

China Intellectual Property Law

Text, Cases, and Materials

2019 | WANHUIDA



Established in 1999, Wanhuida has travelled a path of 20 years' vibrant yet steady growth. The firm is now a leading IP service powerhouse in China. It is the home for over 400 IP professionals and a total of some 500 employees with presence in all major IP hubs in China, with offices in Beijing, Shanghai, Guangzhou, Ningbo, Suzhou, Hangzhou, Xiamen, Kunming, Shenzhen and Hong Kong.

Wanhuida supplies a full range of IP services, from procurement of all forms of IP rights to dispute resolution involving patents, trademarks, unfair competition and other IP-related rights. Over the years, our prosecution team helped clients prosecuting numerous patent and trademark applications and obtaining enforceable patent and trademark rights with high rate of success. We have also litigated thousands of cases concerning patent infringement and validity, trademark registration, ownership and infringement, unfair competition, trade secrets infringement, patent ownership and other disputes related to technology and IP, protecting and defending our client's interests and help advancing China's legal fronts. We focus on adding value to our clients.

Some of our cases are selected by courts or agencies as exemplary cases. We have:

- 30+ litigation cases selected to be reported in the SPC's Gazette or listed in SPC's annual 10/50 exemplary cases
- 30+ cases entered the list of "Best Deal Awards" or "Exemplary Case Awards" launched by industry associations or legal medias
- 50+ cases honored "10 Best Cases Award" by local AICs and courts at various levels
- Constant winner of the "Best Practice Award" of Quality Brands Protection Committee (QBPC) for the past 14 years



TABLE OF CONTENTS

PART I – TEXT	1
TRADEMARK.....	1
A1: Trademark Law of the People's Republic of China (2019)	1
A2: Regulations for the Implementation of the Trademark Law of the People's Republic of China (2014)	29
A3: Interpretation of the Supreme People's Court on Several Matters Regarding the Application of Law in Trial of Trademark Civil Dispute Cases (2002).....	56
A4: 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 (2008)	62
A5: Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Involving Protection of Well-Known Trademarks (2009)	64
A6: Provisions of the Supreme People's Court on Several Issues Concerning the Hearing of Administrative Cases Involving the Granting and Affirmation of Trademark Rights (2017)	68
A7: Beijing High People's Court Guidelines for the Adjudication of Cases Involving Granting and Affirmation of Trademark Right (2019)77	
PATENT	122
B1: Patent Law of the People's Republic of China (2008)	122
B2: Implementing Regulations of the Patent Law of the People's Republic of China (2010).....	141
B3: Interpretation I of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Disputes over Infringement of Patent Rights (2010).....	184

B4: Several Provisions of the Supreme People's Court on Issues concerning the Application of Law in the Trial of Patent Dispute Cases (2015).....	189
B5: Interpretation II of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Disputes over Infringement of Patent Rights (2016).....	196

COPYRIGHT.....204

C1: Copyright Law of the People's Republic of China (2010).....	204
C2: Regulations for the Implementation of the Copyright Law of the People's Republic of China (2013)	222
C3: Interpretation of the Supreme People's Court Concerning Several Issues on Application of Law in Hearing Civil Dispute Cases Involving Copyright (2002).....	229
C4: Provisions of the Supreme People's Court on Several Issues Concerning Application of Law in Adjudication of Civil Dispute Cases Related to Infringement of the Right of Communication via Information Networks (2012)	236

ANTI-UNFAIR COMPETITION.....241

D1: Anti-Unfair Competition Law of the People's Republic of China (2019).....	241
D2: Interpretation of the Supreme People's Court on the Application of Laws in the Trial of Civil Disputes over Domain Names of Computer Network (2001)	255
D3: Interpretation of the Supreme People's Court on Some Matters Concerning the Application of Law in the Trial of Civil Cases Involving Unfair Competition (2007)	258

ANTI-MONOPOLY.....265

E1: Anti-monopoly Law of the People's Republic of China (2008)....	265
E2: Provisions of the Supreme People's Court on Several Issues	

concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct (2012).....	280
IP GENERAL	284
Administrative.....	284
Regulations of the People's Republic of China Regarding Customs Protection of Intellectual Property Rights (2010)	284
Rules of the General Administration of Customs of the People's Republic of China for Implementation of the Regulations of the People's Republic of China on Customs Protection of Intellectual Property Rights (2009)	293
Criminal	308
Interpretation I of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Concrete Application of Laws in Handling Intellectual Property Criminal Cases (2004).....	308
Interpretation II of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Concrete Application of Laws in Handling Intellectual Property Criminal Cases (2007).....	316
Procedural.....	318
Decision of the Standing Committee of the National People's Congress on Establishing Specialized IP Courts in Beijing, Shanghai and Guangzhou (2014)	318
Provisions of the Supreme People's Court on the Jurisdiction of the Intellectual Property Courts of Beijing, Shanghai and Guangzhou over Cases (2014).....	320
Decision on Several Issues Concerning the Litigation Procedures of Patent and Other Intellectual Property Cases (2018)	323
Provisions of the Supreme People's Court on Several Issues Concerning the Intellectual Property Court (2018)	324

