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# Unfair Competition in China

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# CHAPTER 1

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**Insights**

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## The new Anti-Unfair Competition Law and the Trademark Law of China viewed from the perspective of Article 10<sup>bis</sup> of the Paris Convention

The Paris Convention (Article 10<sup>bis</sup>)<sup>1</sup>, together with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) form the cornerstone of China's legislative framework on the protection of commercial signs, which consists of a few laws:

- The new Anti-unfair Competition Law (AUCI), of 4 November 2017 which has taken effect on 1 January 2018 (a first revision of the original act of 1993).

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<sup>1</sup>(1) The countries of the Union are bound to assure to nationals of such countries **effective protection against unfair competition.**

(2) **Any act of competition contrary to honest practices** in industrial or commercial matters **constitutes an act of unfair competition.**

(3) The following in particular shall be prohibited:

1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

- The Trademark Law (TML) (amended in 2013)
- the General Principles of Civil Law (enacted in 1986) and
- the General Provisions of Civil Law (enacted in 2017).

China's legislature has been long planning the amendment to the AUCL since the accession to the WTO. During the four drafts that followed, substantial changes concerning important issues such as commercial bribery and theft of trade secrets have been made. However, concerning the principles set out in article 10<sup>bis</sup> of the Paris Convention, most of the main concepts and principles of the original text of 1993 have been maintained.

This article intends to analyze, phrase by phrase, from the perspective of Article 10<sup>bis</sup> of the Paris Convention, and by comparison with some corresponding provisions of the TML, how the AUCL will redefine and reshape the legal landscape of protecting commercial signs in China.



## I. GENERAL PRINCIPLES

### ARTICLE 2 of AUCL

A business operator shall, during its production and operation, follow the principles of voluntariness, equality, fairness (a) and good faith (b) and observe the laws (c) and business ethics (d).

For purposes of the law, “Unfair Competition Acts” refer to the acts of business operators, during production and operation, which disturb market competition order and damage the lawful rights and interests of other business operators or consumers (e) and thus are in violation of the provisions of the law.

The term “business operator” herein refers to a natural person, a legal person or an unincorporated organization engaged in production and marketing of products (which includes services when used hereinafter) or provision of services (f).

(a) Article 2 provides a **general definition** for the concept of unfair competition acts: *“follow the principles of voluntariness, equality, fairness...”*. This definition corresponds to the definition of Article 10<sup>bis</sup> (2) of the Paris Convention, which reads *“any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition”*.

It is simply impossible to exhaust all the circumstances of unfair competition by enumeration. The practice of the French legislator may serve as a point of reference in this regard. Article 1382 of the French Civil Code (the text not changed since 1804 but only re-numbered, now, as Article 1240) has been used to tackle all disputes arising from unfair competition (*“every act whatever of man that causes damage to another*

*person, obliges him whose fault it occurred to repair it”).*

The approach adopted by the Paris Convention has set the example. The Paris Convention, when enumerating the prohibitive circumstances that fall under the scope of unfair competition, uses the term “*in particular*”, which implies that the list is non-exhaustive. For those scenarios that are not covered, the general principle automatically becomes a fall back provision. This practice enables that: 1) where the act falls under the specific circumstances as provided, the pertinent provisions shall readily apply; and 2) where the act is not covered by the enumerated circumstances, the general principle shall directly apply.

**(b)** The principle of “**good faith**” is present in the TML, the General Principles of Civil Law and the General Provisions of Civil Law. Article 7(1) of the TML underlines that such principle needs to be followed during the registration and use of trademarks. However, the AUCL seems to cover a wider range of acts, and the bad faith is not necessarily present in all of them. Intentional act that causes confusion is of course an exemplary display of bad faith, unintentional act that leads to confusion is still an act of unfair competition.

**(c)** Article 2(1) adds that the “business operator shall [...] observe the **laws** [...]”, stressing that unfair competition is not merely the breach of business ethics, but also an offence. For example, the use of deceptive signs and the posting of false advertisement are also specifically prohibited by the TML and the Advertisement Law respectively.

**(d)** “**Business ethics**” as mentioned in Article 2(1) is semantically equivalent to the “*honest practices in industrial or commercial matters*” as provided in the Paris Convention. Business ethics is a dynamic concept that is constantly evolving, with its standards varying at different times.

**(e)** The introduction of the **consumers’** interest appeared for the first time in the 2016 draft, and is kept in Article 2(2) of the final text.

In the context that new competitive practices are emerging in the Internet Era, whether the welfare of the consumers is to be boosted by such practices, does matter. After all, the AUCL is devised to target unfair competition acts, not competition *per se*.

**(f) Services:** Without explicit definition on services of its own, the AUCL usually resorts to the Classification of Similar Goods and Services (Classification), a document which is normally used in the context of trademark registration and which more often than not, works well until it comes across a problem. However, discrepancies may happen.

There are services, for instance **retail service**, not listed by the Classification, which are not necessarily ruled out, because Article 15(1) of the Regulations for the Implementation of the TML provides that “[...] where any indication of goods or services is not listed in the Classification of Goods and Services, a description of the goods or services in question shall be attached thereto”. This raises the questions whether a type of service that is not allowed to be registered under the TML framework can still subject to the protection under the AUCL. For example, the China Trademark Office only allows trademarks to be registered in respect of “retail services of pharmacy” but not for all “retail services”. However, the latter are not deprived of protection under the AUCL.

The final text also removed the “**profitable**” condition for services, extending the scope of protection to non-profitable social organizations that are introduced in Article 6(1)(2) of the new law.

## II. CONFUSION ACTS

### ARTICLE 6 (1)<sup>(a)</sup> of AUCL

**Business operators shall not commit any of the following confusion acts that may mislead the consumers to believe that its products are those of another person, or induce a special relationship with another person (b):**

**(a) Deletion of trademark counterfeiting.** During the revision process, Article 6 was one of the most commented articles. In the original text of 1993, Article 5 (now re-numbered 6) addressed “*counterfeiting the others’ registered trademarks*” (Article 5(1)(1)). This was obviously overlapping with the TML and it has been deleted from the revised AUCL. Removing the overlapping helped to draw the legal boundaries between the AUCL (general statute) and the TML (special statute).

In a nutshell, the TML grants protection over a trademark on account of its being registered. Whether the mark is actually used (apart from the risk of being revoked if not used for three years) is irrelevant: the trademark owner still has the right to prevent others from using the protected sign. On the other hand, the protection provided by the AUCL to business operators is based on their own use of the distinguishing signs concerned. No use, no competition, no case.

More specifically, it is the scope of such use that matters. In order to be entitled to challenge copycats nationwide, one needs to establish the existence of the sign’s influence city by city, region by region. On the other hand, a trademark registration grants to its proprietor a right that is valid nationwide. Within 3 years as of the date of registration, even if the registered trademark is not used at all or has been used only within a certain geographic region, its registrant is entitled to exclusively use such mark and prohibit others from using it.

**(b) Confusion.** It is worth noting that “*misleading the public (or the consumers)*”, which is the prerequisite of Article 58 of the TML, is generally deemed to be semantically equivalent to “*misleading the consumers to believe that its products are those of another person or induce a special relationship with another person*” (act of confusion, Article 6 of the AUCL). But, if we explore it further, “misleading the public” does not equate to “confusion”. The concept of likelihood of confusion was introduced in Article 57(1)(2) of the TML, which distinguishes (1) the use of an identical or similar trademark on similar goods, and (2) the use of a similar trademark on identical goods, [...] where such use is *likely to cause confusion*”.

Article 10<sup>bis</sup> (3)(1) of the Paris Convention gives a wide scope of the confusion: “*all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor*”.

In article 5 (2) of the old law, the prohibited act was “using a name, package etc... for a product, similar to the famous product of another person, *thereby confusing the product with that famous product and therefore leading the purchasers to mistake the former for the latter*”.

In an “*Interpretation on Some Matters about the Application of Law in the Trial of Civil Cases Involving Unfair Competition*” of 2007 (Judicial Interpretation on Unfair Competition), the Supreme Court interpreted 5(1)(2) of the old AUCL as follows: “... *any confusion arising over the source of a commodity among the relevant public, including misconstruing the offender having a special relationship as licensed use or affiliation with the business operator of a famous commodity...*”.

Under the old law, a question had been raised concerning the confusion over products, and specifically, whether the protection of one product could be extended, by the AUCL, to a completely different type of product.

Indeed, in an extreme case of cross-category confusion over products, a consumer

accidentally consumed shampoo branded “Great Lakes”, mistaking it as “Great Lakes” juice. There was obviously no confusion over the manufacturers, but a confusion between the products. The case was handled by the Administration for Industry and Commerce, which took the view that calling the shampoo with the same name as the juice was an act of unfair competition. A circular was issued afterwards confirming this cross-category protection of products under the AUCL. Such decision, which establishes a parallel with the TML (the cross-category protection for well-known trademarks), is controversial.

It is worth examining different circumstances of confusion defined by the successive drafts of the law. In the 2016 draft, confusion referred to the situation where the public mistakes one manufacturer or operator of certain products for another, or mistakenly believes that the manufacturer and the operator have specific connection. So, the object of the confusion was focused on the operators who make the products. The second 2017 draft and the final text use the broad term “**confusion acts**”, and reset the parameters as “*acts that may mislead the consumers to believe that its products are those of another person, or induce a special relationship with another person*” which meant that the object of the confusion was, therefore, focusing on the products themselves.

In fact, products are not any more the only object of confusion. Other items are listed in Article 6: company names, names of natural persons, website names and domain names.

**Conflict with prior rights.** Another interesting question concerns the conflict between a “sign” protected by the AUCL against “confusion acts”, and a later similar sign that becomes registered as a trademark.

Is it possible for the later trademark registrant to attack the prior sign?

Both the Paris Convention (Article 6<sup>quinquies</sup>) and the TRIPS Agreement provide

that the rights conferred by trademark registration shall not prejudice any **existing prior rights**, nor shall they affect the possibility of making rights available on the basis of use. Both reflect the principle that trademark registration does not alter the existing fact.

This parallel protection is confirmed by Article 138 of the “*Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark*”, which reads: *the proprietor of an earlier right which only applies to a particular locality may oppose the use of the EU trade mark in the territory where his right is protected in so far as the law of the Member State concerned so permits*. So, the prior sign owner shall, not only, be able to continue its use within the area where it has certain influence, but may also to stop others (including the registrant of the later sign) from using it.

China follows the same principle but there is a contradiction between the solution established by the AUCL, as interpreted by the SPC, and the TML. In Article 1(2) of the SPC Interpretation, the *user of the prior mark has the right*, in case the later trademark owner expands to its geographical area so as to cause confusion, to request the later user to affix other signs to distinguish the source of goods. However, Article 59(3) of the TML stipulates the opposite solution: the prior user is allowed to continue use its mark within the original scope but maybe requested to affix signs for distinguishing purposes.

**Deletion of the word “unique”.** The first sub-paragraph of Article 6 raised intense discussions during the revision process. In the original text of 1993, the definition was “*using, without authorization, the names, packaging or decoration unique (or specific) to a famous product, or names, packaging or decoration similar to famous goods, so that their goods are confused with the famous goods of others, causing buyers to mistake*”.

The final text deletes the word “*unique (or specific)*”, which was wrongly interpreted by some as meaning that it was no longer necessary to prove that the name, packaging, or decoration of the products is distinctive or unique (sort of like removing the precondition of the TML that a trademark shall be distinctive so as to be identifiable), in order to invoke protection.

This is, of course, not true. In the absence of distinctiveness or uniqueness of a sign, there cannot be confusion. The parameters set by Article 2 of the Judicial Interpretation on Unfair Competition for uniqueness, the criteria for finding distinctiveness as listed in Article 11 of the TML as well as the fair use defense of non-distinctive signs provided by Article 59(1) of the TML shall continue to apply.

## ARTICLE 6(1)(1) of AUCL

**1. To use, without authorization, a sign (c) that is identical to or similar with the name, packaging, or decoration, etc. (d), of others’ commodity, which has a certain influence (e);**

**(c)** As mentioned above, the deletion of the word “unique” (or specific) does not mean that the distinctiveness requirement is removed. Even if the AUCL does not expressly provide for a fair use defense concerning a **sign** that is indistinctive or functional, we believe it is very likely that the pertinent provisions in the TML shall apply.

“Signs prohibited from being using as a trademark “(Article 10(1) of the TML) and “name, package or decoration of a commodity that falls under the provisions of Article 10(1) of the TML” (Article 5 of the Judicial Interpretation on Unfair Competition), shall still be considered as signs listed in Article 6(1)(1) of the new AUCL. Correspondingly, a sign that has a pure functional effect (Article 12 and



Article 59(2) of the TML) shall not only correspond to the shape, but also extend to a functional color, a sound as well as all sorts of functional effects of a product.

(d) Another topic of discussion concerned the list of signs that are copied: “name, packaging and decoration”. All along the revision process, requests had been made to add to this list the “*shape*” of a product., This was officially proposed in the final draft but, during the final reading of the law, it was refused. Instead, it was proposed and agreed to simply add the word “**etc.**”, which indicates that the list is not exhaustive, and therefore, may include the shape of the product, even a single color or sound.

