

法治·人性

赵连玉律师知识产权案例文书选



珠海出版社

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The rule of law • humanity

—— **Selected Works of lawyer Zhao Lianyu on Intellectual
property cases**

珠海出版社

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赵连玉——著

法治 人性

Rule of Law

Humanity

序

2005 年岁末，作者编写《法治与智慧》一书，让我作序。一晃三年半过去了，他又编写这本专门反映知识产权案件的书，还叫我写个序，谈谈感想。

在上海市科技企业联合会秘书处工作期间，广泛接触科技企业和企业家们，耳闻目睹了不少知识产权纠纷，有大量被侵权的案例，当然也有侵权的案例。有人因为品牌被他人抢注而经受惨痛的教训，有人为了捍卫经过终生努力取得的自主知识产权而倾家荡产，可谓“硝烟弥漫、腥风血雨”！这些争执到最后总免不了诉诸法律。每每与连玉聊起其中的故事，总有不少同感。他萌生了写这本书的念头，经过一番努力，现在付诸实际行动，也算了了大家的心愿！

这些年，我们国家越来越重视依法保护知识产权，科技人员的法治意识也更增强了。问题虽然有，有些还很严重，但只要大家坚持不懈、共同努力，集正义、智慧、勇气于一身，汇科学、法治、人性于一体，可以相信：世界将会变得越来越美好的。

花凌

2009 年 5 月 1 日

前言

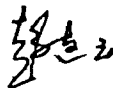
本书收集了我这几年来代理知识产权案件的部分法律文书。

每篇文书，藏着一部真实的故事，一部讲述因知识财富而发生的侵权和维权的斗争故事。每部故事也是一面镜子，照出人间百态，照亮你我前行的路。为尊重当事人，故事中的大多数人名都作了变更和虚拟，不便之处，敬请谅解。

知识财富的理念在我国是跟着“科学技术是第一生产力”的口号而深入人心的，随后，知识财富的创造活动如火如荼，到了上世纪八十年代中期，知识财富（包括人才）缺乏法律保障的种种问题就突出出来。当时，有感于此，我开始研究科技法，写了《科技法学》一书，想说：请重视法治。

无疑，这些年来的立法工作卓有成效，相比之下，司法仍显滞后，有法不依的问题乱象丛生。因此，2005年我把自己的一些法律文书汇集成书时，取书名“法治与智慧”，想说：选择法治，方显智慧；依法执法，仍需智慧。

今天，知识在创造物质财富中的作用促使人类自豪，但人类仍不免困惑知识对人性教化的作用问题。本书中的故事，在诉求法治的同时，也让人同时思考人性。因此，取书名“法治·人性”，想问：法治对教化人性该发挥什么作用呢？



2009年3月29日于珠海

Prologue

By Zhao Lianyu, Mar 29th, 2009 in Zhuhai City

I have collected some of my legal papers concerning intellectual property cases in recent years in this book.

There is a real story hidden in each legal paper in which the writer gives an account of infringement and protection stories arising from intellectual treasure. Each story seems to be a mirror which reflects the aspects of human world and illuminates the path ahead of you and me. A majority of the clients' names have been altered or are invented in respect for the clients in each story. Please understand any inconvenience which may occurs.

The concept of intellectual treasure which followed the slogan "Science and technology is the primary productive force" has penetrated into public feeling in China. Whereafter, as the creation of intellectual treasure spreaded like a raging fire, insufficient protection of intellectual treasure including talents standed out. Responding to the said issue, at the moment, I entered into the researching of Law on Science and Technology and wrote the book titled "the Study of Law on Science & Technology", driving at the idea of "Please think highly of rule by law"

Compared to the fruitful legislation work is the lagged judicial work which has been shown by the phenomenon of not observing laws in many cases. Therefore I compiled some of my legal papers into a book at the year of 2005, naming "Law and Wisdom", aiming at advocating that making choice of ruling by law dispalys wisdom, observing and enforcing laws still ask for wisdom.

Intellectual property plays such a great role in creation of fortune that it prides our human being. However, human being is still confused at the effect of knowledge civilizing human nature. On the one hand we appeal to rule of law, on the other hand we reflect on human nature. Therefore, I name the book "Rule by Law·Humanity", posing the question: what effect does Rule by Law have on civilizing Human Nature?