PART II – CASES.....	327
TRADEMARK.....	329
TML 7	329
BD, UL-20181228/B2018-20/D2018-02 (Trademark acquired in bad faith cannot be enforced and protected by law)	329
ABF, ELLASSAY – 20140814 / A20170306-82 / B2014-20 / F2014-22 (Trademark acquired in bad faith cannot be enforced against legitimate use)	330
TML 8	331
S, Red Sole-20181224 (Single-color trademark designated to be applied at a specific position)	331
BD, Dior Perfume Bottle-20180426/B2018-21/D2018-01 (Consistency of examination criteria in assessing distinctiveness; the applicant of international trademark registration with territorial extension to China should be given reasonable chance to make corrections.).....	332
TML 11.....	334
F, QQ Beeping Sound-20180927/F2018-48 (Distinctiveness acquired through use only applies to the goods/services on which the trademark is genuinely used)	334
SW, Color Combination “Orange and Grey” -20180807 (Distinctiveness of color combination acquired through use).....	335
TML 13	336
F, Lafite - 20171227/F2017-18 (Recognising a trademark as an unregistered well-known trademark allows the awarding of damages for infringement committed preceding the registration).....	336
SW, KuGou - 20170313 (It is still necessary to examine whether Article 13.1 applies when applying Article 31 of the 2001 Trademark Law, cannot grant an unregistered trademark full protection to all the goods or services designated by the disputed trademark)	338
TML 14	339
SW, MIGUMIGU-20180730 (Evidence for well-known trademark	

recognition should be examined comprehensively)	339
SW, Meituxiuxiu-20180730 (Recognition of a well-known trademark in the internet context)	340
F, Suo Fei Ya-20170315/F2017-14 (A party is allowed to choose from its trademark portfolio the trademark for which the well-known status recognition is sought)	341
TML 15	342
S, CHOPPIES-20171228 (Article 15.2 applies to indirect business relationships)	342
TML 30	343
S, YEMA-20181224 (The reputation of a trademark does not automatically mean that where such trademark is combined with the less known trademark of another person, such combined trademark can resist the invalidation requested by the owner of such less known trademark)	343
BFW, Crocodile Device-20181129/B2018-22.25/F2018-46 (Co-existence Agreement reached outside the jurisdiction of China has no bearing on the assessment of trademark similarity in China)	344
B, XILIUFU-20181126/B2018-23 (The reputation of the later applied disputed trademark is generally not to be considered when assessing the similarity of the trademarks)	345
SW, SUPOR-20181115 (A prior trademark that has not been used cannot be used to invalidate a later trademark which has been used and has acquired a reputation)	346
CW, Spider-20171222/C2018-11 (The reputation built up on a prior mark may extend to a later mark filed by the same applicant, but trademark registration can only be extended through renewal)	347
BF, Montagut-20131213/B2013-23/F2013-47 (The reputation/good will of a prior trademark may extend to a later mark of the same applicant)	348
B, Apple Man-20100910/B2010-20/F2010-20 (When assessing the similarity between the opposed mark and the cited mark, the Court may	

take into consideration the similarity between the opposed mark and a prior registered mark owned by the applicant of the opposed mark) 349	
TML 32	350
S, Kui Hua Bao Dian-20190130 (The current jurisprudence does not afford direction protection over merchandising rights)	350
BCF, Jordan II-20171227/B2017-26/C2018-09/F2017-44 (The portrait seeking prior right protection should be identifiable)	351
BD, Jordan I-20161207/B2016-21.22.23/D2016-01 (Right of name may be protected as prior right under the Trademark Law)	352
TML 44	353
S, AmCham-20170711 (An application filed in bad faith may be refused by applying Article 44 and the Principle of Good Faith)	353
TML 49	354
S, USAPRO-20181220 (Affixing trademark on OEM products and facilitating the exportation of such products by OEM manufacturer may be ascertained as genuine trademark use of the trademark by its owner)	354
F, MANGO-20171215 (A trademark affixed on OEM products does not function, in mainland China, as a source identifier of the goods to which it is affixed, and is not used in the sense of the Trademark Law)	355
TML 57	356
F, DOMINO-20181225/F2018-23 (Whether remodeling and selling other's products constitutes trademark infringement depends on the extent of the remodeling)	356
S, DONG FENG-20171228 (The OEM manufacturer does not commit trademark infringement if he fulfills its duty of care and causes no substantial damages)	358
S, MOBIL-20171129 (Determination on trademark dilution)	360
S, PEAK-20170421 (Exportation cannot deny the trademark use and the possibility of confusion in the environment of internet economy) 361	
BF, PRETUL-20151126/B2015-19/F2015-07 (Affixing trademark on OEM products is not trademark use)	362

TML 63	363
S, FILA -20181120 (Court grants punitive damages of three times the proceeds earned by the infringer).....	363
DW, Xinhua Dictionary-20171228/D2017-05 (The Court uses the method of prejudice calculation provided in the Trademark Law for the infringement of an unregistered well-known trademark)	364
PATENT	365
PTL 11	365
S, Huawei SEP-20180104 (Fault determination in the negotiations on SEP licensing)	365
PTL 13.....	368
D, Zhongnan Shuanglv Co.-20170907 (Determination of royalties for invention patent in temporary protection period)	368
PTL 23.....	370
B, Staples-20171225 (Only the prior rights holder and interested parties are allowed to file an invalidation petition on the grounds that the design patent rights conflict with the prior legal rights acquired by others)	370
PTL 59.....	372
S, VALEO-20190327(Criteria for ascertaining infringement of functional features)	372
B, Lifan Co.-20171212 (In patent infringement litigation, whether the estoppel is explicitly denied should be based on an objective and comprehensive judgment over the examination process of the patent prosecution and invalidation procedure.)	374
B, Dyson-20171113 (In patent infringement litigation, if other patents and the patent at issue enjoying common priority, the statement of opinion in the prosecution of such other patents has the effect of estoppel.).....	376
PTL 60.....	378
B, Yulin IP Office-20171225 (In patent administrative enforcement, if a	