This revision is consistent with Article 8 of the TML which enumerates a non-exhaustive list of registrable elements. In judicial practice, the Chinese courts have granted protection over the shape of a product [*M&G pen* case, Supreme People’s Court, 2010 Min Ti Zi No.16], decoration of business premises [*Northeastern cuisines* case, Guangdong High Court, 2001 Yue Gao Fa Zhi Zhong Zi No.63] as well as clothing of business staff [*Hutong Sightseeing* case, Beijing High Court, 2002 Gao Min Zhong Zi No. 84]. Article 3 of the Judicial Interpretation on Unfair Competition affirms that the decoration of business premises, the pattern of business appliances, or the clothing of business staff, etc. may constitutes an overall business image of a unique style and thus may be ascertained as the decoration protected by the AUCL. This falls in line with the protectable subject matters of trademark as provided in Article 15 of the TRIPS Agreement.

(e) The word “**famous**” was also intensely debated during the revision process and its deletion from the latest 2017 draft was hailed as one of the highlights of the amendment. The reasoning is simple. Commodities *per se*, without signs affixed to serve as source identifier, vary merely in qualities. Without signs to distinguish one from the other, it is just logically impossible for certain commodities to attain a reputation that is superior to others. It was unreasonable to demand proof of the

famousness of a commodity and the uniqueness of its name, packaging or decoration, in order to invoke protection.

In the final reading of the text, the concept of reputation was re-introduced, but in the “reduced” form of **“a certain influence”** (the same term as in Articles 32 and 59(3) of the TML).

After the promulgation of the new law, opinions vary on how to interpret the word “a certain influence” to keep it logically consistent with the TML. It would therefore be advisable to interpret “a certain influence” as “a fair degree of influence that is significant but not very high”.

In practice, the application of this condition should be flexible. Geographically speaking, the influence could be limited within a small area like a county/town, or extended to a vast region like a province/city. The essence of the AUCL is that the prior right owner may fall back on the law to seek protection for its rights. It would be a “castle in the air” if a sign were to be well-known or famous across the nation in order to be entitled to protection.

## ARTICLE 6(1)(2) of AUCL

**2. To use, without authorization, the company name (f) (including its abbreviation, trade name, etc.) of others, or the name of a social organization (including its abbreviation, etc.), or the name (g) (including pseudonym, stage name, etc.) of others, which has a certain influence;**

**(f)** Article 6(2) addresses the conflict between **company names**, which may lead to the confusion over business entities. The current *“Regulations on the Registration and Administration of Company names”* (promulgated in 1991, revised in 2012) sets a fundamental principle that business names are governed geographically,

and that within a certain geographical area, duplicate names are not allowed. In this sense, a company name does not need to have a certain influence in order to invoke protection. Application for a new company name will be easily approved if there is no prior name that is either identical with or similar to the applied name.

The practice is fine as long as companies with identical or similar names run their business within their own geographical areas. But what if such geographical boundaries are outgrown by business growth? Without a mechanism that allows the search and registration of company names to be managed at national level, one needs to resort to the AUCL to fend off the copycats, provided that the company name has acquired a certain influence through use.

During the revision process, it was expected that the new AUCL would introduce a subparagraph to link with Article 58 of the Trademark Law, which concerns the use of the trademark of others as **trade name** and refers the AUCL. The 2016 draft, as well as the 2017 first and second draft did contain a subparagraph addressing the conflict between trademark and trade name, but the subparagraph was deleted in the final text.

The absence of any explicit provisions in the new AUCL on the conflict between trademarks and trade names, leaves us with few options but to fall back on Article 6(1)(4) (see below).

The European Union trademark legislation does not take the prominence of use as a relevant criterion: as a rule, as long as the sign is used on goods or services (no matter it is used as a trademark or company name), the act shall be prohibited.

The new AUCL also covers the abbreviation and trade name of company names, which is in line with the provisions of Article 6 of the Judicial Interpretation on Unfair Competition and has been reaffirmed by the Supreme People's Court (SPC) in its guiding case No. 29 (*Tianjin China Youth Travel Service Co., Ltd. v. Tianjin Guo*

*Qing International Travel Agency*, Tianjin High Court, 2012 Jin Gao Min San Zhong Zi No.3).

When an operator is ordered to change its name because it is illegally using the trademark of another person, the effective enforcement of such order was a problem until the new law adopted a solution that will definitely facilitate the enforcement of such order: if the operator does not change the name within a prescribed time, “the enterprise registration authority (AIC) shall replace such name with a Uniform Social Credit Code”.

**(g)** The notion of “**name**” as mentioned in Article 6(1)(2) is not equivalent to the “name right” as provided in the General Provisions of Civil Law. The latter is an inherent right of a person, while the names protected by the AUCL are those benefiting from the reputation of an individual through long-term or extensive use, and that have generated a certain influence.

The criteria of protection are basically the same, in the AUCL and in the TML. In the “*Provisions on Several Issues Concerning the Hearing of Administrative Cases Involving the Granting and Affirmation of Trademark Rights*” (Judicial Interpretation on Trademark Administrative Litigation 2017), the SPC indicated that the name must have a *certain reputation and has established a stable corresponding relation with the natural person so that the relevant public uses such name to refer to that person*.

In the famous Jordan case (*Michael Jordan v. Qiao Dan Sports Co., Ltd.*), a sports goods manufacturer registered the name of both Jordan and his two sons as trademarks. The court found that, although “乔丹” is not the only transliteration of “Jordan”, given that a stable association has been established between the name Jordan and this particular transliteration, in respect of basketball sports goods and sports apparel, this registration was scarcely a coincidence and was to be invalidated.

In general, two people sharing the same name should be fine unless one free-

rides the other's reputation and breaches the principle of good faith, which constitutes unfair competition. There was a case where an amateur writer changed his name into Wang Yuewen (a renowned Chinese writer) and published a book under a title similar to the latter's signature work. The Changsha Intermediate Court found that such act constituted unfair competition and awarded damages.

### ARTICLE 6(1)(3) of AUCL

**3. To use, without authorization, the website name, webpage (h), main parts of the domain name (i), etc., of others, which has a certain influence; or**

**(h) Website name and webpage** is explicitly listed in Article 6(1)(3) as the object of protection. In the Internet era, all sorts of independent websites, including the online stores of various e-commerce platforms, the microblog account names, Wechat account names, as well as the app names, shall be covered by this subparagraph. Some of these names are associated with certain goods or services, some generally refer to certain industrial or commercial activities without directing any specific goods. They may not necessarily lead to the misidentification of one's products as those of another, but may induce a special relationship with another person.

In the Avène case [*Pierre Fabre Dermo-Cosmetique* (owner of the brand Avène) v. *Changsha Hui Ji E-commerce Co., Ltd.* (a Chinese online mall operator)], the seller of genuine goods, which reproduced the design style and layout of Avène's official website, making believe that it was the official site of Avène, was found by the Changsha Intermediate Court to have committed an act of unfair competition.

**(i) Domain name** is nothing more than a network address. The registration or

use of a domain name that may cause confusion falls under the unfair competition acts as provided by the “*Interpretation of the Supreme People’s Court on the Application of Laws in the Trial of Civil Disputes over Domain Names of Computer Network*”.

Article 1(3) of the “*Interpretation of the Supreme People’s Court on Several Matters Regarding the Application of Law in Trial of Trademark Civil Dispute Cases*” (Judicial Interpretation on Trademark Civil Case) provides that where a domain name that is identical with or similar to another’s registered trademark, is used in the e-commerce activities of relevant products and functions as the source identifier of the goods, such act constitutes trademark infringement.

## ARTICLE 6(1)(4) of AUCL

**4. Other confusion acts that may mislead the consumers to believe that its products are those of another person, or induce a special relationship with another person (j).**

(j) The new Article 6 adds a last subparagraph, 6(1)(4), which addresses “***other confusion acts*** that may mislead the consumers to mistake the products for those of others or to misconstrue that such products have a special relation with others”. For those circumstances that are not listed in the preceding paragraphs of Article 6, this is a convenient fallback.

**Conflict of trade name with trademark.** It is useful to keep in mind the detailed solutions elaborated by the SPC on the matter of conflicts between a business name and a registered trademark. According to Article 1(1) of the “*Interpretation of the Supreme People’s Court on Several Matters Regarding the Application of Law in Trial of Trademark Civil Dispute Cases*” (Judicial Interpretation on Trademark Civil Case), where a trademark is used prominently in a trade name, on identical or similar

goods, the trademark owner may pursue the trademark infringement liability of the offending party.

But, if the trademark is not used prominently, no action is possible. If the registered trademark is well-known, there is no need to prove that the use is prominent and the protection may extend to goods that are of different classes or goods that are in the same class but are usually deemed as not similar.

These principles were elaborated further by the SPC in the *Gyoza no Ohsho* case (*Gyoza no Ohsho Dalian Catering Ltd. v. Li Huiting*, 2010 Min Ti Zi No. 15, June 24, 2010 : Where the registration and use of a company name is intrinsically unjustified (for instance registering other's *reputed prior registered trademark* as the trade name of its company name), and the non-prominent use of such name may still create market confusion, the court shall find that such act constitutes *unfair competition*. Due to the illegality of the act of registration and use and the inevitability of market confusion, the court may order the defendant to stop using such name or change its name.

Where a company name that is identical with or similar to another's registered trademark is used *prominently* on identical or similar goods, therefore is likely to cause misidentification among the relevant public, the court shall find that such act constitutes trademark infringement. Where only the prominent use of the trade name is considered as an infringement, the court shall order the cessation of the defendant's prominent use, which will stop the infringement, but shall not order the defendant to change its name.

And, indeed, given the prolific imagination of operators attempting to benefit from the reputation of a competitor, such fall back clause is indispensable.

**Indicative use and comparative use.** For example, there are cases concerning the use of trademarks in the context of exhaustion of rights (after the trademark

owner or its licensee has launched the products in the market). Under European Union trademark legislation, such use may be condemned if good faith business practices have been breached. Under China's current legal framework, it would be advisable to seek solutions from the AUCL.

In addition to the *Avène case*, the *Wuliangye case* (*Wuliangye Yibin Co., Ltd. v. Jiangxi Fabulous Life Investment Development Co., Ltd.*, Sichuan High Court, 2013 Chuan Min Zhong Zi No. 665) and the *Fendi case* (*FENDI ADELE S.R.L. v. Shanghai YI LANG Trading Ltd. & Capital Outlets*, Shanghai IP Court, 2017 Hu 73 Min Zhong No. 23), are cases where the courts adopted the same reasoning that the indicative use shall be confined within reasonable extent to avoid confusion or avoid inducing untrue association between the offending party and the trademark proprietor.

**Reverse passing off** is another possibility of invoking Article 6(1)(4). Such situation is addressed by Article 57(1)(5) of the TML, which refers to the circumstance where the producer misrepresents someone else's goods as his own by replacing the registered trademark with another trademark and relaunching the said goods to the market. If the trademark concerned is not registered, it is possible to resort to Article 6(1)(4) because the switched goods are likely to cause, among consumers, confusion on the genuine source of the products, or induce an untrue association with the offender.

**Merchandising rights** are also a matter of concern. The WIPO Model Provisions on Protection against Unfair Competition as well as the Judicial Interpretation on Trademark Administrative Litigation 2017 address the need to protect the title of a work or the name of a character in the work. Though the AUCL makes no direct reference to merchandising rights, the parameters set by the trademark judicial interpretation has much in common with that of Article 6



of the AUCL. We expect that future judicial practice will shed some light on the protection of merchandising rights under the framework of the AUCL.

### III. FALSE OR MISLEADING COMMERCIAL PUBLICITY

#### ARTICLE 8<sup>(a)</sup> of AUCL

**A business operator shall not make false or misleading commercial publicity on the performance, function, quality, sales, user ratings (b), awards (c), etc. of its merchandise to deceive or mislead the consumers.**

**A business operator shall not assist other operators in conducting false or misleading commercial publicity by organizing fraudulent transactions (d) or other means.**

**(a)** The original Article 9 of the 1993 law is kept basically unchanged (just re-numbered as Article 8), but with some added precisions, such as “misleading commercial publicity” on the “performance, function, quality, sales, used ratings, awards etc.” of its merchandise.

**(b)** It is welcome that this Article addresses the rampant fraud that has been plaguing China’s e-commerce business. “*Shua Dan 刷单*” or “*Chao Xin 炒信*” (the term in Chinese for fake transactions or credit) refers to faking transactions under fake names, in order to increase the vendor’s sales volumes and popularity ranking—in the hopes of attracting real customers to make purchases. Such acts screen negative ratings, distort the facts and prejudices the interests of the consumers and the competitors, thus shall be punished.

Article 8 of the AUCL regulates the unfair competition acts described by Article 10<sup>bis</sup> (3)(3) of the Paris Convention: “*indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods*”. Such practice distorts the market reality, misleads the consumers and gains

for the offenders' illicit profits, which violates business ethics or honest practices in industrial or commercial matters, therefore shall be prohibited.

Where trademarks are concerned, the TML contains a clause that addresses the same type of issue: Article 10(1)(7) prohibits the registration and use of "those (signs) that are deceptive and likely to mislead the public in terms of the quality, place of production or other characteristics of the goods", which is quite similar but has a narrower spectrum.