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案例一 H市工商局因N网吧使用非正版软件,认定 网吧已构成“侵犯他人注册商标专用权”的 行政诉讼案

[背景·提要]

工商局认为网吧使用非正版软件侵犯了微软公司的注册商标专用权,对网吧进行行政处罚。网吧不服,委托我所代理。本案行政复议与一审审理正在进行时……

Case 1: the administrative litigation case of Industry and Commerce Bureau in H City for its assertion that Internet café N has constituted a "violation of the exclusive right to use the registered trademark" while using the non-genuine software

[Background·Abstract]

Industry and Commerce Bureau asserted that the internet café infringed the exclusive rights to use the registered trademark while applying non-genuine Microsoft software, and conducted an administrative penalty upon the Internet café. The Internet café appealed against the allegation, and entrusted me as an agent. When the administrative review and the first instance was ongoing……

..... (001)

案例二 DC发明专利权属纠纷

[背景·提要]

教授说:为提携学生,当初申请专利时将学生列为发明人。

学生说:自己对发明有重要贡献;教授将本该归发明人共有的发明独自一人申请了专利,侵占了他的专利权……

一审法院判决:确认学生是专利权共有人。

二审法院裁定:撤销一审判决,发回重审。

Case 2: the ownership disputes of invention patent DC

[Background·Abstract]

The specification upon the condition that general manager S, the plaintiff is not the inventor, and it's me who put him as one of the inventors

The first instance court judged that the student was one of patentee
The high court rules abrogated the decision of the lower court.(excerpts)
..... (007)

案例三 “盲公饼”商标权纠纷

[背景·提要]

佛山合记饼业公司认为珠海香记食品有限公司生产“盲公饼”侵犯了其“盲公”商标。佛山市中级人民法院两次判决，广东省高院二次审理。尚未终审判决。

一案已四审，一争已五年……

法官称：案情很复杂……

百姓说：事情好简单……

Case 3: "blind man's cake" trademark ownership disputes

[Background·Abstract]

Foshan Heji Cake Co. Ltd accused the "blind man cake" produced by Zhuhai Xiangji Food Co. Ltd Of infringing its registered "blind man's cake" trademark. Foshan Intermediate People's Court has ruled twice, and the Guangdong provincial high court has tried twice, and the final verdict has not been made out yet.

The case has lasted four instances, and one dispute has lasted five years

The judge says: it's a very complicated case

People say: it's very simple

..... (031)

案例四 JS实用新型专利侵权纠纷

[背景·提要]

两个专心创业的小公司，突然成为被告。

在充分调查和准备证据的基础上，做了以下工作：1、向国家知识产权局提出原告的专利无效宣告请求；2、向法院提出“中止诉讼申请书”；3、向原告提出调解意向。

很快，双方同意和解，各自撤诉。

Case 4: JS utility model patent infringement disputes

[Background·Abstract]

Two small companies concentrating on business suddenly become the defendants.

On the basis of full investigation and preparation for the evidence, we have done the following work: 1, to file an application to the State Intellectual Property Office at the plaintiff's request for patent invalidation; 2, to file the court the "proceedings suspension application"; 3, to put forward mediation as a resolution towards the plaintiff.

Soon, both sides agreed to settle and dropped the lawsuit.

..... (039)

案例五 T、C、W 等人涉嫌侵犯知识产权罪

[背景·提要]

公司聘用的两位高管，租房开了地下食品生产车间，利用职权之便悄悄委托印刷厂印制了大量与公司相似的、印有公司商标的包装盒，将公司的半成品和其他食品厂制作的相似食品装入假冒的包装盒内对外销售。公司向警方报案，引起警方重视，介入侦查，有关方面却又有不同认识……

Case 5: T, C, W and others involved in
the crime of infringement of intellectual property rights

See figure 5

[Background·Abstract]

Two senior hired executives by the company utilized the rented premises to open the underground workshop of food production and took advantage of their positions quietly entrusting the printing company to print a large number of packaging boxes which was similar to what were produced in the original company and were printed with the company's trad emark, then sold the company's semi-finished products and similar products from other food production after putting them into the fake packaging boxes mentioned above. The company reported to the police. And it raised the police's high attention, and they quickly got in the investigation, however, relevant parties have a different understandings of the case

..... (043)

案例六 L等人涉嫌侵犯商业秘密罪案

[背景·提要]

A公司副总和总工程师辞职后成立了一家新的软件开发公司B公司。一年多后两公司在项目的招标竞争中，B公司获选中标。A公司认为上述二人涉嫌侵犯商业秘密罪，公安侦查立案，并逮捕了A公司的原副总和总工程师，检察院依法提起了公诉。我们为犯罪嫌疑人作无罪辩护。但犯罪嫌疑人终被判一缓二。

尘埃落定。存疑未明。

Case6: L, and others who are suspected of trade secret infringement crime

[Background·Abstract]

The former deputy general manager and Chief Engineer of A company established a new software development company-- B company after resignation. More than a year later, in a competitive bidding of a project between these two companies, B Company was finally elected as the successful bidder. A company accused B Company of infringing trade secrets, and reported to the police. After investigation, the police arrested the former deputy general manager and Chief Engineer of A company; meanwhile, the prosecutors filed the indictment in accordance with the law. We have a different understanding of this case and serve as a defense for acquittal for the suspect. However, the suspect was finally sentenced to one year in prison with two years' reprieve. The dust has finally settled. But the doubts are still not clarified.

