



## IP Guide



### Determination of Evidence on Common Knowledge

—— (2020) 最高法知行终 35 号

#### 【Relevant Legal Provisions】

1. There are no relevant provisions in the current *Patent Law* and the current *Implementing Regulations of the Patent Law of the People's Republic of China*.
2. In combination with the subject case, which is the administrative dispute over the rejection of the reexamination of the patent application for invention, the current *Guidelines for Patent Examination* stipulates the following provisions,
  - ① 3.2.1.1, Chapter 4, Part 2, “The said distinguishing feature is a common knowledge, such as a customary means in the art to solve the redetermined technical problem, or a technical means disclosed in a textbook or reference book to solve the redetermined technical problem.”
  - ② 4.10.2.2 Chapter 8, Part 2, “The common knowledge of the art cited in the Office Action by the examiner shall be accurate. Where the applicant has objections to the common knowledge cited by the examiner, the examiner shall state the reasons or provide corresponding evidence for proof.”

#### 【Judicial Highlight】

The evidence of common knowledge normally refers to documents that record basic technical knowledge in the art, such as a technical dictionary, a technical manual, a textbook, etc. Whether documents other than a technical dictionary, a technical manual and a textbook belongs to the evidence of common knowledge shall be specifically determined in combination with the **carrier format, contents, range of readers, spreading scope** and other factors of the subject documents.

## 【Basic Facts】

The appellant China National Intellectual Property Administration (hereinafter referred to as “CNIPA”) lodged an appeal with the Supreme People’s Court for the Second Instance, due to opposition to the judgment of the first instance regarding the administrative dispute over the rejection of the reexamination of the patent application for invention with the plaintiff of the First Instance Target pharma Laboratories Co., Ltd. (hereinafter referred to as “Target Company”) and High-tech Research Institute of Nanjing University Changzhou (hereinafter referred to as “RINU”). The subject application is about “Tumor-targeted tumor necrosis factor related apoptosis ligand variant and application thereof”, whose application No. is 201110187700.2.

## 【The First Instance】

The plaintiff of the First Instance Target Company and RINU held that *Cancer Research Frontiers Vol.8* was neither a textbook nor a technical dictionary; instead it was only a collection of reviews of the latest achievements in the art of cancer research in the corresponding year, which cannot be regarded as the evidence of common knowledge. Accordingly, CNIPA’s Decision No. 116649 on the Reexamination (hereafter referred to as “the Decision”) regarding *Cancer Research Frontiers Vol.8* claiming the evidence belongs to common knowledge was wrong. Therefore, Target Company and RINU filed a lawsuit with Beijing Intellectual Property Court (hereinafter referred to as “the court of the First Instance”), asking the court to mediate the dispute.

The court of the First Instance held that firstly *Cancer Research Frontiers Vol.8* was only a periodical for the medical research of cancer; secondly CNIPA failed to determine whether the specific technical knowledge recorded in the *Cancer Research Frontiers Vol.8* belongs to common knowledge, but directly used *Cancer Research Frontiers Vol.8* as the evidence of the common knowledge instead,. As a result, the court of the First Instance revoked the Decision by CNIPA and requested CNIPA to remake the Decision.

## 【The Second Instance】

CNIPA opposed and lodged an appeal with the Supreme People’s Court and claimed that *Cancer Research Frontiers Vol.8* was a book, since it has ISBN (International Standard Book Number) instead of ISSN (International Standard Serial Number). Moreover, the technical knowledge related to NGR cited in *Cancer Research Frontiers Vol.8* was not a cutting-edge progress, but was a common knowledge which was already known in the art.

The Supreme People’s Court\* dismissed the appeal and upheld the original judgment of the First Instance.

\*In China, for jurisdiction over patent disputes, the Second Instance shall be held by the Supreme People’s Court.

## 【Judgment】

In the Second Instance, regarding common knowledge and its proof methods, the Supreme People's Court held that the determination of common knowledge in relevant art directly determines the technical knowledge and cognitive capability that a common person skilled in the art should possess, which has a significant impact on determination of inventive step.

Therefore, **the determination of common knowledge should be based on incontrovertible standard, supported by sufficient evidence and reasons, which should not be arbitrary.**

Generally speaking, whether relevant technical knowledge belongs to common knowledge can be proved by evidence of common knowledge in the art with reference to **a technical dictionary, a technical manual, a textbook**, etc. If it's difficult to be proved by above-mentioned evidence, it can also be proved by mutual verification among multiple evidence of non-common knowledge in the art, such as multiple patent documents, periodicals; however, the above-mentioned method shall follow stricter proof standard.

The Court also held that evidence relating to common knowledge refers to documents that record basic technical knowledge in the art, such as a technical dictionary, a technical manual, a textbook, etc. If there is no evidence to the contrary, the technical knowledge recorded in a technical dictionary, a technical manual and a textbook can be determined as a common knowledge.

**For documents other than a technical dictionary, a technical manual and a textbook, whether which belong to evidence of common knowledge that records basic technical knowledge in the art, it shall be specifically determined in combination with the carrier format, contents, range of readers, spreading scope of the subject documents.**

More specifically, whether *Cancer Research Frontiers Vol.8* belongs into evidence of common knowledge, the Court held that,

Firstly, with respect to the carrier format, *Cancer Research Frontiers Vol.8* is a book.

**Cataloguing in Publication (CIP) of *Cancer Research Frontiers Vol.8* indicates its book number is ISBN978-7-81086-559-3. ISBN is the abbreviation for International Standard Book Number, which has been used for years in China also. Therefore, *Cancer Research Frontiers Vol.8* is a book.** The judgment of the First Instance determined it as a periodical should be corrected.

Secondly, with respect to the contents, *Cancer Research Frontiers Vol.8* is not a textbook in the usual sense, although it is a book.

The preface of the book states that it introduces the latest progress of cancer research in the world to peers and relevant researchers, by the most common language. The book has similar features like monograph, reference review, commentary and popular science book, which is featured by inclusiveness, progressive nature and debate on focus.

This indicates that **the book aims at introducing the latest progress of cancer research in the world, instead of describing common technical knowledge in the art of cancer research, which it's not a textbook in a common sense.**

Finally, with respect to the range of readers and spreading scope, it's difficult to determine *Cancer Research Frontiers Vol.8* is a textbook neither.

According to the "Content Introduction" of this book, it says that "this book can be used as a reference book for researchers in relevant art, as well as for relevant staff in universities and hospitals", which indicates that the book is not a textbook in a common sense, but a reference book for professional researchers instead.

In addition, there is no other evidence showing that the book has become a common reference book for researchers in relevant art.

Combining the above factors, it can be concluded that, although *Cancer Research Frontiers Vol.8* is a book, it's not a textbook in a common sense, thus it cannot be determined as evidence of common knowledge.

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