An act of false publicity may violate, in fact, two laws: the AUCL and the Advertisement Law. Article 20(2) of the AUCL provides for administrative fines calculated in accordance with the seriousness of the case, while the Advertising Law also provides for punishment targeting deceptive advertising.

**(c)** Granting awards is a common practice in China and publicizing the same is a logical promotional method. The practice could entail the risk of abuse, if the recipient of the awards seeks for unfair competitive edge under the guise of promotion. The new text allows the administration to monitor and keep control over these practices. It is expected to rein in the abuse of the well-known trademark status, which is in line with Article 14(5) of the TML that prohibits using the words "well-known trademark" on the goods, the packaging or the containers of the goods, or for advertising, exhibition or other commercial activities. This may serve as a point of reference for the control over using for commercial purposes the "famous trademark" (a title granted by local authorities, which is sometimes confused with the "well-known trademark status" referred to in the TML).

**(d)** A new paragraph is added: "A business operator shall not assist other operators in making false or misleading commercial publicity by organizing fraudulent transactions or other means". This may help put an end to the old scam where vendors raise the price of the products before offering a discount to the consumers.

## IV. DENIGRATION

### ARTICLE 11<sup>(a)</sup> of AUCL

**A business operator shall neither fabricate nor disseminate false or misleading information (b) to defame the commercial credit (c) of its competitors or the reputation (d) of commodities of its competitors.**

**(a)** Article 14 of the original text provided “*an operator shall not fabricate stories or disseminate falsehoods to damage the commodity reputation or business credit of a competitor*”. The 2016 draft added “false information or malicious negative comments or incomplete information or information that is unverifiable”. The final text keeps the same concept: “[...] neither fabricate nor disseminate false or misleading information to defame the commercial credit” of a competitor.

**(b)** This Article can be attributed to Article 10<sup>bis</sup> (3)(2) of the Paris Convention, which provides that “*false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor; should be prohibited*”.

**(c)** False information, in particular, misleading information, covers a wide spectrum of unfair competition practices. There is a very recent case where a second-hand automobile broker platform Beijing Ren Ren Che Network Technology (Ren Ren Che) brought an unfair competition action against its rival Che Hao Duo Second-hand Automobile Brokerage (Beijing) Ltd. (Gua Zi Wang) for the latter’s using a slogan like “with a leading trading volume nationwide”.

**(d)** In 2017, the confirmation from McDonald's that it had changed its Chinese company name from Maidanglao 麦当劳 (Chinese transliteration of the English word McDonald's) into Jin Gong Men 金拱门 (Golden Arches) spawned spoofs over big brands all over the Internet. Some posts far exceeded the extent of parody, which could constitute denigration of business reputation of a well-known trademark (Article 13(3) of the TML). The legal wrangle between Nanjing Tuniu Technology Ltd. and rival Tongcheng Technology Holdings Ltd. over the latter's inappropriate use of Tuniu (homophone of the former's trade name travel Ox 途牛, but with a different meaning of cattle slaughtering 屠牛) also fit the scenario as provided by this Article.

## V. Legal liability

### ARTICLE 17 of AUCL

**A business operator, which violates the provisions of the law and thus causes damage to others, shall bear civil liability according to the laws (a).**

**A business operator whose lawful rights and interests are damaged by Unfair Competition Acts may bring a lawsuit before a people's court.**

**The amount of compensation (b) for the business operator that has been harmed by the Unfair Competition acts shall be assessed in accordance with the actual damages it has suffered from the infringement; if it is difficult to assess the actual damages, the amount of compensation shall be equivalent to the profit that the infringer has earned through the infringement. The amount of compensation shall cover the rational expenses paid by the business operator for stopping the infringing act.**

**Where a business operator violates the provisions of Article 6 and Article 9 of the law, yet it is difficult to determine the amount of loss suffered by the infringed from the infringing act or the amount of the infringer's profit obtained from the infringing act, the people's court shall make a decision on the amount of compensation not higher than RMB 3 million yuan, by taking into account the seriousness of the infringement (c).**

**(a)** The AUCL does not specifically elaborate on which kind of act constitutes a violation of Article 6 of the law: fabrication or sale. Therefore, both activities are covered by the prohibition. As a result, the forfeiture of the illegitimate products provided in Article 18 for breaching Article 6, is expected to apply both in the area of production and in the area of circulation. If such speculation was affirmed in practice,

the AUCL would be better situated in handling infringing products in circulation than the TML. Indeed, the TML provisions concerning the so called “innocent seller”, implemented by the Implementation Rules of the TML, have put in evidence an obvious shortcoming of the enforcement system: the illegal stock seized in the hand of a seller cannot be forfeited and, even though it is deemed as infringing, will inevitable return to the market.

**(b) Regarding the award of damages,** Article 17 of the new AUCL basically follows the same calculation principles as set forth in the TML: first the estimation of the losses suffered by the plaintiff, then the calculation of the illegal profit made by the defendant. The new law introduces the same statutory maximum amount of RMB 3 million (which is provided in the TML) which is the limit of what the judge may award when it is difficult to estimate the losses of the illegal profit.

Unfortunately, the new law does not include the other modes of calculation that are provided in article 63 of the TML: the reference to a royalty (“...*a reasonable multiple of the royalty that the infringed registered trademark might have earned...*”) and the punitive damages, (“... *in case of bad faith where the infringement is serious, the amount of compensation may be determined to a level that shall be not more than three times but also no less than one time the amount calculated according to the abovementioned approaches*”).

The original text of the AUCL (Article 20) was succinct: a mere reference to the losses or to the illegal gains. This is why the SPC, in its Judicial Interpretation on Unfair Competition of 2007 (Article 17), expressly referred the judges to the calculation method provided in the TML (which, at the time, already had the concept of statutory damages). It remains to be seen if, based on the 2007 SPC Interpretation, the courts will still be free to follow the calculations methods provided in the revised TML of 2013, and make use of the punitive damages provided therein.

(c) As far as unregistered trademarks are concerned, the remedies granted by the TML and the AUCL are asymmetric. In accordance with the provisions of the TML and pertinent judicial interpretations, the proprietor of an unregistered well-known trademark may request the cessation of use of the offending mark, yet is not entitled to claim damages. The AUCL being only concerned with signs that are “business identifiers”, does not make any difference as to whether they are registered or unregistered. So the owner of an unregistered trademark might prefer to claim protection over “a sign of certain influence”, in order to obtain damages. However, one of the newly published SPC Top 10 cases 2017 XinHuaZiDian 新华字典 concerns the statutory damage of 3 million in the case of an unregistered well-known mark.

The same comment as above may be made concerning the compensation for false publicity (Article 20) or denigration (Article 23). A clear reference to the TML would have been useful.



## VI. Continuation of use of a prior trademark

### ARTICLE 59(3)<sup>(a)</sup> of TML

Where, before *(b)* a trademark registrant applies for registration of a trademark, another party has used a trademark that is of certain influence *(c)* and is identical with or similar to the registered trademark on the same kind of goods or similar goods, the proprietor of the registered trademark shall have no right to prohibit the said party from continued use *(d)* of the trademark within the original scope of use *(e)*, however, the holder may require the latter to add a proper mark for distinguishing purposes *(f)*.

*(a)* The promulgation of this article is a milestone in the legislative history of China's Trademark Law (TML). Though it does not offer a once for all solution to the confrontation between prior use and later registration, yet it helps to clarify the relations between use and registration. Back in 1993, when the first amendment of the Trademark Law introduced the concept of "service mark", the legislator made sure to acknowledge the prior use of the de facto service mark before the introduction of the notion *per se*.

*(b)* This Article protects the interests of a **prior user** in good faith and the reputation attached to the prior used trademark, and may additionally discourage the conduct of bad-faith applications to a certain degree. On the one hand, it could be deemed as a setback of the trademark registration system for making an exception in favor of the unregistered prior used trademark. On the other hand, the Article clarifies that the application date of the later registered trademark is the time to judge the level of use and reputation of the prior used mark. It therefore rules out the possibility that the use of any unregistered trademark after the application date could be intrinsically

legitimate. In any event, however, it is clear that the prior use shall remain restricted and shall not mature to registration. Within that context, it would be unjustified if the trademark of the later user were to be allowed to generate any legitimate right out of the use of its trademark.

If by any chance, the proprietor of the later registered trademark had been using his mark prior to its application date, the use of the prior mark has to predate that of the later registered mark, in order to establish its absolute bona fides.

The IPR Tribunal of the SPC in its *Reply to the China Trademark Office on whether “Wing Wah Mooncake” can be identified as a unique name of a famous product*, expounded its position that: A trademark, once approved for registration, prohibits, within the range of its designated goods, an identical or similar trademark from generating the rights of an unregistered trademark or of the unique name of a famous product through actual use; or else, the fundamental value of the trademark registration system will be undermined. This is consistent with the legislative intent of Article 59(3).

**(c)** The term “**certain influence**” is referred in Article 32 and Article 59(3) of the TML, as well as Article 6 of the AUCL. There has been concern over the interpretation of such phrase. How to define a “certain influence”? Do they share the same criteria in the two laws? We could approach this matter from the angle of Chinese philosophy: the ambiguity or imprecision of the expression is the exact expression of vagueness of the sophisticated circumstances.

**(d)** The **continuation of use** of a prior used trademark may be deemed as an exception to the rights conferred by a trademark, as long as this exception takes account of the legitimate interests of the owner of the trademark and of third parties (Article 17 of the TRIPS Agreement stipulates that Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms,

provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.). Any limitation or exception to the trademark right shall be interpreted rigorously to avoid creating fundamental contradiction with the exclusive right of registered trademarks, which will deprive its basic function as business identifier. Article L.713-6 of the France Intellectual Property Code provides that: Registration of a mark shall not prevent use of the same sign or a similar sign as [...] a company name, trade name or signboard, where such use is either earlier than the registration or made by another person using his own surname in good faith. However, where such use infringes his rights, the owner of the registration may require that it be limited or prohibited.

(e) The current controversy lies in whether the continuation of use shall be restricted geographically or how to define the **original scope of use**. The European Union trademark legislation provides that the proprietor of the prior used trademark is only allowed to continue using his mark within the original geography. This perspective is shared by Article 33(5) of the U.S. Trademark Law, which reads: [...] the defense...shall apply only for the area in which such continuous prior use is proved. China's SPC clarifies in the *Ya Wang* case (*Beijing Ya Wang Roast Duck Co., Ltd. v Shanghai Huaihai Ya Wang Roast Duck Co., Ltd. & Trademark Review and Adjudication Board* (2012) Zhi Xing Zi No.9) that the prior right generated by the prior use of Beijing Ya Wang shall be protected and Beijing Ya Wang is entitled to continue using its prior used sign within the geographic range of Beijing.

The reasoning can be explained as follows: where a prior used trademark conflicts with a later registered trademark, the prior mark is immediately "frozen" within its used geography. Were its use allowed to expand, the later registered trademark would be constantly vulnerable to the challenge of the prior used mark, which would cause confusion among the consumers and jeopardize the trademark right.

**(f) Affixing distinguishable signs** is a last resort to resolve the problem. In essence, the approaches adopted by the TML and the AUCL are opposite. Under the framework of the AUCL, the prior user of a sign has the right to challenge a later user, and the later user bears the burden of affixing additional signs to avoid confusion. In the context of the TML, the prior user is only allowed to continue using, provided that it affixes additional signs in order to avoid confusion. The TML, by shifting this burden to the prior user, grants the later registrant certain privilege, so as to encourage the filing of trademarks.

## The new Anti-Unfair Competition Law

After several drafts published in 2004, 2016 and two in 2017, the Anti-Unfair Competition Law of China, which dated back to 1993, has finally been revised and the new law, promulgated on November 4th, 2017, shall enter into force on January 1st, 2018.

The general structure of the law remains the same. Four chapters: *(I)* general principles, *(II)* a description of unfair competition acts, *(III)* the powers of the administration to investigate and punish such acts, *(IV)* the legal liability and sanctions for each type of act.

Since the original text of 1993 and during the four drafts that followed, basically, the same concepts and principles have been maintained. Changes, however, were introduced and some of them seem more significant than others. The paper below proposes to highlight some of these changes.

Some articles were deleted because they did not correspond to the present situation or were addressed in other laws enacted since 1993: no more reference to trademark counterfeiting, to abuse of dominant situation, to selling below cost, to tie-in sales, or to bid rigging in tenders.

### I. General principles

Article 2 sets out the *"principle of fairness and good faith"* in activities of *"production and operation"* (which replaces "market transactions"). An "Unfair Competition Act" is defined as an act that disturbs the *"market competition order"* and *"damages the lawful rights and interests of other business operators or consumers"* (the introduction of the consumers' interest appeared for the first time in 2016).

The vocabulary changes that were made in the successive drafts are minor, yet interesting.

In the original text of 1993, the act of unfair competition is an act *"conducted in violation of provisions of the law"*, which *"damages the interests"* of others and *"disturbs the social-economic order"*. So, by referring to the provisions of the law, the definition implies that the act is conducted against the general principle of fairness.

The 2016 draft keeps the same definition and introduces "the consumers", along with the "market order".

