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When we type a query into a search engine, beyond the organic results which are what the search engine determines to be the most relevant content for the query, we often discover, at the top of the page, those popups marked with an "Ad label". How does that work? It is quite simple: a company pays the search engine to make sure that each time a user types in the name, or the trademark, of a certain peer company, the search result features both companies, like an implant marketing. In other words, the company who paid the search engine will get extra exposure and immediate visibility, thus benefiting from the reputation of its peer.

Is this fair or not fair? That is the question.

This issue has been the object of a recent revision of the Anti-Unfair Competition Law of China (AUCL) and of two judicial decisions which contradict the previous positions adopted by the Supreme People's Court of China.

This situation is, therefore, worth analyzing in detail.

First of all, there are different types of keyword use: the use can be "explicit" or "implicit". In the "explicit" use, the keyword appears inside the webpage of the company who paid the search engine while in the "implicit" use, the word does not appear. Furthermore, the "implicit" use can be of two different kinds: either it appears on the page as if it was the natural result of the search, or it is clearly labelled "advertising".

With regards to "fairness", the "explicit" use is obviously as an unfair "confusing" act, as mentioned in the AUCL. The "implicit use", where the appearance of the competitor's name pretends to be the natural result of the search is also problematic: there is a general consensus that such practice is not fair.

However, when the use is not only "implicit" but is also prominently labelled as an advertisement, the opinions as to "fair or not fair" diverge. Some argue that such practice, which does not cause any confusion, belongs to the realm of free competition, while others maintain that such act of freeriding is contrary to the principle of fairness.

It is, therefore, necessary to examine the issue in its international and national legal context.

Article 10 bis of the Paris Convention:

The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.

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

The following in particular shall be prohibited:

- (i) 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;
- (ii) 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;
- (iii) 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.

Put in simple words, this article means that, as a matter of principle, business operators must behave according

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to "honest trade practices" and act in "good faith". Given the multifaceted nature of competition and competitive behavior, the catalogue of prohibited acts in Article 10bis (3) of the Paris Convention can hardly be expected to be exhaustive, hence the need for examples of what "in particular" constitutes unfair practices: (1) the fact of creating confusion with a competitor, (2) the fact of discrediting the reputation of a competitor, and (3) false advertising.

The Model Provisions on Protection Against Unfair Competition of 1996 (WMP)

In line with Article 10bis of the Paris Convention, WMP Article 3(1) makes clear that: "Any act or practice, in the course of industrial or commercial activities, that damages, or is likely to damage, the goodwill or reputation of another's enterprise shall constitute an act of unfair competition, regardless of whether such act or practice causes confusion". And WMP Article 3(2)(b) specifies: "dilution of goodwill or reputation means the lessening of the distinctive character or advertising value of a trademark, trade name or other business identifier, the appearance of a product or the presentation of products or services or of a celebrity or well-known fictional character". Article 3 thus gives another example against freeriding and dilution.

The Anti-Unfair Competition Law of China (AUCL)

The law was first enacted in 1993, revised in 2019, and recently revised in 2025 (which entered into effect on 15 October). The law is drafted according to the same principles of the Paris Convention: a general principle followed by examples, drafted in a "including, but not limited to" style.

The general principle is stipulated in Article 2:

- (1) Businesses shall, in their production and distribution activities, adhere to the free will, equality, fairness, and good faith principles, and abide by laws and business ethics.
- (2) For the purposes of this Law, "act of unfair competition" means that, in its production or distribution activities, a business disrupts the order of market competition and causes damage to the lawful rights and interests of the other businesses or consumers, in violation of this Law...

The first "example" corresponding to Article 10 bis (3) of the Paris Convention is found in Article 6 of the 2019 version of the AUCL, recently renumbered Article 7 in the revised version of 2025. The article enumerates "acts of confusion (that) mislead a person into believing that a commodity is one of another person, or has a particular connection with another person", such as using a similar logo, packaging, decoration, tradename, domain name, website name etc. The 2019 version of the AUCL did not address the search keyword issue. This was contemplated in the drafting of the revised version.

The 2022 draft

Article 7(4) of the draft issued in 2022 contained a specific reference to the use of search keywords: setting without authorization as search keywords, another person's business logo, which has influence to a certain extent, to mislead the relevant public. The 2022 draft also added a paragraph to Article 16 about traffic hijacking and improper conduct on the Internet: "(2) setting up links to their own products or services by means of keyword association, setting false operation options, etc., so as to cheat or mislead users to click".

The 2024 draft

In the final draft released by the standing Committee of the National People's Congress (NPC) in December 2024, Article 7(5) read as follows: "Unauthorized use of another's distinctive product name or enterprise name (including abbreviations and trade names) as search keyword". The "mislead" part had been deleted, and besides, the additional paragraph in Article 16 had been deleted.

