

# A GUIDE TO PROTECTING NEW PLANT VARIETY RIGHTS IN CHINA

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# NEW PLANT VARIETY RIGHT PROTECTION IN CHINA

## 1. Introduction

For many foreign investors in China's agricultural sector the protection of their plant variety rights are among the biggest concerns. Appropriate protection of those rights is however achievable. This article provides a legal and practical overview of plant breeder's rights and the protection thereof in China.

## 2. Applicable law

In April 1999 China officially ratified the International Convention for the Protection of New Varieties of Plants ("UPOV Convention"). The Convention was adopted in Paris in 1961 and revised in 1972, 1978 and 1991. Currently Chinese laws and regulations regarding new plant variety right ("NPVR") protection are based on the 1978 version of the UPOV Convention. The legal protection system of new plant variety in China (which will be dealt with in detail below) is however different than the protection systems in most other member states of the UPOV Convention. The main regulations applicable to NPVR protection in China include:

- The Seed Law of the People's Republic of China ("Seed Law"), revised on 4 November 2015;
- The Regulations on the Protection of New Plant Variety ("Regulation"), revised on 29 July 2014;
- The implementing Rules for Regulations on the Protection of New Plant Variety (Agricultural Part) ("Agricultural Implementing Rules"), revised on 25 April 2014;
- The implementing Rules for Regulations on the Protection of New Plant Variety (Forestry Part) ("Forestry Implementing Rules"), revised on 25 January 2011;
- MoA Provisions on Handling Cases of Infringement on Agricultural New Plant Variety Right ("MoA Provisions on NPVR Infringement Cases"), effective as per 1 February 2003;

- Interpretations of the Supreme People's Court on the Issues Concerning the Dispute Related to New Plant Varieties Rights ("Judicial Opinion 2001"), effective as per 14 February 2001;
- Several Provisions of the Supreme People's Court on the Issues Concerning the Application of Law in the Trial of Cases Involving Disputes over Infringement on New Plant Varieties ("Judicial Opinion 2007"), effective as per 1 February 2007.

## 3. Eligibility of a NPVR

Under Chinese law, a New Plant Variety ("NPV") refers to a cultivated plant variety or a variety developed from a discovered wild plant which is new, distinct, uniform and stable ("DUS")<sup>1</sup> and whose denomination is adequately designated.

A NPV is eligible to be protected under the NPVR protection laws and regulation if it satisfies the following conditions:

1. The NPV is included into the genera or species listed in the National Schedules of Protected Plant Varieties ("NSPPV")<sup>2</sup>;
2. The NPV is novel;
3. The NPV satisfies the DUS criteria (as mentioned above); and
4. The NPV name is in line with Regulations on the Naming of the Agricultural Plant Variety.<sup>3</sup>

The breeder of a NPV, or a party to whom the breeder had transferred its right to apply for NPVR protection, may apply for registration and protection of NPVR at the PVP Office. Once the NPVR is granted to the applicant by the PVP Office, no other entity or person

<sup>1</sup> DUS represents the distinctness, uniformity and stability of a new plant variety. DUS test is a compulsory procedure for granting protection to a new plant variety.

<sup>2</sup> NSPPV is an official list stating the plant varieties which can be protected by the grant of NPVR. The NSPPV (Agricultural Part) is issued and updated by MoA. The NSPPV (Forestry Part) is issued and updated by FSB.

<sup>3</sup> Regulation on the Naming of the Agricultural Plant Variety was promulgated by MoA effective as per 15 April 2012.

shall, without the consent of NPVR holder, produce or sell for commercial purposes the propagating material of the protected variety, or use the propagation material of the protected variety for the production of the propagation material of another variety for commercial purpose.

#### 4. Protection period

The NPVR protection period of most of the agricultural varieties is 15 years. However, the protection period of NPVR regarding forest trees, fruit trees and ornamental plants is 20 years. These protection periods deviate from the periods in the UPOV Convention, which are 20 and 25 years respectively. Important restrictions on the NPVRs under Chinese law include:

- The use of protected NPVs for breeding or other scientific research activities is allowed. In that case no royalties have to be paid and no prior consent by the NPVR holder is required;
- Self use of the propagation material of a protected NPV by farmers for breeding and propagation is allowed;
- The competent authorities (see paragraph 5.1.1) may, for national or public interest, grant a compulsory license of a protected NPV to certain parties. Compulsory licensing should be registered and published. The entity or individual who obtained a compulsory license shall not have an exclusive right to exploit the NPVR or allow others to exploit such right.