panel member that has been replaced still signs the administrative decision, it constitutes a serious violation of the due process.)	378
PTL 65	380
S, Guowei-20180626(Method of calculating compensation for damages)	380
ANTI-UNFAIR COMPETITION.....	382
AUCL 2.....	382
S, Coppertone - 20180308 (Enforcing a trademark acquired in bad faith disturbs market order and constitutes unfair competition)	382
AUCL 6.....	383
C, TIANRONG-20161110/C-201810 (Using the English enterprise name of others on exports may be found unfair-competition).....	383
AUCL 17	384
S, Gold Mantis-20180417 (No damages can be claimed against the unfair competition act of merely registering the trademark of another person as one's enterprise name)	384
PART III – MATERIALS	385
TRADEMARK.....	385
Introduction to the 4th Amendment to the Trademark Law of China (2019)	385
Introduction to the 3rd Amendment to the Trademark Law of China (2013)	389
Introduction to the Amendment to the Implementing Regulations of the Trademark Law of China (2014)	402
PATENT	408
Introduction to the Amendment of the Guidelines for Patent Infringement Determination by the Beijing High People's Court (2017)	408

Introduction to SIPO's Amendment to its Patent Examination Guidelines (2017)	414
ANTI-UNFAIR COMPETITION.....	416
Introduction to the 2 nd Amendment to the Anti-Unfair Competition Law of China (2019).....	416
Introduction to the 1 st Amendment to the Anti-Unfair Competition Law of China (2017).....	418
IP GENERAL	429
China's 2018 National Intellectual Property Action Plan	429
Regulations Clarify Role of New Agencies Following China's IP Institutional Reform.....	434
The Outlook for IP and Brand Owners in the Context of China's Institutional Reform.....	438
Provisions on Several Issues Concerning the SPC IP Court.....	442
INDEX	446

PART I – TEXT

TRADEMARK

A1: Trademark Law of the People's Republic of China (2019)

(Adopted at the 24th Session of the Standing Committee of the Fifth National People's Congress on August 23, 1982; amended for the first time in accordance with the Decision on Revising the Trademark Law of the People's Republic of China adopted at the 30th Session of the Standing Committee of the Seventh National People's Congress on February 22, 1993; amended for the second time in accordance with the Decision on Revising the Trademark Law of the People's Republic of China adopted at the 24th Session of the Standing Committee of the Ninth National People's Congress on October 27, 2001; amended for the third time in accordance with the Decision on Revising the Trademark Law of the People's Republic of China adopted at the 4th Session of the Standing Committee of the Twelfth National People's Congress on August 30, 2013; and amended for the fourth time in accordance with the Decision on Revising the Trademark Law of the People's Republic of China adopted at the 10th session of the Thirteenth Standing Committee of the National People's Congress on April 23, 2019)

Chapter I General Provisions

Article 1 This Law is enacted for the purpose of improving the administration of trademarks, protecting the exclusive right to the use of a trademark, and encouraging manufacturers and operators to guarantee the quality of their goods and services and maintain the credibility of trademarks, so as to protect the interests of consumers, manufacturers and operators and promote the development of the socialist market economy.

Article 2 The trademark office of the administrative department for industry and commerce under the State Council shall be in charge of trademark registration and administration throughout the country.

The administrative department for industry and commerce under the State Council shall establish a trademark review and adjudication board to be responsible for handling trademark disputes.

Article 3 Registered trademarks refer to trademarks that are registered with the approval of the trademark office, including trademarks for goods and services, collective trademarks and certification trademarks. The owner of a

registered trademark shall enjoy the exclusive right to the use of the trademark, which shall be protected by law.

For purposes of this Law, a collective trademark refers to one that is registered in the name of a group, association, or any other organization for use in business by its members to indicate membership.

For purposes of this Law, a certification trademark refers to one that is controlled by an organization which is capable of exercising supervision over a particular kind of goods or services and that is used by an entity other than the organization or by an individual for its or his goods or services, and is designed to certify the indications of the place of origin, raw materials, mode of manufacture, quality, or other specific features of the said goods or services.

Particulars pertaining to the registration and administration of collective trademarks and certification trademarks shall be formulated by the administrative department for industry and commerce under the State Council.

Article 4 Any natural person, legal person or other organization that needs to obtain the exclusive right to use a trademark for its goods or services during production and business operations shall apply for trademark registration with the trademark office. Any bad faith application for the registration of a trademark that is not intended for use shall be rejected.

Provisions regarding the trademarks for goods in this Law shall be applicable to service trademarks.

Article 5 Two or more natural persons, legal persons, or other organizations may jointly file an application with the trademark office for the registration of one and the same trademark and jointly enjoy and exercise the exclusive right to the use of the trademark.

Article 6 Where a registered trademark is required to be used for some goods by laws or administrative regulations, an application for trademark registration shall be filed. No such goods may be marketed without an approved and registered trademark.

Article 7 The principle of good faith shall be followed in the application for trademark registration and in the use of trademarks.

The user of a trademark shall be responsible for the quality of the goods on which the trademark is used. The administrative departments for industry and commerce at all levels shall, through the administration of trademarks, put an

end to any practice that deceives consumers.

Article 8 Any signs, including words, graphs, letters, numbers, three-dimensional symbols, color combinations, sound or any combination thereof, that are capable of distinguishing the goods of a natural person, legal person or other organization from those of others may be applied for registration as trademarks.

Article 9 A trademark applied for registration shall bear distinctive features so as to be readily distinguishable, and shall not conflict with the legitimate rights obtained by others in prior.