When this draft was submitted to the NPC, some Members commented that since Article 7 is about "confusing acts", it is necessary, in order to be consistent with the heading of the article, to specify that the use of another person's name as a search keyword should cause confusion, hence the reinstatement of the initial wording about misleading.

The 2025 amendment

The issue concerning the use of the trademark, or name, of another person, as search keywords appears in Article 7:

Article 7(4)(b): "The unauthorized use of a person's product name, business name (including abbreviations and designations), registered trademarks, unregistered well-known trademarks, and other designations as search keywords to mislead others into believing that the keywords refer to a person's product or imply a specific

connection with that person constitutes the type of confusion mentioned in the preceding paragraph."

Interpretation of the AUCL by the Supreme People's Court

On January 29, 2022, the SPC issued an Interpretation of the 2019 AUCL which became effective as of March 20, 2022.

Article 1 of this Interpretation provides "The People's Court may apply Article 2 of the AUCL to determine whether an operator, outside the situations described in Chapter II of the AUCL, and of the Patent Law, Trademark Law, Copyright Law, disrupts the order of market competition, causes damage to other operators or to consumers' legitimate rights and interests".

This means that an act, even it is not expressly categorized under Chapter II of the AUCL, may violate the general principle of fairness.

On January 6, 2025, the SPC published the Opinion on Safeguarding Technological Innovation through High-Quality Judicial Adjudications (Fa Fa [2025] No.1). In this Opinion, the SPC encourages the High Courts of China to apply the general principles included in the various IP laws. More specifically, in Article 18 of the Opinion, the Court refers to Article 2 of the AUCL (...properly apply the catch-all provisions, principle clauses, and legal purpose clauses of the Anti-Unfair Competition Law, take the principle of good faith and business ethics as the basic standards, effectively curb various new types of unfair competition acts such as free-riding...").

According to the SPC Interpretations and Opinions, it is clear that "freeriding" is contrary to business ethics even if it is not precisely described in another part of the law, such as Article 7 on "confusing acts".

Case law

The Hailiang case (SPC - 28 November 2022). Under the 2019 AUCL, the Supreme People's Court issued a retrial judgment in a case involving Hailiang Education Management Group and Ronghuai Education Group, a competitor in the same industry. Hailiang complained that Ronghuai was using the word Hailiang as a search keyword so that its website appeared each time at the top of the search results. The second instance court had ruled that such "hidden" use did not constitute unfair competition. The SPC reversed that decision and ruled that even though the link promoted by Ronghuai and the content displayed on its website did not contain any infringing word or logo and did not cause consumer confusion, Ronghuai had the subjective intention to use Hailiang's goodwill to attract consumer's attention to its own education brand. And such behavior was deemed unfair pursuant to Article 2 of the AUCL.

The Binzhou Zhanhua Winter Jujube case (Yinchuan Intermediate Court - 18 August 2023). Binzhou Company, which sells jujubes (a fruit that resembles a date) originating from the region of Zhanhua, found that a competitor Lingwu Fucheng Jujube was using, as a search keyword, the word Zhanhua to advertise the sale of its "Non-Zhanhua Winter Jujube". Binzhou Company initiated a civil action based on trademark infringement and unfair competition. The first instance Lingwu Municipal Court (7 March 2023) admitted that the accused acts did not cause confusion but ruled that they constituted an unfair practice. The Yinchuan Intermediate Court confirmed in the appeal the absence of confusion and the qualification of "keyword traffic diversion". This case has been selected by SPC as one of the 50 IP exemplary cases in 2023.

Academic comments

The above jurisprudence drew the attention of search engines and Internet platforms, whose business models included the sale of search keywords. Legal opinions were soon to be found, published by distinguished law professors, explaining that since the latest draft of the AUCL clearly categorized the prohibition to use another person's name or trademark as a search keyword under the "confusing acts" of Article 7, and specified that such use must create a false association, therefore, the mere "implicit" use, which does not cause confusion, should be considered as free competition.

In other words, for those academics, the general principle laid down in Article 2 of AUCL should be replaced by a new principle: any competition practice that is not expressly prohibited by Chapter II of the law is allowed, rendering Article 2 null and void.

New case law

The Die Xun case: on the exact date of entry-into-force of the revised AUCL, 15 October 2025, a first instance judgment was rendered by the Qingpu District Court Shanghai in which, the court resolutely adopted the "free competition" approach. The Shenzhen based Die Xun Network Technology Company is a well-known operator

of a comprehensive service platform for the fashion industry and owns the registered trademark "蝶讯" (Die Xun in Chinese pinyin), with the two Chinese characters meaning "butterfly" and "information". The defendant company, Yi Shang Chuang Zhan Technology Company (YSCZ), a direct competitor, used the word "蝶讯" as search keyword, so that every time an Internet user searched this word, the name of YSCZ, labelled as "advertising" appeared on the screen. Such action was clearly a "hidden" or "implicit" use. This time, contrary to the previous decisions rendered in similar situations, and contrary to the recommendations made by the SPC in the aforesaid Interpretations and Opinions, the court decided that the "implicit" use of the plaintiff's trademark did not constitute an act of unfair competition.