Note that, in practice, farmers who share or exchange propagation materials in violation of the laws are seldom sued. A reason for this lenience is that Chinese farmers are generally not able to pay fines or damages, while cost for legal proceedings are relatively high.



#### 5. Infringement of NPVR

In case of a NPVR infringement, the variety right holder or interested party can choose to apply for administrative protection (see paragraph 4.1) or to initiate legal proceedings (see paragraph 5.2).

Under the occasional circumstances that a NPV is seriously counterfeited or other criminal acts have been carried out, criminal proceedings could also be triggered (see paragraph 5.3).

The following paragraphs will introduce these three different procedures and will discuss some relevant case law.

##### 5.1 Administrative protection of NPVR

###### 5.1.1. Competent authorities and measures

A NPVR holder or interested party, for example the licensed user of a protected variety, may file a case at the competent administrative authorities for administrative enforcement in order to protect its rights.

In China, both the Ministry of Agriculture and Rural Affairs (“MoA”) and the State Forestry and Grassland Administration (“SFGA”) are the authorities responsible for the receipt, examination and approval of applications to protect rights to new plant varieties via the administrative procedure.

Each authority has its own specific New Plant Variety Protection Office (“PVP Office”), both covering a different range of new varieties. I.e. MoA is responsible for the protection of new varieties of field crops, vegetables, ornamental species and fruit crops. Whereas SFGA is responsible for the protection of new varieties of forest trees, bamboo, woody rattan, woody ornamental plant (including woody flower e.g. roses), fruit tree (dry fruit), woody oil-bearing plants, plants used for beverage and plants used for condiment and woody herbs.

Administrative enforcement can, in line with the above, be requested by a NPVR holder or interested party at the Agriculture Department or Forestry Department of county-level government (jointly referred to as “Competent Administrative Authority”).



#### 5.1.2. Conditions for requesting administrative enforcement

NPVR holders or any other “directly interested parties” are eligible to request administrative enforcement upon NPVR infringement under the following conditions:

1. There is a specific infringing party;
2. There are explicit complaints, substantiated by facts and reasons;
3. The complaint is filed within the time limit of action. The time limit for reporting NPVR infringement is three years,<sup>4</sup> commencing from the day the complainant knows or should have known about the infringement;
4. The infringement has not yet been brought to a civil court by other party involved.

Note that a “directly interested party” normally refers to a licensee or a legitimate successor of the NPVR. However, according to different types of license agreements, the rights of the licensees for requesting an administrative enforcement vary as follows:

(a) A licensee under an exclusive licensing agreement can file an independent complaint;

(b) A licensee under a sole licensing agreement can only file an independent complaint provided that the NPVR holder does not file any complaint;

(c) A licensee under a non-exclusive licensing agreement cannot file an independent complaint unless otherwise agreed upon by the parties.

#### 5.1.3. Evidence submitted by the claimant

Evidence proving the occurrence of an infringement should be submitted at the time of filing the complaint with the Competent Administrative Authority. To date there are no specific evidence requirements provided by law in this regard. In order to initiate administrative enforcement, in practice, the complaint should usually provide the following three documents:

1. a NPVR ownership certificate or license agreement or any other document which can prove the legitimate NPVR of the complainant;
2. a plant DNA comparison report (“DNA Report”) provided by a certified test institution (see paragraph 4.1.4); and
3. a production and/or sales agreement or any other document which can prove the use of protected propagation material for commercial purposes.

It is important to note that the accuracy of a DNA Report is still being questioned by some experts. The reason is that according to the Rules for Agricultural

<sup>4</sup> In general, the limitation period has been extended from two to three years according to General Rules of Civil Law effective as of 1 Oct 2017. It seems evident that this extension also applies to the time limit for reporting NPVR infringement, however, further clarification by the Supreme People’s Court has not been published yet.

Seed Tests,<sup>5</sup> field observation tests are regarded as the most reliable and accurate methods to identify seed genuineness. The differences in plant character between two plant varieties can be directly observed and clearly distinguished. However, such test reports are time consuming, which is in conflict with the time-efficient administrative procedure. Therefore, in practice, the DNA Report, which can be obtained relatively quick and at low costs, is widely accepted as key evidence for determining whether there is a NPVR infringement.