A trademark registrant shall have the right to indicate the wording "Registered Trademark" or the sign showing that the trademark is registered.

Article 10 None of the following signs may be used as trademarks:

(1) Those identical with or similar to the State name, the national flag, emblem or anthem, the military flag, emblem or songs, or medals, etc. of the People's Republic of China; or those identical with the names or emblems of Central State organs, the names of the specific locations where the Central State organs are seated; or those identical with the names or designs of landmark buildings;

(2) Those identical with or similar to the State name, national flag, national emblem or military flag, etc. of a foreign country, except with the consent of the government of that country;

(3) Those identical with or similar to the name, flag or emblem of an international inter-governmental organization, except with the consent of that organization or except where it is unlikely to mislead the public;

(4) Those identical with or similar to an official mark or inspection stamp that indicates control and guarantee, except where authorized;

(5) Those identical with or similar to the symbol or name of the Red Cross or the Red Crescent;

(6) Those having the nature of discrimination against any nationality;

(7) Those that are deceptive and likely to mislead the public in terms of the quality, place of origin or other characteristics of the goods; and

(8) Those detrimental to socialist ethics or customs, or having other adverse

influences.

No geographical names of administrative divisions at or above the county level or foreign geographical names known to the public may be used as trademarks, except where geographical names have other meanings or constitute part of a collective trademark or certification trademark. Registered trademarks in which geographical names are used shall remain valid.

Article 11 None of the following marks may be registered as trademarks:

(1)Where the mark bears only the generic name, design, or model number of the goods concerned;

(2)Where it only directly indicates the quality, principal raw materials, function, use, weight, quantity or other features of the goods; and

(3) Signs that otherwise lack any distinctive features.

Any mark mentioned in the preceding paragraph may be registered as a trademark if it has acquired distinctive features through use and is readily distinguishable.

Article 12 No application for registration of a three-dimensional symbol as a trademark may be granted, where the sign merely indicates the shape inherent in the nature of the goods concerned, or it is only dictated by the need to achieve technical effects or the need to give the goods substantive value.

Article 13 A holder of a trademark that is well known by the relevant public may, if he holds that his rights have been infringed upon, request for well-known trademark protection in accordance with this Law.

Where the trademark of an identical or similar kind of goods is a reproduction, imitation, or translation of another person's well-known trademark not registered in China and is liable to cause public confusion, no application for its registration may be granted and its use shall be prohibited.

Where the trademark of a different or dissimilar kind of goods is a reproduction, imitation, or translation of another person's well-known trademark registered in China and it misleads the public so that the interests of the owner of the registered well-known trademark are likely to be impaired, no application for its registration may be granted and its use shall be prohibited.

Article 14 A well-known trademark shall be recognized as a fact that needs to be ascertained in dealing with a trademark-related case upon request by the party concerned. The following factors shall be taken into consideration in the recognition of a well-known trademark:

- (1) The recognition degree of the trademark among the relevant public;
- (2) The duration in which the trademark has been in use;
- (3) The duration, extent and geographical scope of all publicity operations carried out for the trademark;
- (4) The records of protection of a well-known trademark provided for the trademark and
- (5) Other factors making the trademark well-known.

Where the party concerned claims rights according to Article 13 of this Law in a trademark registration review or during the process whereby the administrative department or industry and commerce investigates and deals with a case involving trademark infringement, the trademark office may, based on the need for reviewing or dealing with the case, decide whether or not to recognize the relevant trademark as a well-known one.

Where the party concerned claims rights according to Article 13 of this Law, during the handling of a trademark dispute, the trademark review and adjudication board may, based on the need for handling the cases, decide whether or not to recognize the relevant trademark as well-known.

Where the party concerned claims rights according to Article 13 of this Law during the hearing of a civil or administrative case involving a trademark, the people's court designated by the Supreme People's Court may, based on the need for trying the case, decide whether or not to recognize the relevant trademark as well-known.

No manufacturers and business operators may indicate the words "well-known trademark" upon the goods, the packaging or the containers of the goods, nor may they use the same for advertising, exhibition or other commercial activities.

Article 15 Where an agent or representative, without authorization of the client, seeks to register in its own name the client's trademark and the client objects, the trademark shall not be registered and its use shall be prohibited.

An application for registering a trademark for the same kind of goods, or similar goods shall not be approved if the applied trademark is identical with or similar to an unregistered trademark used in prior by another party, the applicant is clearly aware of the existence of the trademark of such another party due to contractual, business or other relationships with the latter other than those prescribed in the preceding paragraph, and such another party raises objections to the trademark registration application in question.

Article 16 Where a trademark contains a geographical indication of the goods when the place indicated is not the origin of the goods in question, thus misleading the public, the trademark shall not be registered and its use shall be prohibited. However, where the registration is obtained in goodwill, it shall remain valid.

The geographical indication mentioned in the preceding paragraph means the origin of the goods, the special qualities, credibility or other characteristics of the goods is primarily determined by the natural factors or other humanistic factors of the place indicated.

Article 17 Where a foreigner or foreign enterprise applies for trademark registration in China, the matter shall be handled in accordance with any agreement concluded between the country to which the applicant belongs and the People's Republic of China, or any international treaty to which both countries are parties, or on the basis of the principle of reciprocity.

Article 18 A party may apply for trademark registration or handle trademark-related matters on its own or by entrusting a trademark intermediary established according to the law.

A foreigner or foreign enterprise shall entrust a trademark intermediary established according to the law for applying for trademark registration and handling other trademark-related matters in China.

Article 19 Trademark agencies shall follow the principle of good faith, comply with laws and administrative regulations, apply for trademark registration or deal with other trademark-related matters as entrusted by the principals, and keep confidential the principals' trade secrets that come to their knowledge during the process.