In the first 2017 draft, the same concepts remain: violating the provisions of the "preceding paragraph" (therefore, the "fairness principle") and *"engaging in market transaction through improper means"*. The focus is clearly on the unfairness of the act committed.

In the second 2017 draft, the only change is the replacement of the terms "market transactions" by "market competition". The reference to "improper means" remains.

In the final text, there is a slight difference: an act of unfair competition becomes *"an act made during production and operation which disturbs the market competition order and damages the rights of other operators or consumers, and thus, is in violation of the law"*. Therefore, the focus is not any more on the "improper means" and "unfairness" of the act, but is placed on the objective consequences of the act, the unfairness and violation of the law becoming the result.

Concerning the definition of "business operators", while the original text of 1993 only referred to legal persons, the drafts (2016) and the final text include natural persons and other organizations in this definition.

The final text adds a new reference to *"industry associations (which) shall promote self-regulations and fair competition through guidance and regulations of their members"*.

## II. Acts of unfair competition

These acts can be classified in two categories: (1) those that affect the interests of one identified competitor and are described in Article 6 (copy/imitate), Article 9 (trade secrets) and Article 11 (denigration), and (2) those that affect the market order in general and are described in article 7 (commercial bribery), Article 8 (false advertising) and Article 10 (premium sales).

A new type of unfair competition act is added since 2016, which could be considered as belonging to both categories: Internet related acts (Article 12).

### A. Unfair acts against a competitor

#### *Copying - imitating (Article 6)*

During the revision process, Article 6 was one of the most commented articles. It concerns the (1) acts of copying the name, packaging or decoration of a product, (2) the act of using the name of another entity and (3) the act of using another person's website name.

Before examining the details of this article, it is worth examining the different approaches revealed by the successive drafts.

In the original text of 1993, Article 5 (later re-numbered 6): "*Operators shall not adopt any of the following improper means to carry out market transactions*". In the 2016 draft, the wording becomes "*Operators shall not cause confusion in the market by committing the following acts with business identifiers*". The first draft of 2017 reads: "*No business operator shall use any of the following unfair means in market transactions*". The second 2017 draft reverts to "*Business operators shall not engage in any of the following confusion acts that may mislead the consumers to mistake its products for those of others or to misconstrue that such products have a*

*certain association with others". And the final text confirms "Business operators shall not commit any of the following confusion acts that may mislead the consumers to mistake its products for those of another person or induce a special relationship with another person".*

The discussion and comments concerning the first sub-paragraph of Article 6 (new numbering since 2017), are a good illustration of the differences between the two approaches.

In the original text of 1993, the definition was *"using, without authorization, the names, packaging or decoration unique (or specific) to a well-known product, or names, packaging or decoration similar to well-known goods, so that their goods are confused with the well-known goods of others, causing buyers to mistake"*.

The word "well-known" raised discussions during the revision process. It was argued that such (high) requirement (it was as difficult to prove the well-known status of a commodity as it was to obtain the well-known status for a trademark) implied that, unless the well-known status is established, the acts of copying was not unfair.

In the second draft of 2017, the word well-known was deleted, but the word "unique", or "specific", was maintained. Such uniqueness meant that the shape or packaging, should not be a sign that is too common, otherwise it would lose its function of "business identifier" (a function that had been particularly highlighted in the 2016 draft).

In the final reading of the text, the concept of reputation was re-introduced, but in the "reduced" form of "a certain influence" (the same term as in Article 32 and 59.3 of the Trademark Law). Meanwhile, the word "unique" is deleted.

Another topic of discussion concerned the list of objects that are copied: "name, packaging and decoration". The shape of the product was not included in this list. Yet, many cases of unfair competition acts involved the slavish copy of the shape of a



product. In the early days, it was common for the courts to refuse cases based on such facts, because the shape was not listed in the law as an unfair practice. The Supreme People's Court, in [*M&G pen case, March 3rd, 2010*] clarified that the shape of a product may be considered as its decoration, and during the final reading of the law, it was proposed to add the word "shape" to the list. This was refused, but instead, it was proposed and agreed to simply add the sign "*etc.*", which indicates that the list is not exhaustive, and therefore, may include the shape of the product, even a single color or sound.

Article 6.2 and 6.3 list other types of unfair use: enterprise name, trade name etc., (Article 6.2) and website names, webpage, main parts of a domain name (Article 6.3). These items had been introduced in the first 2017 draft, where it was specified that such use would be unfair competition acts if they "mislead people". The first 2017 draft added that the use of another person's trademark (registered or not) in an enterprise name would be unfair if it misleads the public. The second 2017 draft deleted the "mislead" condition altogether, which was, maybe, going a little far... The final text keeps the reference to enterprise names and websites, but replaces the "mislead" condition by "*which has a certain influence*".

The new Article 6 adds a last paragraph (6.4) which addresses "*other confusion acts that may mislead the consumers to mistake the products for those of others or to misconstrue that such products have a special relation with others*". It seems that this article could refer to Article 58 of Trademark Law which concerns the use of the trademark of others as trade name and refers to the Anti-Unfair Competition Law.

### ***Trade secrets (Article 9)***

The theft of trade secrets (which includes commercial and technology information) is certainly one of the highest concerns in the market. Many comments and suggestions were made during the revision process.

The 1993 original text refers to "*obtaining trade secrets by theft, promise of gains, coercion or other improper means*". The 2016 draft added "*cheating*" to these improper means. The first 2017 draft changed it into "*bribery*". The final text adds "*fraud*".

The discussions revealed that the main concern was the behavior of employees and ex-employees of the victim of trade secret theft. The issue was first addressed, indirectly, in the 2016 draft which referred to the "*third party who has or ought to have a clear knowledge*" of the unfair acts "*shall be deemed to have infringed upon the trade secrets*". However, no express reference was made to the employees. The first 2017 draft law added a new Article 10 concerning employees "*where an employee or former employee of the right holder of trade secrets conducts any act provided in Paragraph 1 of Article 9 hereof*". This was kept in the second draft and in the final text: "*where a third party clearly knows or ought to know that the employee or former employee of the trade secret owner, or any other organization or individual has committed the acts listed in the preceding paragraph, yet, still acquires, discloses, explores or permit others to explore the trade secret, such act shall be deemed as infringement upon trade secrets*".

The express reference to the role played by employees and former employees should be seen as an improvement.

However, the real difficulty is to prove that the trade secret has been stolen by "improper means". In a trade secret litigation, it is sometimes necessary to "reverse the burden of proof". It remains to be seen if the above "*clearly knows or ought to know*" expression will mean that, at a certain point, the courts will decide to request the defendant to justify that it has acquired the information through legal means.

### ***Denigration (Article 11)***

Article 14 of the original text provided "*an operator shall not fabricate stories or*

*disseminate falsehoods to damage the commodity reputation or business credit of a competitor". The 2016 draft added "false information or malicious negative comments or incomplete information or information that is unverifiable". The final text keeps the same concept: "...neither fabricate nor disseminate false or misleading information to defame the commercial credit" of a competitor.*

### ***B. Acts disturbing the market order***

#### ***Commercial bribery (Article 7)***

This was a rather dangerous zone for enterprises. Commercial bribery, as defined in Article 8 of the original 1993 law, relates to kickbacks or discounts "*secretly*" paid to, and accepted by, a counterparty "*off the books*".

Companies have been placed under investigation and imposed fines by the administration for Industry and Commerce, in cases where they had no idea that they had done something wrong.

The main problem was that, sometimes, the companies under investigation had no precise knowledge of the facts.

The second 2017 draft came as a relief, when it replaced the term "counterparty" by the following list: "*(1) Staff of the counterparty; (2) Any organization or individual that is commissioned by the counterparty to handle relevant matters; (3) Government agencies, state-owned corporation and business public institution non-governmental organization or state functionaries; or (4) Any other organization or individual that may take advantage of the position of the state functionary to influence the transactions*".

This wording is kept in the final text. And the main satisfaction comes from the replacement of "counterparty", which was dangerously open and vague, by "*staff of the counterparty*", which is much more precise.

### ***False advertising (Article 8)***

The original Article 9 of the 1993 law is kept basically unchanged, but with some added precisions, such as "*misleading commercial publicity*" on the performance "*function, quality, sales, used ratings, awards etc.*" of its merchandise. Granting awards is a common practice in China and publicizing the same is a logical promotional method, which entails the risk of abuse. The new text allows the administration to monitor and keep control over these practices.

A new paragraph is added: "*A business operator shall not assist other operators in making false or misleading commercial publicity by organizing fraudulent transactions or other means*".

### ***Premium sales (Article 10)***

The 1993 law prohibited, in its Article 13, the act of selling "*with prizes, in a fraudulent manner by falsely claiming the existence of prizes ...or promoting the sale of inferior but high- priced goods by offering prizes*"... or "*using lucky draws where the amount of the highest prize exceeds CNY 5,000.*"

The final text stipulates, in more general terms, that where prizes are offered with sales, the conditions must be clear. As to lucky draws, the amount of the highest prize is raised to CNY 50,000.

### ***C. Internet (Article 12)***

Internet, with its unlimited means of influencing the market, was obviously not addressed in the 1993 law.

The 2016 draft introduced the matter by stating (Article 13) that "*operators shall not utilize network technologies to influence the choices of users and interfere with the normal operations of other operators*". This was followed by a list of 4 technical

examples.

The second 2017 draft – adopted in the final text – placed the use of Internet technologies in the general framework of the law: *"A business operator that conducts its operations by using Internet shall obey the provisions of the law"*.

The examples given are (1) *"inserting links into another website which mandatorily redirects the page to other targets"*, (2) *"mislead, deceive or force users to revise, shut down or uninstall products or services offered by another operator"*; (3) *"maliciously make the products or services of another operator incompatible"* (4) *"other acts that interfere or sabotage the normal running of network products legally offered by others"*.

### III. Investigation on suspected unfair competition acts

The title of this chapter *"Control and Inspection"*, used in the 1993 law and until the first 2017 draft, was changed in the final text to *"inspection of suspected acts"*.

The administration concerned is the Administration for Industry and Commerce (AIC).

Like in other law revisions, the administration seeks to increase its powers.

In the 1993 law, the AIC could only question and require evidence material. The AIC had no right to enter the business premises. So, its right to access to *documents, account books, vouchers etc., and to inspect property* was, in practice, rather limited.

The right to enter the premises was added in the law in the 2016 draft and is adopted in the final text. This right gives more power to the administration to perform the investigation, seize or detain merchandises, duplicate documents and check bank accounts.

Some comments were made to warn against possible abuses of power that could be triggered by a malicious complaint. The second 2017 draft seems to have somewhat taken the concern into account as it stipulates that *"Execution of the measures as provided in the preceding paragraph requires a written report filed to and an approval from the head of supervision and inspection departments"*.

Another new Article 15 added in the final text, provides some protection for the defendant *"The supervision and inspection departments and their functionaries are obliged to keep the confidentiality of the trade secrets that come to their knowledge during the process of investigation"*.

In 2017, the drafts introduced the notion of "whistleblower": any person has the right to report any *suspicious* (this was added in the second draft of 2017) unfair competition act to the administration, who will keep the identity of such whistleblower confidential. This measure is adopted in article 16 of the final text.

## IV. Legal liability

As in other IP laws (trademark, patent), the law Against Unfair Competition provides for two types of sanctions against unfair competition acts: the damages to be paid to the victim of such act who has filed a case with the People's Courts, and the penalty imposed by the administration.

The revision of the law has updated the original text to the current practice in these matters.

### ***Damages (Article 17)***

For the damages, Article 17 reproduces the solutions already established in the Trademark Law. The damages are to be calculated by reference to the actual prejudice, and if this is difficult to establish, by reference to the profits earned through the

infringement. And if neither of these calculation criteria can be easily established, the court may decide up to the statutory maximum amount of CNY 3 million. This rule concerning statutory damages only applies to cases under Articles 6 and 9 (copy and trade secrets).

### ***Fines***

Likewise, the revised law updates the practice and amounts of fines stipulated for each of the unfair competition acts.

The amounts and calculations methods vary depending on the types of unfair competition acts.

In cases of violations of Article 6 (confusion with name, packaging, etc., enterprise name, websites), the calculation is similar to what is provided in the Trademark Law: up to 5 times the illegal turnover if the turnover exceeds CNY 50,000, and up to CNY 250,000 if the turnover is inferior to CNY 50,000.

When an operator is ordered to change its name because it is illegally using the trademark of another person, the law adopts a solution that will definitely facilitate the enforcement of such order: if the operator does not change the name within a prescribed time, *"the enterprise registration authority (AIC) shall replace such name with a Uniform Social Credit Code"*.

For the other two unfair acts directly committed against a competitor, i.e., theft of trade secrets (Article 9) and denigration (Article 11), they are treated in the same way: a fine of CNY 100,000 to CNY 500,000, and a fine up to CNY 3 million if the case is "serious". As for trade secrets, the final text specifies that functionaries shall be punished if they abuse their powers and if they are found, *divulging the trade secrets that come to their knowledge during the process of investigation*.

