposes **by farmers, on their own holdings**, of the propagating material of the protected variety **harvested on their own holdings**.

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Disposal of infringing goods

- **Disposal of infringing goods**
- The principle is to **prevent waste of resources, maintain stability of villages, avoid re-proliferation of infringing plant**. The parties can use the infringing plant to **reimburse right-holder for his loss**, irrespective of maturity level of the infringing plant.
- If the parties **can not reach agreement**, the court shall request the infringer to **dispose of infringing plant appropriately**, e.g. by **inactivation**.
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 - Where the infringing plant is **in growth period** or the **destruction** of the infringing plant **may lead to serious unfavorable consequence**,
 - the court generally **may not order the destruction of infringing plant**,
 - so as to avoid the **negative impacts of harming farmers' feelings and damaging villages' stability** caused by acts of destructing infringing plant,

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Compensation for damage

- **Compensation for damage**
- Article 73 of the Seed Law
- where the loss of the right holder, the benefits obtained by the infringer and the royalty of the right to new varieties of plants can not be determined, the people's court may determine a compensation of not more than three million yuan based on the type of the right to new varieties of plants, the nature and circumstances of the infringement, and other factors.

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- Disclosure of evidence and obstruction of evidence are about to be introduced into judicial practices.
- “Where the right holder has made its best efforts to adduce evidence but the account books and materials related to infringement are mainly in the possession of the infringer, in order to determine the amount of damages, a people's court may order the infringer to provide such account books and materials; and if the infringer refuses to provide or provide any false ones, the people's court may determine the amount of damages by reference to the claims of and the evidence provided by the right holder. ”

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Characters of Disputes on PVP civil case

- **Characters of Disputes**
- First, **disequilibrium of geographic distribution**. Most cases occurred in Henan, Shandong and Gansu provinces, etc. In addition, proceeding time was seasonal.
- Due to **the growth period of plants**, seeds were generally planted in spring and autumn. Seed trading units mainly sold seeds during these periods and infringement acts also accordingly occurred during these seed production and sale peak seasons. Hence, the disputes over new varieties of plants **mainly emerged in spring and autumn**.

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- Secondly, **diverse types of variety rights**.
- Thirdly, **diversity of plaintiffs**.
- The crops in the cases include corn, wheat and Chinese cabbage, as well as **agamogenetic varieties** such as jujube trees.
- Plaintiffs include the owners of variety rights, as well as certain amount of the **interested party** of variety rights.

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- Fourthly, **withdrawing the action** is a large proportion of the methods of case settlement.
- In recent years, with the surgent emergence of **transfers and licenses** of variety rights, there was a stable increase of disputes when owners of variety rights transferred or licensed their rights to others for exploitation **or use variety rights or utilization rights of varieties as a share** in other companies.

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- Fifthly, **constantly strengthened difficulties of trials**.
- Trials of cases of new plant varieties **involved legal, technical issues and administrative system**. Nowadays, numerous R&D centers have been set up in China by international seeding giants.
- With the rapid development of modern breeding researches **through molecular biology**, disputes over IPRs derived from genetically modified breeding will bring out more complicated and sophisticated legal problems.
- These problems **outrange the scope of the rights** of new plant varieties, and thus **relate to granting of patents, protection scope of patent rights, access to genetic resources and benefit sharing**, etc.

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Latest Development on Judicial Protection

- **1. Assignment of Variety Rights**
- Where **assignment** of variety rights has not been registered and announced, whether such assignment is void?
- The right to file an application for variety rights in respect of a new plant variety and the variety rights may be assigned in accordance with the law.
- According to the regulation:
- The parties involved in the assignment of the right to file an application or of the variety rights **shall conclude a written contract, and shall register the assignment** before the examining and approving authorities, which in turn **shall published the assignment.**

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- SPC indicated that (2014) minshen No.52-54 cases civil lawsuit)
- The agricultural and forestry administration departments of the State Council are entitled to examine and grant the rights of new varieties of plants, hence, **the existence, duration, and proprietary** of such rights **shall be registered by such administration departments.**
- Although the registration of change of bibliographics is an administrative method, **it relates to the interests of the proprietor and the public.** Hence, such change **shall be announced.**
- The change of ownership of new varieties of plants **shall be valid after registration** with administration department. **Without such registration and announcement,** assignment of variety right is **not yet valid.**

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- 2.right of disposing of common owners of variety right
- Where there are more than two owners of a new plant variety right and the common owners reach a agreement on exploitation of such right, the agreement shall be binding.
- Right of disposing subject to the agreement of common owners.
- Agreement is the priority when the law is blank.