#### 5.1.4. DNA Report

As stated above, DNA Reports have to be provided by a certified test institution. As of May 2015 the MoA has promulgated eight lists of certified test institutions.

It is important to note that, although the aforesaid test institutions are recognized by MoA to conduct DNA test, most of the institutions are not yet listed in the qualified judicial verification institutions list of the Chinese judicial court system. This means that reports issued by those institutions are not necessarily acceptable evidence in civil court.

As stated by the Administrative Measures for the Registration of Judicial Verification Institutions,<sup>6</sup> only the test institutions which have a judicial verification license are qualified to carry out judicial verification activities. The judicial verification report made by such test institution can be used as legal evidence<sup>7</sup> in civil court.

Given the lack of test institutions with judicial verification qualification, in practice, a DNA Report provided by the MoA recognized test institutions without a judicial verification qualification are accepted by civil courts as long as such DNA Report has been cross-examined by the court and the defendant does not provide more reliable scientific evidences (such as a DUS test or field observation test).

<sup>5</sup> It is an official rule issued by General Administration of Quality Supervision, Inspection and Quarantine in 1995.

<sup>6</sup> Issued by the Ministry of Justice on 29 September 2005.

<sup>7</sup> As stated by article 63 of the Civil Procedure Law revised on 31 August 2012, the judicial verification report is identified as one kind of legal evidences.

#### 5.1.5 Procedure for case investigation

The main procedure for case investigation by a Competent Administrative Authority is as follows:

1. The complainant submits the complaint letter as well as the NPVR certificate<sup>8</sup> to a Competent Administrative Authority;
2. The Competent Administrative Authority will assess whether the complainant satisfies the conditions for requesting administrative enforcement (see above). The case shall be formally accepted or rejected within seven days after receipt of the complaint letter;
3. If the case is formally accepted, the Competent Administrative Authority will deliver a copy of the complaint letter to the respondent party within seven days after acceptance. The respondent party shall submit its written defense within fifteen days upon the receipt of the complaint letter. After receiving the written defense the Competent Administrative Authority will send a copy to the complainant within seven days;
4. In general, the Competent Administrative Authority will give judgement based on written materials. . An oral trial might be conducted upon discretion of the Competent Administrative Authority's. Parties will be informed seven days prior to the trial about the time and place of the hearing;
5. Unless a settlement agreement is reached, the Competent Administrative Authority shall give a written decision within three months as from the date of case acceptance. With approval of its higher authority this three months time limit could be extended to one year.

It is noteworthy that in a case where the infringer makes another infringement regarding the same NPVR, the competent authority can order the infringer to stop such repeated infringement and impose relevant penalties upon the request by the directly interested parties.

<sup>8</sup> NPVR certificate refers to an ownership certificate issued by VVP Office of MoA to a NPVR holder.

### 5.1.6. Administrative penalties

During the case investigation process, the Competent Administrative Authority has the power to seize and detain the propagation materials and related documents for collecting evidences. The aforesaid seizure and detainment shall not exceed 30 days.

When the Competent Administrative Authority comes to the conclusion that an infringement of a NPVR is established, it can order the infringer to stop the production and sale of the propagation materials and it can order to destroy or confiscate the plant materials under production. The unlawful earnings can be confiscated.

The infringer may also be punished with a fine ranging from RMB 10,000 to 250,000 in case the value of the illegal goods is less than RMB 50,000, or a fine of five to ten times the value of the illegal goods when the value exceeds RMB 50,000..

At present there is no specific regulation on the disposal of the confiscated propagation material. In practice destruction of the confiscated propagation material is an effective way to prevent it from entering into the market again. In some cases, upon request, the confiscated propagation material can be returned to the NPVR holder.