..... (047)

案例七 FC实用新型专利侵权纠纷

[背景·提要]

展销期间，两家公司的展览场所突然被查封，不久又在当地被原告起诉侵权。两公司愤而反诉。经律师调解，原、被告双方达成庭外和解，双方按约撤诉。

Case 7: FC utility model patent infringement disputes

[Background·Abstract]

During the exhibition period, the two companies' booths were suddenly closed down, and soon they were prosecuted in local of patent infringement by the plaintiff. Later the two companies angrily counterclaimed. Through the mediation by the lawyers, the plaintiff and the defendant reached conciliation out of court, and both sides dropped the lawsuit according to their agreements.

..... (061)

案例八 ZL外观设计专利侵权纠纷

[背景·提要]

原告认为被告侵犯了其专利权；被告认为该专利丧失新颖性，且原告作为诉讼主体不适格……法院审理后裁定驳回原告起诉。

Case 8: ZL exterior design patent infringement disputes

[Background • Abstract]

The plaintiff accused the defendant of infringing its patent rights, but the defendant rebutted that the patent had lost its novelty, and the plaintiff as the main proceedings didn't not qualify after the trial, the court ruled that the plaintiff's prosecution be dismissed.

..... (067)

案例九 LMN 商标权侵权纠纷

[背景·提要]

原告认为被告在其产品包装上突出使用了原告的企业名称和商标，构成不正当竞争行为。

被告认为自己的行为不构成侵犯，且没有侵权故意。

法院审理后，认定被告的行为有“搭原告商誉便车”的性质，构成不正当竞争。

Case 9: LMN trademark infringement disputes

[Background • Abstract]

The plaintiff accused the defendant of unfair competition while outstandingly using its corporate name and trademark on the packaging of their products.

The defendant defended that his conduct did not constitute a violation, and there was no infringement deliberation.

After the trial, the court ruled the defendant's act constituted unfair competition because it featured in taking the free ride of the plaintiff's trade reputation.

..... (071)

案例十 SA商标侵权及不正当竞争纠纷

[背景·提要]

被告将原告的商标作为本企业的字号使用，从产品的包装、说明书、厂房、商品卖场、运输车辆等各个方面，单独突出使用该字号……原告认为，被告的做法已导致消费者对产品的来源和生产者的关联关系产生了混淆和误解。

法院在审理过程中,主持调解。

Case 10: SA trademark infringement and Unfair competition disputes

[Background • Abstract]

The defendant brought the plaintiff's trademark into the name of its own enterprise, ranging from product packaging, manuals, workshops, stores of goods, transport vehicles as well as highlighting unilaterally the name in various aspects alone; the plaintiff claimed that the defendant's practice had led to the confusion and misunderstanding of the consumers towards the relationship between the origin of the products and producers.

The Court presided over the mediation in the course of hearing.

..... (077)

案例十一 BL等涉嫌侵犯著作权罪、商业秘密罪案

[背景·提要]

A公司认为自己耗时近十年,投资几千万的研究成果已被公司原负责销售和研发的几个骨干成员以盗窃的手段,以成立合法的公司为幌子,窃取使用并获取了非法利益,遂采取向警方报案和民事诉讼的途径要求依法追究被告的法律责任。

被告称成果是自己独立研发的,没有侵犯原公司的合法权益,且新成立的公司实际已撤销。

警方至今未受理。

一审法院2006年6月立案审理至今,尚未下判。

Case 11: the case of BL being suspected of copyright and trade secret infringement crime

[Background • Abstract]

A company asserted the fruits of the research, which had absorbed tens of millions of investment under the disguise of setting up legitimate company through theft means by several key members responsible for the sales and R&D in the original company, and they have obtained the illegal profits. A company thus reported to police and demanded the defendant be held accountable for their legal responsibility through Civil Procedure

The defendant claimed that the outcome of the research stemmed from its own independent R & D, so there was no violation of the legitimate rights and interests of the original company, and the newly established company was actually removed;

Police have not yet dealt with the case.

The court began the First Instance in June 2006, but nothing has been ruled.