Where a trademark entrusted by a principal for registration application may fall under the circumstances prescribed by this Law under which registration is not allowed, the trademark intermediary shall explicitly so inform the principal.

A trademark intermediary shall not accept the entrustment of a principal if it

knows or should have known that the trademark entrusted by the principal for registration application falls under any of the circumstances as prescribed by Article 4, Article 15 and Article 32 of this Law.

A trademark intermediary shall not apply for registration of trademarks other than the agency services it renders.

Article 20 The association of trademark agencies shall, pursuant to its articles of association, strictly enforce the conditions for admitting members, and mete out sanctions against the members violating industry self-disciplinary protocols. The association of trademark agencies shall publish in time information on the members admitted and the disciplinary sanctions against its members.

Article 21 International trademark registration shall be governed by the systems established by relevant international treaties concluded or acceded to by the People's Republic of China. The specific measures in this regard shall be formulated by the State Council.

Chapter II Application for Trademark Registration

Article 22 A trademark registration applicant shall make an application and, according to the prescribed classification of goods, indicate in the application the classes and the designation of goods for which the trademark is to be used.

A trademark registration applicant may apply for registration of the same trademark for multiple classes of goods in one application.

A trademark registration application and other relevant documents may be submitted in writing or by way of data message.

Article 23 For obtaining the exclusive right to use a registered trademark on goods beyond the approved scope of use, a new registration application shall be filed.

Article 24 If a change needs to be made in the signs of a registered trademark, an application shall be filed anew.

Article 25 Where an applicant, within six months from the date he applies for registration of his trademark for the first time in a foreign country, again applies in China for registration of one and the same trademark for the same kind of goods, he may, in accordance with any agreement concluded between the foreign country concerned and the People's Republic of China

or any international treaty to which both countries are parties, or on the basis of the priority principle mutually accepted, enjoy priority.

Where, in accordance with the preceding paragraph, an applicant claims priority, he shall so state in writing at the time when he files the application for trademark registration and shall, within three months, submit a copy of the original application he files for the first time. Failure on the part of the applicant to make the statement in writing or to submit a copy of the original application before the expiration of the time limit shall be regarded as not claiming priority.

Article 26 The applicant for registration of a trademark that is used for the first time on goods displayed at an international exhibition organized or recognized by the Chinese Government may, within six months from the date the said goods are placed on exhibition, enjoy priority.

Where, in accordance with the preceding paragraph, an applicant claims priority, he shall so state in writing at the time when he files the application for trademark registration and shall, within three months, submit the name of the exhibition, evidence supporting the use of the trademark on the goods displayed, documents proving the date the exhibition, etc. Failure to make the statement in writing or to submit the documents before the expiration of the time limit shall be regarded as not claiming priority.

Article 27 Matters stated in the application for trademark registration and all information provided shall be truthful, accurate and complete.

Chapter III Examination and Approval of Trademark Registration

Article 28 The trademark office shall complete the examination of a trademark under registration application within nine months from the date of receiving the application documents for trademark registration, and shall issue a preliminary examination announcement if the said application is in compliance with the relevant provisions of this Law.

Article 29 If during the review, the trademark office is of the opinion that the contents of the trademark registration application need to be explained or corrected, it may require the applicant to do so. The failure of the applicant to provide explanations or make correction shall not affect the trademark office in making a decision upon review.

Article 30 Where a trademark, for the registration of which an application is filed, that does not conform to the relevant provisions of this Law or that is identical with or similar to the trademark, which has already been registered by another person or has been given preliminary examination and approval

for use on the same kind of goods or similar goods, the trademark office shall reject the application and shall not announce that trademark.

Article 31 Where two or more applicants apply to register identical or similar trademarks for use on the same kind of goods or similar goods, the trademark office shall first conduct examination of, give approval to and announce the trademark whose registration is applied for in prior. Where the applications are filed on the same day, the trademark office shall first examine, give approval to and announce the trademark which is used in prior, and it shall reject the applications for registration of the other trademarks and shall not announce them.

Article 32 An applicant for trademark application may not infringe upon another person's existing prior rights, nor may he, by unfair means, preemptively register a trademark that is already in use by another person and has certain influence.

Article 33 If a holder of prior rights or an interested party holds that the trademark announced upon preliminary examination is in violation of the second or third paragraph of Article 13, Article 15, the first paragraph of Article 16, Article 30, Article 31, or Article 32 of this Law, he may, within three months from the date of the preliminary examination announcement, raise objections to the trademark office. Any party that is of the opinion that the aforesaid trademark is in violation of Article 4, Article 10, Article 11, Article 12 or the fourth paragraph of Article 19 of this Law may raise objections to the trademark office within the same three-month period. If no objection is raised upon expiry of the announcement period, the trademark office shall approve the registration application, issue the certificate of trademark registration, and make an announcement thereon.

Article 34 Where an application for trademark is rejected and no preliminary examination announcement is to be made, the trademark office shall so notify the trademark registration applicant concerned in writing. Where the applicant disagrees to the result, he may, within 15 days from the date he receives the notice, apply to the trademark review and adjudication board for a review. The trademark review and adjudication board shall, within nine months upon receipt of the application, make a decision and notify the applicant in writing. Where it is necessary under exceptional circumstances, an extension of three months may be granted upon approval by the administrative department for industry and commerce of the State Council. Where the applicant disagrees to the decision of the trademark review and adjudication board, he may, within 30 days from the date he receives the notice, bring a lawsuit to a people's court.