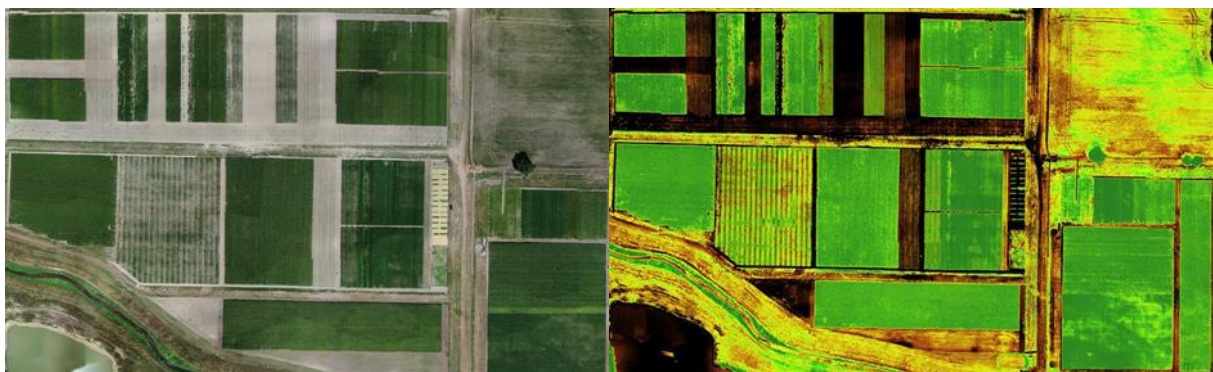
### 5.1.7. Alternative administrative protection

Although detailed administrative procedures are available to protect NPVRs from infringement, it may not always be the preferred way to stop the infringement. The reason is that, during the investigation process, the claimant has a relatively high burden of proof. Moreover, the investigation process by the competent authorities can be time-consuming.

To avoid a lengthy procedure it is under the following circumstances also possible to directly report to county level agricultural or forestry law enforcement stations by claiming that the infringer:

1. produced and/or distributed false and inferior quality seeds; or
2. produced and/or distributed seeds without relevant seed production and/or operation license; or
3. produced and distributed seeds against the stipulation of seed production and/or operational license.

In this alternative administrative procedure the infringement of NPVR can be stopped in a relatively short period and losses can be controlled in a timely



manner. Furthermore the NPVR holder is not obliged to submit detailed evidence to prove the existence of the infringement. However, in this procedure the complainant cannot obtain any compensation from the infringer. For monetary compensation the complainant should still file a claim into the civil court.

#### 5.1.8. Administrative case law review

##### (a) Case Summary

The Agriculture Department of Province A (“the Agricultural Department”) found during routine inspection in 2009 that Company B and C were suspected to infringe the NPVR of an oilseed rape variety named “ShiLiFeng”. As of the inspection, Company B had sold 1,500 kilos of the rape variety “ShiLiFeng” materials at RMB 12 yuan per kilo while Company C had sold 4,900 kilos at RMB 15 yuan per kilo. The suspected infringement was communicated by the Agriculture Department to Company D, who was the NPVR holder. Company D and the exclusive licensee of rape variety “ShiLiFeng”, Company E, then jointly asked the Agriculture Department to block the infringement of rape variety “ShiLiFeng”.

Company B argued that it had been cooperating with Company D on field test of the rape variety “SuWan 768” (the former name for “ShiLiFeng”) for national and provincial variety recognition. Though it produced a small amount of rape seeds, Company B was not informed that “ShiLiFeng” had been granted the NPVR. Company C argued that the head of the company did not know the occurrence of infringement as each project manager had full discretion on rape seed production, packaging and sale.

The Agriculture Department, at both parties’ discretion, conducted the mediation for the losses caused by the infringement. However, the mediation failed due to a difference in expectations on the compensation amount between the parties. The Agriculture Department then made an administrative penalty decision and decided that the action of Company B and C infringed the NPVR of the rape variety “ShiLiFeng”. Company B and C were ordered to stop the infringement and paid a fine of RMB 10,000 and 20,000 respectively to the Agriculture Department. The Agriculture Department also confiscated unlawful earnings in the amount of RMB 1,800 and 73,500 respectively.



##### (b) Case analysis

The key issue for administrative enforcement is to confirm the occurrence of the infringement of NPVR. The legal requirements to qualify for the infringement of NPVR include:

- The variety has been granted NPVR;
- Without consent of the NPVR holder there is production or sale of propagation material of the variety or repeatedly use of propagation material of the variety for producing material for another variety;
- The use of propagation material is for commercial purpose; and
- The infringer is negligent.