The Dianmao case (Beijing Chaoyang District Court – 21 November 2025). The Shenzhen based Dianmao Technology filed a case of unfair competition against three Beijing companies, Tongcheng Shidai, Tarena Shidai and Hualingyun Artificial Intelligence Technology which were using its trademarks as search keywords on the search engine Baidu (who was a third party). The facts described were the category of "implicit /advertising use".

The three defendants did not bother to appear in court, but Baidu did.

Given the dates of the accused acts, the case was subject to the previous 2019 version of the AUCL. Baidu argued that implicit keywords do not violate Article 6 of the law, nor do they constitute unfair competition pursuant to Article 2.

The Court cited Article 2 of AUCL and Article 1 of the SPC Interpretation and based on such provisions, identified the key point of the case: whether the alleged conduct falls outside the circumstances regulated by Chapter II of AUCL. The Court added: "The core question in determining whether implicit keyword use constitutes unfair competition is whether it creates a likelihood of confusion". The Court, then, decided that although the accused acts were subject to the 2019 version of the law, (which does not contain any provision concerning search keywords) "...the latest legislative spirit ... should be taken into account. Therefore, when applying Article 2 of the 2019 Anti-Unfair Competition Law to evaluate the "implicit use of keywords" in this case, the court considers whether the implicit use of keywords in this case is sufficient to cause confusion ...". Having found that the "implicit/advertising" use was not likely to cause confusion and was not subject to Article 6 (or to the renumbered Article 7), the Court examined whether the use violated the principle of good faith and decided in the negative: ".... as long as an operator does not ...intentionally freeride on the goodwill of others, such competitive activity falls within the scope permitted by a market economy". The Court added "What the law prohibits is the use of deceptive means, such as causing confusion, to illicitly obtain traffic, not the legitimate diversion of traffic through clearly identified advertising". Finally, as regards the market competition order, the Court expressed its opinion about implicit keyword use: "For emerging small and medium-sized enterprises, whose brands may not receive significant consumer attention through natural search, such promotional methods offer increased exposure and opportunities to enter the market and reach consumers".

The Die Xun case and the Dianmao cases are both first instance decisions.

COMMENT

The question that needs to be analyzed is whether an act which does not belong to any of the situations defined in Article 7 of AUCL, can still be qualified as unfair pursuant to the general principle of honesty stipulated in Article 2.

Applied to the act of using the trademark of another person as search keyword, the question is: if such use does not create confusion, can it still be qualified as unfair pursuant to Article 2?

Another way to put the question is to ask whether the list of "confusing acts" enumerated in Article 7 is exhaustive, or not.

Article 10bis (3) of the Paris Convention (The following in particular shall be prohibited ...) provides a clear answer: the "following" are examples, provided "in particular", and therefore, obviously not exhaustive. The AUCL is built on the same footprint: a general principle followed by a list of examples. If the list of examples were to be exhaustive, there would be no point stipulating for a general principle.

And yet, Baidu has obviously succeeded in convincing the courts of Shanghai and Beijing, that, provided no confusion is caused, it is perfectly fair for a business operator to use the name of a competitor in order to place its own advertisement next to the competitor's page.

The reasonings leading to such conclusion is not devoid of self-contradiction.

For example, in the Dianmao case, the Court defines what is fair competition: "Ultimately, the extent to which

each operator gains consumer favor depends on the quality, price, after-sales service, and other attributes of its product or service. Only by enhancing product quality can a business become more competitive in the marketplace". In addition, the Court cites the act of freeriding on the reputation of a competitor as an unfair act ("...as long as an operator does not intentionally freeride on the goodwill of others..."). And yet, when it comes to qualifying the act of using the name and reputation of a competitor by way of search keyword, the Court finds a surprising excuse: "For emerging small and medium-sized enterprises, whose brands may not receive significant consumer attention through natural search, such promotional methods offer increased exposure and opportunities to enter the market and reach consumers".

In other words, intentionally freeriding on the goodwill of others is bad, but doing this by arranging with a search engine the right to use the name of others as a search keyword... is OK.

The two abovementioned cases are first instance decisions. Will they have a "Butterfly effect" and impact on many future similar cases? Will they be reviewed by the IP Courts of Shanghai and Beijing? Time will tell.