Article 35 Where objections are raised against a trademark for which a preliminary examination announcement has been made, the trademark office

shall listen to the facts and grounds stated by both the opponent and the opposed, and after investigation and verification make a decision on whether or not to approve the registration of the trademark within 12 months from the expiry date of the announcement period and shall notify the opponent and the opposed of the decision in writing. Where it is necessary under exceptional circumstances, an extension of six months may be granted upon approval by the administrative department for industry and commerce of the State Council.

Where the trademark office decides to approve a trademark registration, it shall issue the certificate of trademark registration to the applicant and make an announcement thereon. Where the opponent is dissatisfied with the decision, he may request the trademark review and adjudication board to declare the said registered trademark invalid in accordance with Article 44 or Article 45 of this Law.

Where the trademark office decides not to approve a trademark registration, the opposed party disagreeing to the decision may apply for a review to the trademark review and adjudication board within 15 days upon receipt of the relevant notice. The trademark review and adjudication board shall make a decision after review, and notify both the opponent and the opposed parties of such a decision in writing within 12 months from the date of the receipt of the application for review. Where it is necessary under exceptional circumstances, an extension of six months may be granted upon approval by the administrative department for industry and commerce of the State Council. If the opposed is dissatisfied with the decision made by the trademark review and adjudication board, he may bring a lawsuit to the people's court within 30 days from the date he receives the notice, in which case the people's court shall notify the opponent to participate in the litigation proceedings as a third party.

When carrying out review in accordance with the preceding paragraph, the trademark review and adjudication board may suspend the review if the prior rights involved can only be ascertained based on the outcomes of another case currently under the hearing by a people's court or under the handling by an administrative organ. The trademark review and adjudication board shall resume the review procedure once the circumstances for suspension are eliminated.

Article 36 Where, upon the expiry of the statutory time limit, a party concerned fails to apply for review of the decision on rejection of a registration application or decision on denial of registration made by the trademark office, or fails to bring a lawsuit to the people's court against the decision of review made by the trademark review and adjudication board, the decision on rejection of a registration application, the decision on denial of registration or the decision of review shall become effective.

Where the registration of a trademark is approved after the objection to its registration is found to be unsubstantiated upon examination, the time when the trademark registration applicant obtains the exclusive right to use the trademark shall commence from the date of the expiry of the three-month period of the preliminary examination announcement. During the period from the date of the expiry of the said announcement period to the time when decision is made to approve the registration of the trademark, the trademark shall have no retroactive effect on the use of an identical or similar mark by another party on the same kind of goods or similar goods. However, such other party shall be liable for compensating any losses caused, *mala fide*, to the trademark registrant.

Article 37 Applications for trademark registration and for review shall be examined without delay.

Article 38 Where an applicant for trademark registration or a registrant discovers an obvious error in the trademark application or registration documents, he may apply for its correction. The trademark office shall, in accordance with law and within the limits of its functions and powers, make the correction and shall notify the party of the matter.

The correction of errors mentioned in the preceding paragraph shall not involve substantive matters in the application or registration documents.

Chapter IV Renewal, Modification, Assignment and Licensing of Registered Trademarks

Article 39 The period of validity of a registered trademark shall be 10 years, counted from the day the registration is approved.

Article 40 Where a trademark registrant intends to continue using the registered trademark upon expiry of the validity period of registration, the trademark registrant shall go through the renewal procedure within 12 months prior to the expiry date in accordance with relevant provisions; where the registrant fails to do so during the said time limit, a grace period of six months may be granted. Each renewal of registration shall be valid for ten years calculating from the date immediately following the expiry date of the last validity period of the trademark. If no application for renewal is filed upon expiry of the grace period, the registered trademark shall be cancelled.

The trademark office shall announce the trademarks whose registration has been renewed.

Article 41 If a change needs to be made in the name or address of the owner of a registered trademark or in any other registered matter, an application for

the change shall be filed.

Article 42 To assign a registered trademark, the assignor and assignee shall sign an assignment agreement and jointly file an application with the trademark office. The assignee shall guarantee the quality of the goods on which the registered trademark is used.

When assigning a registered trademark, the trademark registrant shall assign, along with it, other similar trademark he has registered for the same kind of goods, and other identical and similar trademarks he has registered for similar goods.

The trademark office shall not approve the assignment of a registered trademark that is likely to cause confusion or result in other adverse effects, and shall notify the applicant concerned in writing and explain the reasons therefor.

After the assignment of a registered trademark is approved, it shall be announced. The assignee shall enjoy the exclusive right to the use of the trademark starting from the date the announcement is made.

Article 43 The owner of a registered trademark may, by concluding a trademark licensing contract, authorize another person to use his registered trademark. The licensor shall supervise the quality of the goods on which the licensee uses his registered trademark, and the licensee shall guarantee the quality of the goods on which the registered trademark is to be used.

If any person is authorized to use the registered trademark of another person, the name of the licensee and the origin of the goods shall be indicated on the goods that bear the registered trademark.

A licensor who licenses others to use his registered trademark shall submit the trademark licensing to the trademark office for file, and the trademark office shall announce the trademark licensing. Without filing, the trademark licensing shall not be used against a bona fide third party.

Chapter V Declaration of the Invalidity of Registered Trademarks

Article 44 A registered trademark shall be declared invalid by the trademark office if it is in violation of Article 4, Article 10, Article 11, Article 12 or the fourth paragraph of Article 19 of this Law, or its registration is obtained by fraudulent or other unfair means. Other entities or individuals may request the trademark review and adjudication board to declare the aforesaid registered trademark invalid.