Commercial bribery (Article 7) is punished by the confiscation of the illegal

turnover and a fine of CNY 100,000 to CNY 3 million, with possible revocation of the business license in serious cases. False advertising (Article 8) is punished by a fine of CNY 200,000 to CNY 1 million or up to CNY 2 million if the case is serious. Illegal premium sales (Article 10) can be fined for an amount of CNY 50,000 to CNY 500,000.

Unfair competition acts committed in relation with Internet technologies are punished by a fine from CNY 100,000 to CNY 500,000 or, if the case is serious, up to CNY 3 million.

However, all these administrative punishments may be waived or diminished depending on the attitude of the operator. Article 25 of the revised law provides that if the *"circumstances are minor and the operator rectifies his behavior in time so that no consequential damage is caused"*, no sanction will be applied. Or, the sanction may be lighter *"if the operator proactively removes or relieves the harmful consequences of its act, or there are other circumstances explicitly provided by laws that enable the application of a lighter or mitigate administrative punishment"*.

## CONCLUSION

The most significant change in the law is probably the introduction, in Article 6, of the expression "a certain influence", which applied to the "sign", and replaced the term "known" or "well-known", which applied to the product itself.

The expression *"a certain influence"* is vague, and – this may be sound as a paradox – it is a good thing.

"Influence" refers to the reputation of a sign and is the direct consequence of the duration and intensity of the use of such sign.

In all cases where a party accuses a competitor of "copying" or "imitating", it will be necessary to demonstrate a certain level of reputation. This sounds very much like the new Provisions about administrative trademark litigation published by the



Supreme People's Court in 2017 about Article 13.2 of the Trademark Law (protection of unregistered well-known trademark). When applying this article, the courts should take into consideration the degree of similarity, the degree of reputation of the plaintiff's (non-registered) mark, the intentions of the defendant, etc., all these criteria being interwoven and flexible. In unfair competition cases under Article 6, the method will be the same: the courts will examine the degree of similarity, the degree of "influence" of the sign, the intentions of the defendant.

The generality of term *influence* allows a comparison between the various situations provided by the Trademark Law and the Anti-Unfair Competition Law.

In the basic case of a registered trademark, there is no need for proving any influence. The mark is protected as a result of its registration.

The problem arises where the sign is not registered. Then, a reputation needs to be established.

The reputation may be very high, as for a well-known trademark (TM Law Article.13.2), or less high but - when combined with "improper means" - sufficient to oppose a preemptively filed trademark (TM Law Article 32).

There are other situations where a trademark needs to show some *influence*: resist a revocation action based on non-use (TM Law Article.49: if a registered trademark has not achieved a certain influence after 3 years it is not worth being protected), or justify the exception provided in TM Law Article 59.3 (first user of the trademark allowed to continue within the same use range).

The degree of required "influence" varies in accordance with the circumstances addressed by each of articles of the law. Furthermore, the degree of influence required also varies in relation to other criteria such as the degree of similarity, the degree of bad or good faith of the defendant etc.

The new wording of Article 6 in the Anti-Unfair Competition Law, with its

reference to the same term "influence" (of the "sign" concerned), should bring coherence to the reasoning of the courts who are expected to apprehend each case with flexibility and openness, and consider all the circumstances of the cases.

This being said, it seems that one paradox and one regret could be noted.

- The paradox: an unregistered sign (name, decoration, packaging etc.,) is better protected by the Anti-Unfair Competition Law than an unregistered well-known trademark by the Trademark Law (such unregistered well-known trademark may only prevent registration and use, but cannot obtain damages);
- The regret: the focus on confusion and *influence* puts the unfairness of the act in second place. This can be problematic where a competitor is systematically copying new models, which do not have, yet, a certain *influence*, since they have just been launched. Such a behavior is obviously unfair. Would an action still be possible based on the general principle set out in Article 2?

The other noticeable change, in trade secret cases, is the clear acknowledgment of the key role played by employees and former employees. One can only hope that the expression *clearly knows of ought to know* will be construed in an open and flexible way by the courts, and that courts will, once satisfied that the plaintiff had produced all available evidence, consider requesting the defendant to prove that it has not benefited from illegally obtained trade secrets.

*CHAPTER* *2*

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**Laws**

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## The Comparison Table of the 1993 Version and 2017 Version of Anti-Unfair Competition Law of China

1993 Version	2017 Version
Chapter I General Provisions	Chapter I General Provisions
<p><b>Article 1</b> The Anti-unfair Competition Law of the People's Republic of China (hereinafter referred to as the "Law") is hereby formulated for the purpose of <b>ensuring</b> the healthy development of the socialist market economy, encouraging and protecting fair competition, preventing acts of unfair competition, and safeguarding the legitimate rights and interests of operators and consumers.</p>	<p><b>Article 1</b> The Law is formulated for the purposes of <b>promoting</b> the healthy development of socialist market economy, encouraging and protecting fair competition, repressing Unfair Competition Acts, and protecting the lawful rights and interests of Business Operators and consumers.</p>

**Article 2** When **carrying out market transactions**, operators shall follow the principles of voluntariness, equality, fairness and good faith, and observe **generally recognized** business ethics. For the purpose of the Law, unfair competition refers to acts that are conducted by operators in violation of the provisions of the Law, damage the legitimate rights and interests of other operators and disturb the **socio-economic** order. For the purpose of the Law, operators refer to legal persons, **other economic organizations and individuals** engaging in trading of goods or **profit-making** services (The goods referred to hereinafter include services).

**Article 2** A Business Operator shall, **during its production and operation**, follow the principles of voluntariness, equality, fairness and good faith and observe **the laws** and business ethics. For purposes of the law, “Unfair Competition Acts” refer to the acts of Business Operators, **during production and operation**, which disturb **market competition** order and damage the lawful rights and interests of other Business Operators **or Consumers** and thus are in violation of the provisions of the law. The term “Business Operator” herein refers to **a natural person**, a legal person or **an unincorporated organization** engaged in **production and** marketing of commodities (which includes services when used hereinafter) **or provision of services**.

**Article 3** The people's governments at various levels shall adopt measures to stop acts of unfair competition to create favorable environment and conditions for fair competition.

**The administrative authorities for industry and commerce** of the people's governments **above** the county level shall **supervise** and investigate acts of unfair competition. The provisions that certain acts shall be supervised and investigated by other departments as prescribed under laws and administrative regulations shall prevail.

**Article 3** People's governments at various levels shall take measures to repress Unfair Competition Acts so as to foster favorable environment and create the conditions for fair competition. **The State Council shall establish a coordination mechanism for anti-unfair competition, research and decide significant policies on anti-unfair competition matters, as well as coordinate and handle major issues in maintaining market competition order.**

**Article 4** Departments fulfilling the duties of administration for industry and commerce of the people's governments **at or above** county level shall investigate and **punish** Unfair Competition Acts. Where laws or administrative rules and regulations provide that other departments shall be responsible for investigation and punishment of such acts, those provisions shall prevail.

<p><b>Article 4</b> The State encourages, supports and protects the social supervision over acts of unfair competition by all organizations and individuals.  <b>Staff members of the State organs</b> shall not support or cover up acts of unfair competition.</p>	<p><b>Article 5</b> The State encourages, supports and protects all organizations and individuals in their exercise of social supervision over Unfair Competition Acts.  <b>Neither State organ nor its functionary</b> shall support or harbour Unfair Competition Acts.  <i>Industry association shall promote self-regulation and fair competition through guidance and regulation of its members so as to maintain the market competition order.</i></p>
<p><b>Chapter II Acts of Unfair Competition</b></p>	<p><b>Chapter II Acts of Unfair Competition</b></p>
<p><b>Article 5</b> Operators shall not adopt any of the following <b>improper means</b> to <b>carry out market transactions or cause damage to competitors</b>:</p>	<p><b>Article 6</b> Business Operators shall not <b>commit</b> any of the following <b>confusion acts</b> that may mislead the consumers to believe that its products are those of another person, or induce a special relationship with another person:</p>



1. counterfeiting the registered trademarks of others;

2. using, without authorization, the names, packaging or decoration **unique to well-known goods** or the names, packaging or decoration similar to those of **well-known goods so that their goods are confused with the well-known goods of others, causing buyers to mistake them for the well-known goods of others;**

3. using, without authorization, the enterprise names or personal names of others **on their own goods, leading purchasers to mistake them for the goods of others;** or

4. forging or falsely using symbols of quality such as symbols of authentication and symbols of famous and high-quality goods on their goods, falsifying the origin of their goods, and making false representations that are misleading as to the quality of the goods.

1. To use, without authorization, *a sign* that is identical to or similar with the name, packaging, or decoration, *etc.*, of others' commodity, *which has a certain influence;*

2. To use, without authorization, the enterprise name (**including its abbreviation, trade name, etc.**) of others, **or the name of a social organization (including its abbreviation, etc.)**, or the name (**including pseudonym, stage name, etc.**) of others, *which has a certain influence;*

3. To use, without authorization, *the website name, webpage, main parts of the domain name, etc., of others, which has a certain influence;* or

4. *Other confusion acts that may mislead the consumers to believe that its products are those of another person, or induce a special relationship with another person.*

<p><b>Article 6</b> Public utilities or other operators having monopolistic status by law shall not require others to purchase the goods of the operators designated by them so as to exclude other operators from competing fairly.</p>	
<p><b>Article 7</b> A local government and its subordinate departments shall not abuse their administrative power to require others to purchase the goods of the operators designated by them so as to restrict the proper business activities of other operators.</p> <p>A local government and its subordinate departments shall not abuse their administrative power to restrict the entry of goods from other regions into the local market or the flow of local goods to markets in other regions.</p>	
	<p><b>Article 7</b> A Business Operator shall not offer money or valuable things or take any other means to bribe <b>the organisations or individuals listed below in order to seek transaction opportunity or competitive edge.</b></p>

**Article 8** An operator shall not **sell or purchase goods** by offering bribes with money or valuables or otherwise.

**Where an operator secretly pays kickbacks to the counterparty, be it an entity or individual, off the books, the operator shall be punished for offering bribes; where the counterparty, be it an entity or individual, secretly accepts kickbacks off the books, the transaction counterparty shall be punished for taking bribes.**

**In selling or purchasing goods**, an operator may expressly offer discounts to the counterparty and may pay commissions to the middlemen. Where an operator gives discounts to the counterparty or pays commissions to the middlemen, it shall enter the items in accounts faithfully. An operator accepting discounts or commissions shall enter such receipt in the accounts faithfully.

**1.Staff of the counterparty;  
2.Any organisation or individual commissioned by the counterparty to handle relevant matters; or  
3.Any organisation or individual that may take advantage of its position or sway to influence the transactions.**

A Business Operator may expressly offer, **in transaction activities**, discount to the counterparty or pay commission to the middleman. The Business Operator that offers discount to the counterparty or pays commission to the middleman shall truthfully enter such items in the ledger. Business Operator that accepts the discount or the commission shall also truthfully enter such items in the ledger.

**Where an employee of the Business Operator resorts to bribery, this shall be determined as act of such Business Operator, unless the Business Operator has evidence to prove that such act is irrelevant to his seeking of transaction opportunity or competitive edge.**

<p><b>Article 9</b> An operator shall not <b>use advertisements or other means</b> to give false and misleading promotion on the quality, <b>ingredient</b>, performance, <b>purposes, manufacturer, useful life</b>, and origin of goods.</p> <p>An advertising operator shall not act as an agent for, or design, produce or release false advertisements where such operator clearly knows, or should have known, that the information in the advertisements is false.</p>	<p><b>Article 8</b> A Business Operator shall not make false or misleading <b>commercial publicity</b> on the performance, <b>function</b>, quality, <b>sales, user ratings, awards, etc. of its merchandise to deceive or mislead the consumers.</b></p> <p><i>A Business Operator shall not assist other operators in conducting false or misleading commercial publicity by organizing fraudulent transactions or other means.</i></p>
<p><b>Article 10</b> An operator shall not <b>adopt any of the following means</b> to infringe on the trade secrets of others:</p> <ol style="list-style-type: none"><li>1. obtaining the trade secrets from right holders by theft, <b>promise of gains</b>, intimidation or other improper means;</li><li>2. disclosing, using or allowing others to use the trade secrets of right holders obtained by the means mentioned in the preceding item; or</li></ol>	<p><b>Article 9</b> A Business Operator shall not <b>conduct any of the following acts</b> to infringe upon trade secrets:</p> <ol style="list-style-type: none"><li>1. To obtain a right holder's trade secrets by theft, <b>bribery, fraud</b>, coercion or any other improper means;</li><li>2. To disclose, explore or permit others to explore the trade secrets obtained from the right holder by means mentioned in the preceding paragraph; or</li></ol>

3. disclosing, using or allowing others to use the trade secrets under its possession by breaching agreements or violating the requirements of the right holders on keeping confidential the trade secrets.

Where a third party obtains, uses or discloses the trade secrets of others when it has, or should have, the clear knowledge of **the illegal acts listed in the preceding paragraph**, the third party shall be deemed to have infringed on the trade secrets of others. For the purpose of this article, trade secrets refer to the technical information and operational information that are not known to the public, **can be used to bring economic benefits to the right holders, and have practicability** and for which the right holders have taken measures to ensure confidentiality.

3. To disclose, explore or permit others to explore the trade secrets at its disposal by breaching agreement or violating confidentiality requirement of the right holder.