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- 3.Distinctness in identifying infringement case
- Any plant variety in respect of which variety rights are granted shall have the characteristic of distinctness.
- Distinctness means that the plant variety in respect of which variety rights are applied for must noticeably distinguish it from any other plant variety known prior to the filing of the application.

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Determination of identicalness

- SPC's opinion:
- Where there are **no more than two different loci between two varieties** under the DNA test, **other factors** shall also be considered for judgment, such as conducting more tests by **expanding detection loci (supplementary set of loci)**, and **submitting examined samples for testing**, etc. Such burden of proof shall be borne **by the alleged infringer**.
- Since granting of a new variety of plant is **subject to DUS testing** other than DNA fingerprint, the decision of infringement can be overruled **if the alleged infringer can provide opposite evidence** to prove that **the traits and characters** of the alleged infringing plants are different from those of granted variety by DUS testing.

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Case study

- Latest Model Cases
- Case of dispute over infringement of new variety of plant: (Dafeng 30 v. Xianyu 335)
- Shandong Denghai Xianfeng Seeding Company. vs. Shanxi Dafeng Seeding Company and Sha'an Xi Nongfeng Company (2015) minshen No.2633 Civil Lawsuit (Dec. 11, 2015)
- The prerequisite for **judging infringement** of the right of a new variety of plant is **to determine the traits and characters** of the alleged propagating materials **are identical** with those of the granted variety.

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- Dafeng company raised an **objection against the conclusion of DNA identification**, and the Shanxi Provincial Administration of Agricultural Seeds assigned the Testing Center of New Varieties of Plants under the Ministry of Agriculture to conduct a **DUS testing**. **The result indicated** that “Dafeng 30” had **explicit and reproducible distinctiveness in at least one feature** with the similar variety “Xianyu 335”.

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Holding

- **Holding by SPC**
- Where the **conclusion of DNA testing** shows the detection of DNA results shows that two varieties **are similar or no clear difference**, the alleged infringer provides evidence to prove that **DUS test show the clear and consistent (reproducible) difference(s) between two varieties**, it shall be determined that **no infringement** of the right of a new variety of plant exists.

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Reasoning

- 1. Pursuant to **DUS tests**, the authority of variety rights **conducts substantial examination on distinctiveness, uniformity and stability**.
- With regard to **the propagating material of a living body**, the traits and characters shall be **pursuant to the nature and features determined by DUS tests**.
- 2. Where come from
- The DUS testing report in said case recorded that Dafeng company **raised an opposition on DNA fingerprint testing during variety examination**(approved by national and provincial governments), its main reason of applying for DUS testing was the company asserted that two varieties had obvious **differences in nature, thus were different varieties**.

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- 3. **Variety rights and variety examination(approval)** are the two key aspects of administrating varieties of crops in China.
- China adopts the **variety examination and approval system for main crops and forest trees**.
- DUS testing **is conducted by approving authority** of protecting new varieties of plant.
- Said **DUS testing report aimed at** verifying whether two varieties had **differences by traits and characters** manifested in DUS testing,
- and whether the tested variety “Dafeng 30” was **distinct from the similar variety “Xianyu 335”**.

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- **The role of DUS testing**
- DUS testing is the technology basis for variety administration. Not only the examination (approval) authority conduct substantial examination on application of variety on the basis of DUS testing, DUS testing is also the fundamental basis for variety examination(approval) and registration,
- field cultivation experiments are all required Breeding reports and comparison experiment reports of the variety in application are considered as basis.

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- Then, testing will be conducted on the nature that the variety manifested during field planting, and analysis and evaluation will be made accordingly afterwards.
- With regard to the cases of disputes over infringement of variety rights, comparison shall be made between the traits and features of alleged varieties and those of granted varieties.

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- **The role of DNA**
- Concerning the judicial protection of variety rights, DNA fingerprint expedite **detection is commonly adopted to identify infringement.**
- DNA fingerprint expedite detection has also been **widely used in many areas**, e.g. in regional testing and examination on variety, protection of variety rights, **supervision and inspection of seeding markets.**

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- DNA detection has **absolute advantages in falsifiability of facts**, but when it comes to **verification of facts**, **it is possible that** the conclusion reached by such detection is **inconsistent with** that got **in the field plant testing.**

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- The **core sites** adopted in DNA detection **do not correspond to the characters and traits** in DUS testing. But the rights of new varieties of plants are **granted on the basis of DUS testing** by **field planting**.
- Where DNA identification manifests that **test sample is not distinct from standard sample**, it shall not be concluded that the traits and characters of both samples are identical.
- Thus, **Distinctiveness is absolute, while identicalness is relative.**

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- Thank your attention

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