In this case the fact of illegal production and sale of “ShiLiFeng” could not be denied but both Company B and C argued that they were not negligent. However, their arguments were not upheld. The grounds are specified as follows:

1. Pursuant to article 56 of the Agricultural Implementing Rules, the PVP Office of MoA regularly publishes new plant variety protection gazettes concerning NPVR on their website. This implies that Company B and C could easily learn that “ShiLiFeng” had been granted a NPVR.
2. Pursuant to article 34 of the Tort Law of the People’s Republic of China, employers are liable for any injury or damage caused to other people by their employees in the course of their work. The argument by Company C that the head of the company did not know the occurrence of the infringement can thus not be regarded as a solid legal defense.
3. Pursuant to article 21 of the Seed Law, an application for a production license regarding one of the main crop seeds (which have been granted a NPVR) requires prior written consent from the NPVR holder. Rape is one of the seven main crops defined by MoA in 2001. This implies that Company B and C had the obligation to apply for a rape seed production license for “ShiLiFeng” as well as an obligation to obtain the written consent of Company D. However, both obligations were not performed by Company B and C, and “negligence” has thus been proven.

It is noteworthy that in this case the Agriculture Department was the first to inform Company D of the infringement of the NPVR of “ShiLiFeng”. This shows a relatively high efficiency of administrative protection on NPVR.

## 5.2. Civil procedure

A NPVR owner or any other directly interested party could also choose to initiate litigation in stead of (or: after) initiating an administrative protection procedure.

### 5.2.1. Competent court and measures

The competent court for civil proceedings regarding NPVRs are the Beijing Intellectual Property Court or the competent (appointed) Intermediate People’s Court, depending on the nature of a dispute and the place of infringement. There are appointed courts located in Wuwei, Zhangye and Jiuquan (Gansu Province) and Weifang, Qingdao, Yantai and Dongying (Shandong Province). There are no specialized regulations on competent courts being responsible for civil claims involving foreign interests.

The directly interested parties can claim financial compensation from the infringer in a civil procedure. According to the Seed Law, the following methods, in ascending order of priority, are available to define damages:

- The actual loss of the plaintiff due to the infringements;
- The illegal profits the infringer resulting from its infringing acts;
- In case the abovementioned references are not available, the court can take the market license fee standards of the variety under the same license conditions as a reference to determine a compensation for damages;

The plaintiff has to provide the court with evidence to determine compensation on the basis of any of the above methods. In case of serious infringement the compensation may be increased by one to three times. In case none of the above references for calculation is available, the court shall decide a compensation of no more than RMB 3,000,000.

## 5.2.2. Civil case law review

### (a) Variety right holder disputes

In the case *Hai v. Xu*,<sup>9</sup> the High Court of Anhui made a verdict that, although Hai was only the co-breeder<sup>10</sup> with Xu in the period from 1995 to 2003, and the co-breeding ended 3 years prior to Xu applying for the NPVR for the paddy variety “CSYD No.1” in 2006, Hai did fundamental researches and preparatory works, participated in breeding in the initial period and made indispensable contributions to this new variety. Hai should be considered as a breeder and is entitled to jointly apply for the NPVR. The key evidence proving Hai’s indispensable contributions include: (I) a joint research agreement signed in 2001 between Hai and Xu, confirming all the fundamental research conducted by Hai for “CSYD No.1” and (II) a NPVR certificate of “CSYD No.1” clearly stating Hai as a co-breeder.

9 (2012) 皖民三终字第00007号 (Wan Min San ZhongZi, [2012] No.00007)

10 A breeder refers to an entity or a person who has accomplished the breeding of a NPV (Article 6, Regulations 2014). A breeder shall be the person who made creative contributions to the NPV. A person/entity who merely provided facilities, administration or assistance in other forms shall not be considered a breeder (article 9, the Agricultural Implementing Rules).

### (b) Variety right infringement – DNA Report

Yancheng Seed Co., Ltd. (“Yancheng”) was an exclusive licensee of a protected barley variety “SUPI No.3”. Yancheng filed a complaint to the local MoA to the effect that the seeds produced and sold by Jinfeng Seed Co., Ltd. (“Jinfeng”) under the name of variety “SUPI No.5” were actually seeds of “SUPI No.3”. The local MoA obtained and preserved seeds of “SUPI No.5”, which were bought by an individual customer named Yu.

The Court accepted an investigation report provided by the local MoA, which contained testimonies of the end customer Yu and seed distributor Ji, who purchased “SUPI No.5” seeds from Jinfeng. The court accordingly found that the seeds of “SUPI No.5” (preserved by local MoA) were produced and sold by Jinfeng.

