

China National Intellectual Property Administration (CNIPA) vs Jiangsu Targetpharma  
Laboratories Co., Ltd. (Jiangsu) and High-tech Research Institute of Nanjing University,  
Changzhou:

Administrative dispute over reexamination of invention patent application

(Intellectual Property Court of PRC Supreme People's Court (SPC), (2020) SPC IP Admin. Final  
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Prepared by the Intellectual Property Court of SPC

## Summary

In this case, the SPC established an adjudicative standard for identifying common technical knowledge (CTK) and its evidence in the relevant technical field. The identification of CTK as well as evidence of CTK may determine the technical knowledge and cognitive capability that so-called persons skilled in the art shall possess, and, hence, is of significant influence on inventiveness assessment at issue. Therefore, the identification of CTK shall be conducted with an incontrovertible standard and supported by sufficient evidence or grounds without being arbitrary.

## Facts

Under Chinese patent law an ordinary person skilled in the art is presumed to be aware of all the common technical knowledge (CTK) in the in the technical field covered by a patent application. In determining inventiveness, a patent examiner first identifies the closest prior art, then identify the distinguishing features of the claimed invention and the technical problem that is solves, then assess if a person skilled in the art (presumed to possess CTK) could be motivated to apply the invention when confronted with the technical problem. Hence, identifying the CTK becomes an important element of the examination of inventiveness.

This case concerns a patent application by *Jiangsu* and High-tech Research Institute of Nanjing University entitled “*A Tumor-Targeting Tumor Necrosis Factor (TNF) Related Apoptotic Ligand Variants and Application Thereof.*” The technical problem to be solved by the invention was to construct a tumor-targeting TNF-related apoptotic ligand variant fusion protein with a linker peptide. After substantive examination, the original examining division of China National Intellectual Property Administration (CNIPA) rejected the application on the ground that the application does not meet the inventiveness requirement. The applicants requested for re-examination, and CNIPA, upon re-examination, upheld its original decision. The applicants then filed an administrative lawsuit with Beijing Intellectual Property Court which revoked CNIPA's re-examination decision.

CNIPA appealed to the Intellectual Property Court of the SPC on the following grounds:

- (1) Before the decision was made, the two applicants have been notified about the

evidence contained in the 8<sup>th</sup> Volume of *Frontier of Cancer Research* via the Notice of Re-examination and were given opportunities to state their opinions. The applicants, however, did not object the reference as CTK.

(2) The application of the law in the original judgment was erroneous. The 8<sup>th</sup> Volume of *Frontier of Cancer Research* is not a journal but a book. Medical science is a field where updating of knowledge is relatively quick. The technical knowledge in the 8<sup>th</sup> Volume of *Frontier of Cancer Research* as cited in CNIPA's decision is not a notable progress<sup>1</sup> compared to the prior art, but a piece of CTK existed for a long time in the art. Even if the 8<sup>th</sup> Volume of *Frontier of Cancer Research* shall not be considered as evidence of CTK, there are also many books and literatures in the prior art to verify that the relevant technical knowledge in relation to the subject of the patent claim as disputed in this case constitutes CTK.

### **The legal issues**

The SPC held that the identification of CTK in the relevant technical field directly determines the technical knowledge and the cognitive capability that the so-called persons skilled in the art shall possess and, hence, is of a significant influence on the assessment of inventiveness. Therefore, it should be conducted with an incontrovertible standard and supported by sufficient evidence or grounds without being arbitrary.

In principle, CTK can be verified by such evidence as technical dictionaries, technical manuals, textbooks, etc., in failure of which, multiple evidence of other kinds in the relevant art, such as patent documents and journals, can also be referred to if such evidence are corroborative to one another and thereby suffice to establish CTK. Nevertheless, it's also noteworthy that the latter proving pattern shall follow a stricter standard of proof. In order to assess whether technical materials other than dictionaries, manuals and textbooks can prove CTK, it is necessary to look into such factors as their genre, content, characteristic, target readers, scope of dissemination, etc. and then make the assessment on a case-by-case basis. In this case, the 8<sup>th</sup> Volume of *Frontier of Cancer Research* belongs to the category of book publication, but it's not a textbook in a conventional sense, and hence does not suffice to amount to CTK evidence. Therefore, it is not convincing for CNIPA to use the 8<sup>th</sup> Volume of *Frontier of Cancer Research* solely as the evidence of CTK in its decision as identified by the applicants.

The related questions concerns whether the additional evidence including the books and journals dated before the publication date of the application submitted by CNIPA in the second instance proceeding shall be accepted by the court as new evidence. The SPC pointed out that CNIPA had already identified the relevant technical knowledge solely on the basis of the 8th Volume of

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<sup>1</sup> Notable progress means that the claimed invention produces a better or an advantageous technical effect as compared with the prior art. Such effect could be solving shortcomings of existing technology, improving quality, increasing productivity, saving energy, preventing or reducing environmental pollution, or representing a new trend of technical development etc. See Liu, Shuo, 2020. The inventive step in Chinese patent law compared with the U.S. non-obviousness standard. <https://www.ipwatchdog.com/2020/12/26/inventive-step-chinese-patent-law-compared-u-s-non-obviousness-standard/id=128454/>

*Frontier of Cancer Research* in its decision. The additional evidence was presented to prove the existence of CTK only during the judicial proceeding, and hence such additional evidence is of no substantive pertinence to the basis for issuing CNIPA's decision in the first place. CNIPA had fundamentally altered its reasoning and logics by submitting and presenting such evidence only when confronted during the judicial proceedings, and therefore the evidence should not be accepted by the court.

In view of the above, the SPC rejected CNIPA's appeal and upheld the original judgment.

### **Points of Significance**

1. Identification of CTK shall be conducted with an incontrovertible standard and supported by sufficient evidence or grounds without being arbitrary.
2. In principle, CTK can be verified by such evidence as technical dictionaries, technical manuals, textbooks, etc., or multiple evidence of other kinds in the relevant technical field such as patent documents and journals. Nevertheless, it's noteworthy that the latter proving pattern shall follow a stricter standard of proof.
3. In order to assess whether technical materials other than dictionaries, manuals and textbooks can prove CTK, it is necessary to look into such factors as their genre, content, characteristic, target readers, scope of dissemination, etc. and then make the assessment on a case-by-case basis.

### **Key Words**

Inventiveness; common general knowledge (CTK); person skilled in the art