Where a third party clearly knows or ought to know that **the employee or former employee of the trade secret owner or any other organisation or individual has conducted** the acts as prescribed in the preceding paragraph, **yet still** acquires, discloses, explores **or permits others to explore the trade secret**, such act shall be deemed as infringement upon trade secrets.

For purposes of the law, “trade secrets” refer to technology information or business information which is unknown to the public, **has commercial value** and for which the right holder has taken corresponding measures to ensure confidentiality.

<p><b>Article 11</b> An operator shall not sell its goods at a price below the cost for the purpose of excluding competitors. Such sales do not constitute acts of unfair competition under any of the following circumstances:</p> <ol style="list-style-type: none"><li>1. selling fresh or live goods;</li><li>2. disposing of goods whose useful life is about to expire, or disposing of other overstocked goods;</li><li>3. price cut due to seasonal factors; or</li><li>4. selling goods at lowered prices for paying off debts, changing the line of production or closing business.</li></ol>	
<p><b>Article 12</b> In selling goods, an operator shall not make tie-in sale against the wish of purchasers or attach other unreasonable conditions.</p>	

**Article 13** An operator shall not **engage in** any of the following types of sales with prizes:

1. engaging in sales with prizes in a fraudulent manner by falsely claiming the existence of prizes or intentionally making pre-chosen person win the prizes;
2. **promoting the sales of inferior but high-priced goods by offering prizes;** or
3. engaging in sales with prizes in the form of lucky draws where the amount of the highest prize exceeds **RMB5,000 Yuan**.

**Article 14** An operator shall not **fabricate stories or disseminate falsehoods** to damage the commodity reputation or business credit of a competitor.

**Article 10** The premium sale of a Business Operator shall not **have any of the following circumstances**:

1. **Where the type of prizes to be offered, conditions for claiming prize, amount of bonus, prize or other information of premium sale is unclear, which affects the claiming for prizes;**
2. Premium sale conducted by such deceptive means as falsely declaring to have prize or intentionally making a designated insider win the prize;
3. Premium sale in form of lottery-drawing with the highest prize exceeding **RMB50,000 Yuan**.

**Article 11** A Business Operator shall neither **fabricate nor disseminate false or misleading information** to defame the commercial credit of its competitors or the reputation of commodities of its competitors.

***Article 12*** A Business Operator that conducts its production and operation by using Internet shall obey the provisions of the law. A Business Operator shall not resort to technical means to commit any of the following acts that interfere or sabotage legitimate network products provided by other operators or normal running of the services offered by other operators by affecting the choice of users or by other means:

1. To insert without consent any link to the network product or service legally offered by other Business Operators, which mandatorily redirects the page to other targets;
2. To mislead, deceive or force users to revise, shut down or uninstall network product or service legally offered by other Business Operators;



	<p>3. To maliciously make the network product or service legally offered by other Business Operators incompatible; or</p> <p>4. Other acts that interfere or sabotage the normal running of network product or service legally offered by others.</p>
<p><b>Article 15</b> Tenderers shall not be involved in bid-rigging to force up or down the tender prices.</p> <p>A tenderer shall not collaborate with the bidder to exclude competitors from fair competition.</p>	
<b>Chapter III Control and Inspection</b>	<b>Chapter III Investigation on Suspected Unfair Competition Acts</b>
<p><b>Article 16</b> The control and inspection authorities above the county level may exercise control over and carry out inspection of acts of unfair competition.</p>	

**Article 17** In monitoring and investigating acts of unfair competition, the control and inspection authorities **are entitled to exercise the following functions and powers:**

1. questioning the operators under investigation, interested parties **and witnesses in accordance with the prescribed procedures** and requiring them to provide **evidential materials** or other information related to acts of unfair competition;
2. accessing to and copying agreements, account books, vouchers, documents, records, business correspondence and other materials related to acts of unfair competition; and
3. **inspecting property related to acts of unfair competition as stipulated in Article 5 of the Law, and, where necessary, ordering other operators under investigation to explain the source and quantity of the goods, to temporarily stop selling the same and wait for inspection, and not to remove, conceal or destroy them.**

**Article 13** The supervision and inspection departments, **may take the following measures** in investigating suspected Unfair Competition Acts:

1. **To enter and conduct inspection at the premises of a Business Operator that is suspected of committing Unfair Competition Acts;**
2. To inquire the Business Operator, the interested parties, **and other relevant entities and individuals** that are under investigation, and require them to **explain the situation** or provide other materials pertinent to the acts **being investigated;**
3. To check and duplicate agreements, ledgers, vouchers and invoices, documents, records, business correspondences or other materials relating to the **suspected** Unfair Competition Acts;
4. **To seize or detain properties relating to the suspected Unfair Competition Acts; and**

	<p>5. To check bank accounts of the Business Operator that is suspected of committing Unfair Competition Acts. Execution of the measures as provided in the preceding paragraph requires a written report filed to and an approval from the head of supervision and inspection departments. Execution of the measures as provided in preceding paragraph 4 and 5 requires a written report filed to and an approval from the head of supervision and inspection department subordinate to the people's government at and above municipal level with district administration division. Supervision and inspection departments shall comply with the Administrative Coercion Law of the People's Republic of China and other relevant laws and administrative regulations in their investigation of suspected Unfair Competition Acts. The result of investigation and punishment shall be made public in time.</p>
<p><b>Article 18</b> When monitoring and investigating acts of unfair competition, members of the control and inspection authorities shall produce warrants of inspection.</p>	

<p><b>Article 19</b> Where the control and inspection authorities are <b>monitoring</b> and investigating acts of unfair competition, the operators under investigation, interested parties and <b>witnesses</b> shall truthfully provide them with relevant data or information.</p>	<p><b>Article 14</b> The Business operator, the interested parties and <b>other relevant entities or individuals</b> that are under <b>investigation</b> shall truthfully provide relevant materials or particulars when the supervision and inspection departments <b>investigate</b> suspected Unfair Competition Acts.</p>
	<p><b>Article 15</b> The supervision and inspection departments and <b>their functionaries</b> are obliged to keep the confidentiality of the trade secrets that come to their knowledge during the process of investigation.</p>
	<p><b>Article 16</b> Any entity or individual is entitled to report any suspicious Unfair Competition Act to the supervision and inspection departments. The supervision and inspection departments shall handle the matter according to law in a timely manner.</p>

	<p>Supervision and inspection departments shall make public the telephone number, mail box or email address for acceptance of reporting, and keep whistleblower's identity confidential. The supervision and inspection departments shall inform the whistleblower who provides relevant facts and evidences in his real identity of the result of the matter.</p>
Chapter IV Legal Liability	Chapter IV Legal Liability
	<p><b>Article 17</b> A Business Operator, which violates the provisions of the law and thus causes damage to others, shall bear <b>civil liability</b> according to the laws. A Business Operator whose lawful rights and interests are damaged by Unfair Competition Acts may bring a lawsuit before a people's court.</p>

**Article 20** An operator, where causing damage to **an injured operator** for contravention of the provisions of the Law, shall bear **liability for compensating for the damages**. Where the losses suffered by the injured operator are difficult to calculate, the amount of damages shall be the profit gained by the infringer during the period of infringement through the infringing act. The infringer shall also bear all reasonable costs paid by the injured operator in **investigating the acts of unfair competition committed by the operator suspected of infringing its or his lawful rights and interests**.

When the lawful rights and interests of the injured operator are damaged by the acts of unfair competition, such injured operator may institute proceedings in a people's court.

The amount of compensation for the Business Operator that has been harmed by the Unfair Competition acts shall be assessed in accordance with the actual damages it has suffered from the infringement; if it is difficult to assess the actual damages, the amount of compensation shall be equivalent to the profit that the infringer has earned through the infringement. The amount of compensation shall cover the rational expenses paid by the Business Operator for **stopping** the infringing act.

**Where A Business Operator violates the provisions of Article 6 and Article 9 of the law, yet it is difficult to determine the amount of loss suffered by the infringed from the infringing act or the amount of the infringer's profit obtained from the infringing act, the people's court shall make a decision on the amount of compensation not higher than RMB 3 million yuan, by taking into account the seriousness of the infringement.**

**Article 21** Where passing off the registered trademark of another person, using the enterprise name or personal name of another person without authorization, counterfeiting or fraudulently using symbols of quality such as symbols of authentication and symbols of famous and high-quality goods, falsifying the origin of the goods and making false representations that are misleading as to the quality of the goods, an operator shall be punished in accordance with the provisions of the Trademark Law of the People's Republic of China and the Product Quality Law of the People's Republic of China. Where an operator uses, without authorization, the name, packaging or decoration peculiar to well-known goods or uses names, packaging or decoration similar to those of well-known goods so that such operator's

**Article 18** Where a Business Operator conducts confusion acts thus violates the provisions of Article 6 of the law, the supervision and inspection department shall order it to stop such acts and confiscate the illegal merchandise. The supervision and inspection department may concurrently impose a fine of not more than five times of the illegal turnover in case the illegal turnover is more than RMB50,000 Yuan, or a fine of up to RMB250,000 Yuan in case there is no illegal turnover or the illegal turnover is less than RMB50,000 Yuan. If the circumstances are serious, the supervision and inspection department may revoke the business license of the Business Operator. Where the business name registered by a Business Operator violates the provisions of Article 6 of the law, the Business Operator shall apply for change of registration of name in time. The

**goods are confused with the well-known goods of others, causing buyers to mistake them for the well-known goods,** relevant control and inspection authorities shall order the same to stop the offence, confiscate the illegal **income**, and may impose, according to circumstances, a fine of **not less than one time but not more than three times the amount of illegal income**; where the circumstances are serious, the said authorities may revoke its or his business license; **where an operator sells goods counterfeited or of inferior quality, which constitutes a crime, criminal liability shall be prosecuted according to the law.**

**original enterprise registration authority shall replace such name with a Uniform Social Credit Code before name change.**



**Article 22** Where an operator practices bribery **by using money, valuables or other means to sell or purchase goods, which constitutes a crime, criminal liability shall be prosecuted according to the law; where the act does not constitute a crime,** relevant control and inspection authority may, according to circumstances, impose a fine of **not less than RMB10,000 Yuan but not more than RMB200,000 Yuan. Illegal income involved, if any, shall be confiscated.**

**Article 19** Where a Business Operator offers bribes to others **thus violates the provisions of Article 7 of the law,** the supervision and inspection department shall **confiscate the illegal turnover** and impose a fine of **more than RMB100,000 Yuan but not higher than RMB3,000,000 Yuan. If the circumstances are serious,** the supervision and inspection department may revoke the business license of the Business Operator.

**Article 23** Where public utilities or other operators having monopolistic status according to the law force others to buy the goods of the operators designated by them so as to exclude other operators from competing fairly, the control and inspection authorities at the level of provinces or of cities that are divided into districts shall order them to desist from the illegal acts and may punish them by imposing, according to circumstances, fines of not less than RMB50,000 Yuan but not more than RMB200,000 Yuan. Where the designated operators take advantage of the illegal arrangements to foist inferior but high-priced goods on buyers or make exorbitant charges, the control and inspection authorities shall confiscate the illegal income and may, according to circumstances, impose fines of not less than one time but not more than three times the illegal income.

**Article 24** Where an operator **uses advertisement or other means to give false and misleading information** on goods thereof, relevant control and inspection authority shall order the same to desist from the illegal act, **dispel the bad influence**, and may, **according to circumstances**, impose a fine of **not less than RMB10,000 Yuan but not more than RMB200,000 Yuan**. Where an advertising operator acts as an agent for, or design, produce or release false advertisements when such operator clearly knows, or should have known, that the information in the advertisements is false, relevant control and inspection authority shall order such operator to desist from the illegal act, confiscate illegal income, and impose a fine according to the law.

**Article 20** Where a Business Operator violates the provisions of Article 8 of the law by making false or misleading commercial promotion of its merchandise or by helping other operators making false or misleading commercial promotion by organizing fraudulent transactions, the supervision and inspection department shall order it to stop the illegal act and impose a fine of more than RMB200,000 Yuan but not higher than RMB1,000,000 Yuan. If the circumstances are serious, the supervision and inspection department shall impose a fine of more than RMB1,000,000 Yuan but not higher than RMB2,000,000 Yuan, and may revoke the business license of the Business Operator. Where a Business Operator violates provisions of Article 8 of the law in deceptive advertising, it shall be punished in accordance with the provisions of the Advertisement Law of the People's Republic of China.