Where the trademark office makes a decision on declaring a registered trademark invalid, it shall notify the party concerned in writing of the decision. If a party concerned is dissatisfied with the decision made by the trademark office, he may apply for a review with the trademark review and adjudication board within 15 days upon the receipt of the notice from the trademark office. The trademark review and adjudication board shall make a decision and notify the party concerned in writing within nine months upon the receipt of the application for review. Where it is necessary under exceptional circumstances, an extension of three months may be granted upon approval by the administrative department for industry and commerce of the State Council. If a party concerned is dissatisfied with the decision made by the trademark review and adjudication board, he may bring a lawsuit to the people's court within 30 days upon the receipt of the notice from the trademark review and adjudication board.

Where other entities or individuals request the trademark review and adjudication board to declare a registered trademark invalid, the latter shall, upon receipt of the application, notify the party concerned in writing, and require the party concerned to respond within a time limit. The trademark review and adjudication board shall, within nine months upon the receipt of the application, render a ruling on either maintaining the validity of the registered trademark or declaring the registered trademark invalid, and notify the party concerned in writing. Where it is necessary under exceptional circumstances, an extension of three months may be granted upon approval by the administrative department for industry and commerce of the State Council. If the party concerned is dissatisfied with the ruling made by the trademark review and adjudication board, he may bring a lawsuit to the people's court within 30 days upon the receipt of the notice, in which case the people's court shall notify the counterparty to the trademark adjudication procedures to participate in the litigation proceedings as a third party.

Article 45 Where a registered trademark is in violation of the second and third paragraph of Article 13, Article 15, the first paragraph of Article 16, Article 30, Article 31 or Article 32 of this Law, the holder of prior rights or an interested party may, within five years upon the registration of the trademark, request the trademark review and adjudication board to declare the registered trademark invalid. Where the aforesaid registration is obtained mala fide, the owner of a well-known trademark is not bound by the five-year restriction.

The trademark review and adjudication board shall, after receiving an application for declaring the registered trademark invalid, notify the party concerned as such in writing, and require the party concerned to respond within a time limit. The trademark review and adjudication board shall, within 12 months upon the receipt of the application, render a ruling on either maintaining the validity of the registered trademark or declaring the registered trademark invalid, and notify the party concerned as such in writing.

Where it is necessary under exceptional circumstances, an extension of six months may be granted upon approval by the administrative department for industry and commerce of the State Council. If the party concerned is dissatisfied with the ruling made by the trademark review and adjudication board, he may bring a lawsuit to the people's court within 30 days upon the receipt of the notice, in which case the people's court shall notify the counterparty to the trademark adjudication procedures to participate in the litigation proceedings as a third party.

In reviewing an application for declaring a registered trademark invalid pursuant to the preceding paragraph, the trademark review and adjudication board may suspend the review if the prior rights involved can only be ascertained based on the outcomes of another case currently under the hearing by a people's court or under the handling by an administrative organ. The trademark review and adjudication board shall resume the review procedure once the circumstances for suspension are eliminated.

Article 46 Upon the expiry of the statutory time limit, if the party concerned fails to apply for review of the trademark office's decision on declaring a registered trademark invalid, or fails to bring a lawsuit to the people's court against the trademark review and adjudication board's review decision or its ruling on maintaining the validity of a registered trademark or declaring a registered trademark invalid, the trademark office's decision or the trademark review and adjudication board's review decision or ruling shall become effective.

Article 47 A registered trademark that is declared invalid in accordance with Article 44 or Article 45 of this Law shall be announced by the trademark office, and the exclusive right to use the registered trademark thereof shall be deemed as non-existent ab initio.

The decision or ruling on declaring a registered trademark invalid shall have no retroactive effect on a judgment, ruling or mediation statement on a trademark infringement case already rendered and enforced by a people's court, a decision on handling a trademark infringement case already made and enforced by an administrative department for industry and commerce as well as a trademark assignment or licensing contract already performed prior to such declaration. However, the trademark registrant shall be liable for compensation where losses are caused, *mala fide*, to another party.

Trademark infringement damages, trademark assignment fees or trademark royalties shall be refunded fully or partially if the non-refund thereof pursuant to the preceding paragraph is in obvious violation of the principle of fairness.

Chapter VI Administrative Control of the Use of Trademarks

Article 48 For the purpose of this Law, the use of trademarks shall refer to the use of trademarks on goods, the packaging or containers of goods and the transaction documents of goods, as well as the use of trademarks for advertising, exhibition and other commercial activities for the purpose of identifying the sources of goods.

Article 49 A trademark registrant that, without authorization, makes alterations with respect to the registered trademark, the name or address of the registrant or other registration particulars during the use of the registered trademark, shall be ordered to make correction within a time limit by the relevant local administrative department for industry and commerce; if it fails to make correction within the prescribed time limit, the trademark office shall cancel the registered trademark thereof.

Where a registered trademark has become the generic name of the goods for which its use is approved or a registered trademark has not been put in use for three consecutive years without a justifiable reason, any entity or individual may apply to the trademark office for revocation of the registered trademark, and the trademark office shall make a decision within nine months upon the receipt of the application. Where it is necessary under exceptional circumstances, an extension of three months may be granted for making a decision upon approval by the administrative department for industry and commerce of the State Council.

Article 50 Within one year from the time where a registered trademark is cancelled or declared invalid, or is not renewed upon the expiry of its validity period, the trademark office shall not approve any application for registration of a trademark identical with or similar to the aforesaid trademark.