..... (085)

案例十二 N网吧与 AB 公司电影作品著作权侵权纠纷

[背景·提要]

AB 公司称自己拥有某电影作品的信息网络权,某些网吧未经授权和支付报酬,在网吧内向公众提供该电影的在线播放和下载服务,已构成侵权。

网吧在一审中辩称自己不构成侵权;

一审法院判被告停止侵权,赔偿原告损失;

二审代理中,我方认为一审法院查明事实不清,适用法律不当.....

Case 12: Copyrights infringement disputes between N internet cafe and AB company

[Background • Abstract]

AB company claimed that they has its own information network rights of one film , but some Internet cafes provided the public with the online movie play and download services without authorization and payment of remuneration, which had constituted an infringement;

In the first instance, the Internet cafes defended that they didn't constitute an infringement;

The First Instance Court sentenced the defendant to stop infringement, and compensate the plaintiff for losses;

In the second instance, we hold that the Court of First Instance was unclear about the fact, and improperly apply the law

..... (099)

案例十三 DD 实用新型专利实施许可纠纷

[背景·提要]

李先生的专利同意转让,但中介公司的工作人员横生枝节;

律师接受代理后,直接与买方交涉并将问题提交中介公司高层,纠纷终获圆满解决。

Case 13: DD utility model patent License disputes

[Background • Abstract]

Mr. Lee agreed to the transfer of the patent, but the intermediary company stirred;

After accepting the agent, we negotiated directly with the buyer and submitted the issue to the high-level of the intermediary company. The dispute was compeceely settled.

..... (107)

案例十四 Im外观设计专利侵权纠纷

[背景·提要]

对方的律师函没有对方的“授权委托书”…… 律师接受代理后, 先按程序调查核实、此后对方再无消息。

Case 14: Im exterior design patent infringement disputes

[Background • Abstract]

The lawyer's letter of the contra party didn't include the contra party's "power of attorney"; After accepting the agent, we conducted investigation and verification in accordance with the procedures, to find out actual situation, however, Since then there was no news

..... (113)

案例十五 BS化学有限公司与 D 区工商局关于不正当竞争行为的行政处罚争议

[背景·提要]

工商局认定某产品的包装上印刷内容不真实, 遂对产品采取查封措施。律师接受代理后, 首先建议工商局慎重斟酌“封存”措施是否得当的问题。工商局采纳我们的观点并解封。

Case 15 :the disputes between BS Chemical Co., Ltd. and Industry and Commerce Bureau of D district upon the administrative penalty of unfair competition

[Background • Abstract]

Industry and Commerce Bureau take sealing measures on a product because of the untrue contents printed on its packaging.

After accepting the agent, first of all we recommended the Industry and Commerce Bureau contemplated carefully the question whether the "sealing" measures were adequate

..... (117)

案例十六 AD 商标权涉外维权纠纷

[背景·提要]

WF 公司根据海关认定并作出的处罚决定, 委托我所直接与国外进口商联系, 洽商纠纷解决的具体事宜……

Case 16: disputes on overseas protection of AD trademark rights

[Background • Abstract]

WF company entrusted our firm to contact foreign importers directly and negotiate details of disputes resolution in accordance with the assertion and the punishment decision of the Customs and Excise Department

..... (121)

论文选编

Selected Papers

1 从一个案例、一项立法看我国保护知识产权的制度设计存在的一个问题

广东玉成律师事务所 赵连玉 练李生 让玉成

Looking upon from one case, one legislation one problem existing in the systematic design of intellectual property rights protection in ChinaGuangdong Yucheng Law Firm: Lian Lisheng Zhao Lianyu Rang Yucheng

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2 谈谈知识产权诉讼超审限审理的问题

广东玉成律师事务所 赵连玉 练李生 让玉成

Talking about Intellectual property litigation and trial beyond trial limits
Guangdong Yucheng Law Firm: Lian Lisheng Zhao Lianyu Rang Yucheng

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3 谈谈我国专利法关于专利权损害赔偿额的确定方法存在的缺陷

广东玉成律师事务所 练李生 让玉成 赵连玉

Talking about the deficiency existing in the methods to determine the amount of patent damages in China's patent law

Lack of methods to determine the existence of gap

Guangdong Yucheng Law Firm: Lian Lisheng Zhao Lianyu Rang Yucheng

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4 “由于侵权引起的专利权权属纠纷，不受诉讼时效限制”之我见

广东玉成律师事务所 赵连玉

My viewpoints on "the litigation of patent ownership disputess arising from patent infringement is not restricted by the limitation of time"

uangdong Yucheng Law Firm: Zhao Lianyu

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5 走“知识产权”和“公司”法律服务专业化发展之路的初步体会

广东玉成律师事务所 赵连玉

My experience in professionalisation of Legal Service on Intellectual Property and
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