<p><b>Article 25</b> Where any party infringes on trade secrets in violation of the provisions of <b>Article 10</b> of the Law, relevant control and inspection authority shall order the same to desist from the illegal act and may, <b>according to circumstances</b>, impose a fine of <b>not less than RMB10,000 Yuan but not more than RMB200,000 Yuan</b>.</p>	<p><b>Article 21</b> Where a Business Operator infringes upon trade secrets of others thus violates the provisions of <b>Article 9</b> of the law, the supervision and inspection department shall order such Business Operator to stop the illegal act and impose a fine of <b>more than RMB100,000 Yuan but not higher than RMB500,000 Yuan</b>. <b>If the circumstances are serious, the supervision and inspection department shall impose a fine of more than RMB500,000 Yuan but not higher than RMB3,000,000 Yuan to such Business Operator.</b></p>
<p><b>Article 26</b> Where an operator makes sales with prizes attached in contravention of the provisions of <b>Article 13</b> of the Law, relevant control and inspection authority shall order the same to desist from the illegal act and may, <b>according to circumstances</b>, impose a fine of <b>not less than RMB10,000 Yuan but not more than RMB100, 000 Yuan</b>.</p>	<p><b>Article 22</b> Where a Business Operator carries out premium sale in violation of the provisions of <b>Article 10</b> of the law, the supervision and inspection department shall order it to stop the illegal act and impose a fine of <b>more than RMB50,000 Yuan but not higher than RMB500,000 Yuan</b>.</p>

***Article 23*** Where a Business Operator defames the commercial credit or the reputation of commodities of its competitors thus violates the provisions of Article 11 of the law, the supervision and inspection department shall order it to stop the illegal act and eliminate adverse effects, and impose a fine of more than RMB100,000 Yuan but not higher than RMB500,000 Yuan. If the circumstances are serious, the supervision and inspection department shall impose a fine of more than RMB500,000 Yuan but not higher than RMB3,000,000 Yuan to such Business Operator.

	<p><b><i>Article 24</i></b> Where a Business Operator interferes or sabotages legitimate network products provided by other operators or normal running of the services offered by other operators so as to breach the provisions of Article 12 of the law, the supervision and inspection department shall order it to stop the illegal act and impose a fine of more than RMB100,000 Yuan but not higher than RMB500,000 Yuan. If the circumstances are serious, the supervision and inspection department shall impose a fine of more than RMB500,000 Yuan but not higher than RMB3,000,000 Yuan to such Business Operator.</p>
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*Article 25* Where a Business Operator violates the provisions of the law and engages in unfair competition act, such operator may be imposed a lighter or mitigated administrative punishment provided that the operator takes initiatives to remove or minimize the consequential damage caused by his illegitimate act or there is any other circumstances explicitly provided by laws that enables the application of a lighter or mitigated administrative punishment. No administrative punishment shall be inflicted if the circumstance is minor and such Operator rectifies his behaviours in time so that no consequential damage is caused.

	<b><i>Article 26</i></b> Where a Business Operator engages in unfair competition thus is in violation of the law, for which it is imposed administrative punishment, the supervision and inspection department shall put it on the credit record of such Business Operator and publicize thereof in accordance with relevant laws and regulations.
	<b><i>Article 27</i></b> Where a Business Operator shall bear civil liability, administrative liability and criminal liability for its violation of the provisions of the law, but its properties are insufficient to reimburse both the compensation and the fines, it shall bear the civil liability on a priority basis.



*Article 27* Where tenderers are involved in bid-rigging to force up or down the tender prices, or where a tenderer collaborates with the bidder to exclude competitors from fair competition, such tenderer's successful bid is null and void. The control and inspection authorities may, according to circumstances, impose a fine of not less than RMB 10,000 Yuan but not more than RMB200,000 Yuan.

***Article 28*** Where an operator commits an act in contravention of an order to temporarily stop selling, and not to remove, conceal or destroy, property related to acts of unfair competition, relevant control and inspection authority may, according to circumstances, impose a fine of not less than one time but not more than three times the price of the property that has been sold, removed, concealed or destroyed.

***Article 28*** Where a Business Operator impedes the supervision and inspection departments from fulfilling its duties according to the Law by refusing or obstructing investigation, the supervision and inspection departments shall order the operator to rectify its act and impose a fine of not higher than RMB5,000 Yuan if the offender is an individual or a fine of not higher than RMB50,000 Yuan if the offender is an entity. The supervision and inspection departments may also refer the case to the public security organs for their punishment if such act contravenes public security administration regulations.

**Article 29** Where a party refuses the decision on punishment made by relevant control and inspection authority, such party may, **within 15 days upon receipt of the decision on punishment, apply to the competent authority at the next higher level** for reconsideration; **where the party refuses the decision made after reconsideration, such party may, within 15 days upon receipt of the written decision made after reconsideration,** institute proceedings in a people's court; **the party may also directly institute proceedings in a people's court upon receipt of the decision on punishment.**

**Article 29** Where the parties concerned dissatisfy with any decision made by the supervision and inspection department, they may apply for administrative review or file an administrative lawsuit in accordance with the laws.

**Article 30** Where a local government and its subordinate departments, in contravention of the provisions of Article 7 of the Law, force others to buy the goods of the operators designated by them, restrict the legitimate business activities of other operators, or restrict the normal flow of goods among regions, the higher authorities shall order them to rectify the situation; where the circumstances are serious, the competent authorities at the same level or the next higher level shall take disciplinary sanctions against the persons directly liable. Where the designated operators, taking advantage of this illegal arrangement, foist inferior but high-priced goods or make exorbitant charges, the control and inspection authorities shall confiscate the illegal income and may, according to circumstances, impose a fine of not less than one time but not more than three times the illegal income.

**Article 31** Where a staff member of the **State organs controlling and investigating acts of unfair competition** engages in power abuse and neglect of duty, **which constitutes a crime, criminal liability shall be prosecuted according to the law; where the act does not constitute a crime, the said staff member shall be disciplined administratively.**

**Article 32** Where a staff member of the State organs controlling and investigating acts of unfair competition engages in malpractices for personal gains **and intentionally covers an operator up from prosecution, fully knowing that such operator has contravened the provisions of the Law, which constitutes a crime, the said staff member shall be prosecuted for criminal liability according to the law.**

**Article 30** Where the functionaries of the **supervision and inspection departments** commit any of the act as abuse of power, dereliction of duty, practicing favoritism, or ***divulging the trade secrets that comes to their knowledge during the process of investigation***, the offender shall be imposed punishment according to the laws.

	<b><i>Article 31</i></b> Anyone who violates the provisions of the law and whose act constitutes crime shall be subject to criminal prosecution.
<b>Chapter V Supplementary Provision</b>	<b>Chapter V Supplementary Provision</b>
<b><i>Article 33</i></b> The Law shall come into force as of December 1, 1993.	<b><i>Article 32</i></b> The Law shall take effect as of <b>January 1, 2018</b> .

## Interpretation of the Supreme People's Court on Some Matters Concerning the Application of Law in the Trial of Civil Cases Involving Unfair Competition

Fa Shi [2007] No. 2

The Interpretation of the Supreme People's Court on Some Matters Concerning the Application of Law in the Trial of Civil Cases Involving Unfair Competition has been adopted at the 1412th meeting of the Judicial Committee of the Supreme People's Court on December 30, 2006. It is hereby promulgated and shall enter into force as of February 1, 2007.

January 12, 2007

### **Interpretation of the Supreme People's Court on Some Matters Concerning the Application of Law in the Trial of Civil Cases Involving Unfair Competition**

(Adopted at the 1412th meeting of the Judicial Committee of the Supreme People's Court on December 30, 2006)

For the purpose of correctly hearing the civil cases involving unfair competition, lawfully protecting the legitimate rights and interests of business operators, and maintaining the order of market competition, the present Interpretation is constituted in accordance with the General Principles of the Civil Law of the People's Republic of China, the Anti-unfair Competition Law of the People's Republic of China, and the

Civil Procedure Law of the People's Republic of China and in combination with the experiences and actual situation of the trial practice.

**Article 1** Well-known commodities as stipulated in Subparagraph (2) of Article 5 of the Anti-unfair Competition Law refer to those commodities that have certain market popularity within the territory of China and are known by the public concerned. The people's court shall take into account the time, region, volume and targets for selling such commodities, the duration, degree and scope for any promotion of such commodities, as well as the protection situation as well-known commodities, and make comprehensive judgments when affirming well-known commodities. The burden of proof for the market popularity of commodities shall be assumed by the plaintiff.

In case an identical or similar name, package or ornament with that peculiar to a well-known commodity is used within a different region, it shall not constitute unfair competition as stipulated in Subparagraph (2) of Article 5 of the Anti-unfair Competition Law, provided that the later user can prove its good faith in using it. Where the sources of commodities of the earlier user are confused due to the later business activities conducted within the same zone, the people's court shall give support when the earlier user pleads the court to order the later to add other signs to make a distinction on the sources of its commodities.

**Article 2** In case the name, package and ornament of commodities possesses distinctive features so as to function as source identifier of these commodities, it shall be deemed as the peculiar name, package and ornament as stipulated in Subparagraph (2) of Article 5 of the Anti-unfair Competition Law. In case of any of the following circumstances, the people's court shall not ascertain them as the peculiar name, package and ornament of well-known commodities:

- (1) the generic name, graphics or model of the commodities;



(2) the name of the commodities that directly specifies mere quality, major raw materials, functions, utilities, weight, quantity or any other characteristic of the commodities;

(3) the shape produced due to the nature of the commodities, the shape of the commodities that should be produced for the purpose of obtaining technical effects, as well as the shape that produces substantial value to the commodities; or

(4) other name, package or ornament of the commodities that has no distinctive features.

In case the distinctive features are acquired through use under any circumstance as stipulated in Subparagraph (1), (2) or (4) of the preceding paragraph, it can be regarded as a peculiar name, package and ornament.

In case the peculiar name, package or ornament of a well-known commodity includes the generic name, graphics, or model of the said commodity in question, or directly indicates the quality, major raw materials, functions, utilities, weight, quantity or any other characteristic of the said commodity, or involves the name of the place, if it is fairly used by any other party for narrating commodities, it shall be deemed that an unfair competition is not constituted.

**Article 3** In case the ornament of the business place, the pattern of business appliances, or the clothes of operating personnel, and etc. constitutes an overall business image with a unique style, it may be ascertained as the ornament as stipulated in Subparagraph (2) of Article 5 of the Anti-unfair Competition Law.

**Article 4** In case of any confusion concerning the source of a commodity arising among the relevant public, including the misapprehension of a certain relationship such as licensed use or affiliation with the business operator of a well-known commodity, it shall be regarded as causing the confusion with the well-known commodity of someone else, and making the consumers mistake it to be a well-

known commodity as stipulated in Subparagraph (2) of Article 5 of the Anti-unfair Competition Law.

In case any name, package or ornament of a commodity that is identical or almost visually identical is used on the same commodity, the court shall ascertain that it suffices to cause confusion with the well-known commodity of someone else.

The criteria for finding certain name, package or ornament to be identical with or similar to the peculiar name, package or ornament of a well-known commodity may be ascertained with reference to the principles and methods for judging identical or similar trademarks.

**Article 5** In case the name, package or ornament of a commodity is a sign that cannot be used as a trademark as stipulated in Paragraph 1 of Article 10 of the Trademark Law, if the party concerned applies to the court for protection in accordance with Subparagraph (2) of Article 5 of the Anti-unfair Competition Law, the people's court shall not give support.

**Article 6** A name of any enterprise registered with the enterprise registration authority, or a name of any foreign enterprise used within the territory of China for commercial use shall be ascertained as an enterprise name as stipulated in Subparagraph (3) of Article 5 of the Anti-unfair Competition Law. A trade name in the name of enterprise that has certain market popularity and is known by the relevant public may be ascertained as an enterprise name as stipulated in Subparagraph (3) of Article 5 of the Anti-unfair Competition Law.

The name of any natural person used in the business operation of commodities shall be ascertained as a name as stipulated in Subparagraph (3) of Article 5 of the Anti-unfair Competition Law. The pen name or stage name of any natural person that has certain market popularity and is known by the relevant public may be ascertained as a name as stipulated in Subparagraph (3) of Article 5 of the Anti-unfair Competition

Law.

**Article 7** As regards the commercial use within the territory of China that includes the use of the peculiar name, package or ornament of a well-known commodity, or use of the enterprise title or name for a commodity, commodity packages or commodity transaction documents, or for advertisements, exhibitions or any other commercial activities, it shall be ascertained as the use as stipulated in Subparagraphs (2) and (3) of Article 5 of the Anti-unfair Competition Law.

**Article 8** In case of any of the following acts committed by a business operator, if it suffices to cause the misapprehension of the relevant public, it may be ascertained as a false or misleading promotion as stipulated in Paragraph 1 of Article 9 of the Anti-unfair Competition Law:

- (1) implementing *ex parte* or contrastive promotion of commodities;
- (2) implementing the promotion of commodities by adopting inconclusive scientific viewpoints or phenomena as conclusive facts; or
- (3) implementing the promotion of commodities by way of using ambiguous language or other misleading methods.

In case the commodities are publicized by way of obviously exaggerating, if it is insufficient to cause misidentification among the relevant public, it shall not be ascertained as the false or misleading promotion.

The people's court shall ascertain the false or misleading promotion in light of daily life experiences, the general attention of the public concerned, the fact being misunderstood, as well as the reality of the promotion objects, and etc.

**Article 9** If the related information is neither generally aware by the related personnel in the field therefrom and nor easily accessible, it shall be ascertained as unknown to the public as stipulated in Paragraph 3 of Article 10 of the Anti-unfair Competition Law.

In case of any of the following circumstances, it may be ascertained that the related information is not unknown to the public:

- (1) It is the common sense or industrial practice as known by people in the related technical or economic field;
- (2) It only involves the simple combination of dimensions, structures, materials and components of products, and can be directly obtained through observation of the products by the relevant public after the products enter the market;
- (3) It has been publicly revealed on any publication or any other mass medium;
- (4) It has been published by public reports or exhibits;
- (5) It can be obtained through other public channels; or
- (6) It can be easily obtained without paying a certain price.