Jinfeng denied that the seed products bought by Yu were Yancheng’s products. In fact, Jinfeng denied that his product “SUPI No.5” was actually “SUPI No.3”. Yancheng then applied for judicial identification. In this case the appointed court the Hangzhou Branch of the National Barley Variety Improvement Center (“Hangzhou Branch”) to conduct a DNA comparison identification





on (I) standard variety samples of “SUPI No.3” (preserved at PVP Office of MoA); and (II) samples of “SUPI No.5” from end customer Yu (preserved by local MoA). The identification report presented a result that “SUPI No.5” and “SUPI No.3” were identical.

Jinfeng questioned that this Hangzhou Branch was not one of the qualified judicial verification institutions. The court however held the opinion that, although without judicial verification qualification, the Hangzhou Branch in fact had the technical capacity and scientific methods to conduct DNA comparison. The court therefore accepted the DNA comparison report.

### 5.3 Criminal protection

#### 5.3.1. Criminal procedure

Compared to civil proceedings, judicial protection for NPVR via criminal proceedings is difficult to obtain. There are two reasons for this:

1. a criminal lawsuit pursuant to the Regulation, can only be launched in the case that a NPV is seriously counterfeited, and
2. no specific crime is specifically stipulated for the infringement of NPVR in the Criminal Law of the PRC (“Criminal Law”, 1997). In practice most NPVR related criminal cases are launched on the basis of a violation of article 147 of the Criminal Law (Crime of Manufacture and Sale of Fake and Shoddy Seeds) and/or article 225 of the Criminal Law (Crime of Illegal Business Operations).

Under the criminal procedure the competent court shall be the county/district level court or the intermediate court, depending on the possible penalty. There are no specialized regulations on competent courts when the Criminal Law applies to the infringement of NPVR related to foreign interests.

#### 5.3.2. Criminal case law review

In the case of Beijing Shunyi District Procuratorate (“Shunyi Procuratorate”) v. Beijing Yafeng Agricultural Development Co., Ltd. (“Yafeng”),<sup>11</sup> Yafeng purchased cotton seeds “SGK321” and “Fengkang 16” (together amounting to 660 kg) from a Hebei company. Afterwards Yafeng sold the aforesaid cotton seeds, deliberately repacked as a new cotton variety “S80”, to a distributor in Jiangsu Province. The sales revenue of Yafeng amounted to RMB 29,340.

The so-called “S80” cotton seeds were not suitable for being planted in Jiangsu Province. The total losses of local farmers exceeded RMB 900,000.

Moreover, during the period from 2003 to 2006 Yafeng had been distributing the seeds of 7 crop varieties (paddy, wheat, bean, sorghum, corn, millet and cotton) with a total sales revenue of RMB 1,624,842.40. Yafeng distributed these seeds without a crop seed operation license from the relevant local agricultural departments.

The key evidences provided by Shunyi Procuratorate included (I) a confession of the legal representative of Yafeng (II) testimonies of Yafeng’s employees (III)

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(2008) 顺刑初字第326号 (Shun Xing Chu Zi, [2008] No. 326)

invoices for selling cotton seeds “S80” and (IV) an audit report on sales income of Yafeng during the period from 2003 to 2006 made by an independent accounting firm. The Beijing Shunyi District Court made a verdict stating that the legal representative of Yafeng committed the Crime of Illegal Business Operations as well as Manufacturing and Sale of Fake and Shoddy Seeds. The legal representative was therefore sentenced to a fixed-term imprisonment of 13 years as well as a fine of RMB 3,050,000. Shi, who was the manager of Yafeng Nanjing branch, was sentenced to a fixed-term imprisonment of 8 years as well as a fine of RMB 50,000 for committing a crime of Manufacturing and Sale of Fake and Shoddy Seeds.

## 5.2 Final

Taking into account the forgoing, in practice, the NPVR holders can apply for administrative protection as a first step in safeguarding their NPVRs. It is expected that the competent authorities will play a proactive role to impose administrative sanctions on the infringers. Meanwhile, the evidence collected by the competent authorities for administrative sanctions can be used by the NPVR holders as evidence to claim further judicial protection and damages in civil proceedings. In very serious infringement cases, NPVR holders may consider to report to the competent public procuratorate.

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