**Article 10** In case the related information has practical or potential commercial value, and can be used for bringing competitive advantage for the obligee, it shall be ascertained as capable of bringing about benefits to the obligee, and having practical applicability as stipulated in Paragraph 3 of Article 10 of the Anti-unfair Competition Law.

**Article 11** If the obligee takes proper protection measures that is adapted to the commercial value or any other specific circumstance for the purpose of avoiding information divulgence, it shall be deemed as confidentiality measures as stipulated in Paragraph 3 of Article 10 of the Anti-unfair Competition Law.

The people's court shall ascertain whether the obligee has taken confidentiality measures in accordance with the features of the related information carrier, the obligee's willingness for keeping confidentiality of the information, the identifiability degree of the confidentiality measures, the difficulty for others to obtain it by justifiable methods and other elements.

In case of any of the following circumstances that would be normally sufficient

to prevent the divulging of any classified information, it shall be ascertained that the obligee has taken the confidentiality measures:

- (1) To limit the access scope of the classified information, and the contents shall only be revealed to related personnel that must be aware of the information;
- (2) To take such preventive measures as locking the carrier of the classified information up;
- (3) To tag a confidentiality sign on the carrier of classified information;
- (4) To use passwords or codes on the classified information;
- (5) To conclude a confidentiality agreement;
- (6) To limit the access of visitors to the classified machinery, factory, workshop or any other place or bring forward any confidentiality request; or
- (7) Any other reasonable measure for guaranteeing the confidentiality of information.

**Article 12** As regards business secrets obtained through development and research by itself or reverse engineering, it shall not be ascertained as an infringement upon business secrets as stipulated in Subparagraphs (1) and (2) of Article 10 of the Anti-unfair Competition Law.

Reverse engineering referred to in the preceding paragraph means to obtain the related technical information on the products in technical methods by way of disassembling, mapping or analyzing the products obtained from public channels. Any party concerned that knows the business secrets of someone else by unjustifiable methods and then claims its acquisition as lawful by using reverse engineering as defence shall not be supported.

**Article 13** The list of clients as categorized as business secrets generally refers to the special client information that is different from related public information, including the name, address, contact information, trading practice, intent, and

contents of the clients, which includes the roll of clients that comprises of numerous customers as well as the specific customers that have kept a long-term and stable transaction relationship.

In case a client makes market transactions with the entity due to its confidence in an individual employee thereof, after this employee leaves the entity, if it can be proved that this client voluntarily chooses to perform market transactions with the said employee or the new entity he works for, it shall be ascertained that no unfair methods has been adopted, unless it is otherwise agreed between this employee and the former entity.

**Article 14** As regards any party concerned that claims that someone else has infringed upon its business secret, it shall bear the burden of proof to verify that its business secret satisfies the statutory requirements, the information of the other party concerned is identical or substantially identical with its business secret, and the other party concerned has adopted unfair methods. Among others, the evidence for proving that its business secret satisfies the statutory requirements shall include the carrier, specific contents, and commercial value of this business secret as well as the specific confidentiality measures taken for this business secret.

**Article 15** If the licensee of the license contract for the exclusive use of the business secret brings an action as regards infringement upon any business secret, it shall be accepted by the people's court in accordance with related laws.

If the licensee of the license contract for the sole use, brings jointly with the obligee, an action, or the licensee brings an action on its own provided that the obligee does not initiate an action, it shall be accepted by the people's court in accordance with the related laws.

If the licensee of the license contract for common use, brings jointly with the obligee, an action, or the licensee brings an action on its own upon authorization of the

obligee in writing, it shall be accepted by the people's court in accordance with the related laws.

**Article 16** When the people's court make an adjudication of the civil liability to stop the infringement on any business secret, the time for stopping the infringement shall generally be prolonged to the time when this business secret has been aware by the general public.

In case the time for stopping the infringement adjudicated in accordance with the preceding paragraph is clearly unreasonable, provided that the competitive advantage of the obligee to this business secret is protected, the infringer may be ordered to stop using this business secret within a certain period or scope.

**Article 17** As regards determining the damages for the acts infringing on business secrets as stipulated in Article 10 of the Anti-unfair Competition Law, reference may be made to the methods of determining damages for patent infringements, and as regards determining the damages for the unfair competition acts as stipulated in Article 5 , 9 or 14 of the Anti-unfair Competition Law, reference may be made to the methods of determining damages for infringing upon registered trademark rights.

If any business secret has been made aware by the general public due to any tort, the damages shall be determined based on the commercial value of this business secret. The commercial value of this business secret shall be ascertained in light of such elements as the research and development costs, the proceeds of implementing this business secret, anticipated benefits, and the time for maintaining the competitive advantage, and etc.

**Article 18** The civil cases of the first instance concerning the unfair competition as stipulated in Article 5 , 9, 10 or 14 of the Anti-unfair Competition Law shall generally fall under the jurisdiction of the intermediate people's court.

Upon approval of the Supreme People's Court, the higher people's court may

appoint some grass-roots people's courts to hear the civil cases of the first instance concerning unfair competition in accordance with the actual situation of its jurisdiction. Those grass-roots people's courts that have been approved to hear civil cases regarding intellectual property may continue to hear unfair competition cases.

**Article 19** The Interpretation shall enter into force as of February 1, 2007.



## Interpretation of the Supreme People's Court on the Application of Laws in the Trial of Civil Disputes over Domain Names of Computer Network

Fa Shi [2001] No. 24

The Interpretation of the Supreme People's Court on the Application of Laws in the Trial of Civil Disputes over Domain Names of Computer Network has been adopted at the 1182nd Meeting of the Judicial Committee of the Supreme People's Court on June 26, 2001 and shall enter into force as of July 24, 2001.

### **Interpretation of the Supreme People's Court on the Application of Laws in the Trial of Civil Disputes over Domain Names of Computer Network**

In order to properly adjudicate the civil dispute cases over registration or use of domain names of computer network (hereinafter domain name cases), the Supreme People's Court promulgates the interpretation as follows, in accordance with the provisions of the General Principles of the Civil Law of the People's Republic of China (hereinafter the General Rules of the Civil Law), the Anti-unfair Competition Law of the People's Republic of China (hereinafter the Anti-unfair Competition Law), and the Civil Procedure Law of the People's Republic of China (hereinafter the Civil Procedure Law):

**Article 1** Where a party brings an action concerning the civil disputes over the

registration or use of domain names of computer network, the people's court shall accept the case if it finds that the filing of the suit is in conformity with the provisions of Article 108 of the Civil Procedure Law.

**Article 2** The intermediate people's courts in the places where the infringing acts are committed or where the defendant domiciles, have jurisdiction over domain name infringement cases. Where it is difficult to determine the place where the infringing acts are committed or where the defendant has his domicile, the place where the computer terminal or other equipment to which the plaintiff backtracks the domain name is located may be deemed as the place where the infringing acts are committed.

The domain name cases involving foreign elements include those cases where one party or both parties are foreigners, stateless persons, foreign enterprises or organizations or international organizations, or those domain name cases involving domain names that are registered in foreign countries. The jurisdiction over those domain name cases involving foreign elements that arise in the People's Republic of China, shall be subject to the provisions of Part 4 of the Civil Procedure Law.

**Article 3** The cause of action of a domain name case is affirmed based on the nature of the legal relation in dispute between the parties. The naming of the cause of action of such cases shall be comprised of the words "domain names of the computer network" and the description specifying the nature of the legal relation in dispute. In case the nature of the legal relation in dispute is difficult to affirm, the case may be referred generally as domain name of computer network case.

**Article 4** The people's court, when adjudicating a domain name case, shall find a defendant's action of registration or use of the domain names constitutes infringement or unfair competition, provided that the following conditions are met:

- (1). The civil rights and interests for whose protection the plaintiff seeks are

legitimate and valid;

(2). The defendant's domain names or the main parts of its domain names constitute copies, imitations, translations, or transliterations of the plaintiff's well-known trademarks; or such domain names or the main parts of the domain names are identical with or similar to the plaintiff's registered trademarks or domain names so as to cause misidentification among the relevant public;

(3). The defendant has neither rights nor interests over the domain names or the main parts thereof, and the defendant has no reasonable ground for registration or use of such domain names;

(4). The defendant registers or uses such domain name in bad faith.

**Article 5** The people's court shall find a defendant's act exhibits bad faith, provided that it falls under one of the following circumstances:

(1). Registering others' well-known trademarks for commercial purposes;

(2). Registering or using domain names that are identical with or similar to the plaintiff's registered trademarks or domain names for commercial purposes, and intentionally cause confusion with the plaintiff's products, services, or websites, so as to mislead the network users into visiting his own websites or other online sites;

(3). Offered to sell, rent, or assign, at high price, the domain names in other ways to seek for unfair interests;

(4). Neither use nor prepare to use the domain names after registration and intentionally obstruct the right owner from registering such domain names;

(5). Other circumstances exhibiting bad faith.

Where the defendant is able to adduce evidence to prove that the domain names in his possession have attained certain reputation prior to the arising of the dispute, and that his domain name is distinguishable from the plaintiff's registered trademarks or domain names, or where there are other circumstances proving that the defendant

bears no bad faith, the people's court may find that the defendant has no bad faith.

**Article 6** The people's court, when adjudicating a domain name case, may determine whether the registered trademarks involved has reached well-known, by taking into consideration the parties' request and the circumstances of the cases.

**Article 7** Where the circumstance of a domain name case falls under the conditions as provided in Article 4 of this interpretation, and the people's courts find that such circumstance constitutes infringement in accordance with relevant laws and regulations, the people's court shall apply corresponding provisions of laws; if such circumstance constitutes unfair competition, the court shall apply the provisions of Article 4 of the General Rules of the Civil Law and Article 2.1 of the Anti-unfair Competition Law.

Domain name cases involving foreign elements shall be adjudicated according to the provisions of Chapter 8 of the General Rules of the Civil Law.

**Article 8** In case the people's court finds that the registration or use of domain names constitutes infringement or unfair competition, the court may order the defendant to cease infringement and revoke the domain names, or uphold the plaintiff's request by allowing the plaintiff to register and use the domain names; where the right owner has suffered substantial damages, the court may order the defendant to indemnify the right owner for its damages.

## Provisions of the Supreme People's Court on Issues Concerning the Trial of Cases of Civil Disputes over Conflicts between Registered Trademark or Enterprise Name and Prior Rights

Fa Shi [2008] No. 3

The Provisions of the Supreme People's Court on Issues Concerning the Trial of Cases of Civil Disputes over Conflicts between Registered Trademark or Enterprise Name and Prior Right has been adopted at the 1444th meeting of the Judicial Committee of the Supreme People's Court on February 18, 2008. It is hereby promulgated and shall enter into force as of March 1, 2008.

With a view to properly adjudicate cases of civil dispute over conflicts between registered trademark or enterprise name and prior right, these Provisions are formulated in accordance with the provisions of the Civil Procedure Law of the People's Republic of China, the General Principles of the Civil Law of the People's Republic of China, the Trademark Law of the People's Republic of China, and the Anti-Unfair Competition Law of the People's Republic of China, by taking into consideration of the trial practices.

**Article 1** Where a plaintiff files a lawsuit on the ground that the character or graphic used in other's registered trademark infringes upon its copyright, design patent, enterprise name, or other prior rights, which conforms to the provisions of Article 108 of the Civil Procedure Law, the people's court shall accept the lawsuit.

If a plaintiff files a lawsuit on the ground that a registered trademark used by others in respect of designated goods that are identical with or similar to those of the plaintiff's prior registered trademark, the people's court shall, pursuant to the provisions of Article 111.1.3 of the Civil Procedure Law, notify the plaintiff to apply to the competent administrative authority for settling the matter. However, in case a plaintiff files a lawsuit on the ground that the registered trademark used by others goes beyond the scope of the designated goods or such registered trademark is used in the manner of, among others, changing the distinctive features, splitting, or combination, so that it is identical with or similar to the plaintiff's registered trademark, the people's court shall accept the lawsuit.

**Article 2** Where a plaintiff files a lawsuit on the ground that other's enterprise name is identical with or similar to its prior enterprise name, so as to cause confusion among the public as to the source of the product concerned and thus is in violation of the provisions of Article 5.1.3 of the Anti-Unfair Competition Law, which conforms to the provisions of Article 108 of the Civil Procedure Law, the people's court shall accept the lawsuit.

**Article 3** The people's court shall, based on the plaintiff's litigation claims and the nature of the civil legal relation in dispute, determine the cause of action of the civil dispute over the conflict between registered trademark or enterprise name and prior right and apply corresponding laws, in accordance with the Provisions on the Cause of Action of Civil Cases (for Trial Implementation).

**Article 4** Where a litigious enterprise name of the defendant infringes upon the exclusive right to use a registered trademark or constitute unfair competition, the people's court may determine, in light of the plaintiff's litigation claims and the circumstances of the case, order the defendant to cease or regularize its use of the enterprise name and assume corresponding civil liabilities.



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