Article 51 In the event of a violation of the provisions of Article 6 of this Law, the local administrative department for industry and commerce shall order the violator to file an application for registration within a time limit and if the illegal business revenue is RMB 50,000 yuan or more, a fine of up to 20% of the illegal business revenue may be imposed; if there is no illegal business revenue or the illegal revenue is less than RMB 50,000 yuan, a fine of up to RMB 10,000 yuan may be imposed.

Article 52 Where a party passes off an unregistered trademark as a registered trademark or uses an unregistered trademark in violation of Article 10 of this Law, the relevant local administrative department for industry and commerce shall stop such acts, order the party to make correction within a time limit, and may circulate a notice on the matter. If the illegal business revenue is RMB 50,000 yuan or more, a fine of up to 20% of the illegal business revenue may be imposed; if there is no illegal business revenue or

the illegal business revenue is less than RMB 50,000 yuan, a fine of up to RMB 10,000 yuan may be imposed.

Article 53 Whoever violates the fifth paragraph of Article 14 of this Law shall be ordered to make correction by the relevant local administrative department for industry and commerce, and be imposed with a fine of RMB 100,000 yuan.

Article 54 A party concerned who has objection to the decision made by the trademark office on revoking or not revoking a registered trademark, may apply for review to the trademark review and adjudication board within 15 days upon receipt of the notification of the decision. The trademark review and adjudication board shall, within nine months upon the receipt of the application, make a decision and notify the party concerned in writing. Where it is necessary under exceptional circumstances, an extension of three months may be granted upon approval by the administrative department for industry and commerce under the State Council. The party concerned who has objection to the decision made by the trademark review and adjudication board may bring a lawsuit to the people's court within 30 days from the date the notification is received.

Article 55 Upon expiry of the statutory time limit, if the party concerned fails to apply for review of the trademark office's decision on revoking a registered trademark, or fails to bring a lawsuit to the people's court against a review decision made by the trademark review and adjudication board, such a decision or review decision shall become effective.

The trademark office shall make an announcement on the registered trademark that is revoked. The exclusive right to use the aforesaid registered trademark shall terminate as of the date of announcement.

Chapter VII Protection of the Exclusive Right to the Use of a Registered Trademark

Article 56 The exclusive right to the use of a registered trademark shall be limited to trademarks which are registered upon approval and to goods the use of a trademark on which is approved.

Article 57 Any of the following acts shall constitute an infringement on the exclusive rights to the use of a registered trademark:

(1) Using a trademark that is identical with a registered trademark on the same kind of goods without obtaining licensing from the registrant of the registered trademark;

(2) Using a trademark that is similar to a registered trademark on the same kind of goods, or using a trademark that is identical with or similar to the registered trademark on similar goods without obtaining licensing from the registrant of the registered trademark, and is likely to cause confusion;

(3) Selling goods that infringe on the exclusive right to the use of a registered trademark;

(4) Counterfeiting, or making without authorization, representations of another person's registered trademark, or selling such representations;

(5) Altering a registered trademark without permission of its owner and launching goods bearing such an altered trademark in the market;

(6) Providing, intentionally, convenience for such acts as infringe upon others' exclusive right of trademark use, to facilitate others to commit infringement on the exclusive right of trademark use

(7) Impairing in other manners another person's exclusive right to the use of its registered trademark.

Article 58 Whoever uses a registered trademark or an unregistered well-known trademark of another party as the trade name in its enterprise name so as to mislead the public, thus constitutes unfair competition, the Anti-unfair Competition Law of the People's Republic of China shall apply.

Article 59 The holder of the exclusive right to use a registered trademark shall have no right to prohibit others from fairly using the generic name, graphics or models of a commodity contained in the registered trademark, or such information as directly indicates the quality, main raw materials, functions, purposes, weight, quantity or other features of the commodity, or the names of the geographical locations as contained therein.

The holder of the exclusive right to use a registered trademark that is a three-dimensional sign shall have no right to prohibit others from fairly using such forms as contained in the registered trademark due to the inherent nature of a commodity or the commodity forms necessary for achieving technological effects or the forms that bring substantive value to the commodity as contained therein.

Where, before a trademark registrant applies for registration of a trademark, another party has used a trademark that is of certain influence and is identical with or similar to the registered trademark on the same kind of goods or similar goods, the holder of the exclusive right to use the registered trademark shall have no right to prohibit the said party from continued use of

the trademark within the original scope of use, however, the holder may require the latter to add a proper mark for distinguishing purposes.

Article 60 A dispute that arises from any of the acts infringing upon the exclusive right to use a registered trademark prescribed in Article 57 of this Law shall be settled by the parties concerned through consultation. Where the parties concerned are unwilling to engage in consultation or a consultation has failed, the trademark registrant or an interested party may bring a lawsuit to the people's court, or request the relevant administrative department for industry and commerce to address the dispute.

When addressing the dispute, if the administrative department for industry and commerce is of the opinion that the infringement is established, it shall order the relevant party to immediately cease the infringing acts, and shall confiscate and destroy the infringing goods and instruments mainly used for manufacturing the infringing goods and forging the registered trademark. Where the illegal business revenue is RMB 50,000 yuan or more, a fine of up to five times the illegal business revenue may be imposed thereon; where there is no illegal business revenue or the illegal business revenue is less than RMB 50,000 yuan, a fine of up to RMB 250,000 yuan may be imposed thereon. If a party has committed trademark infringement on two or more occasions within five years or falls under any other serious circumstances, it shall be subject to a heavier punishment. If a party is unaware of the infringing nature of such products and is able to prove that the products are obtained by legitimate means and can provide information on the suppliers of the products, it shall be ordered to stop selling the products by the administrative department for industry and commerce.

As to a dispute over the amount of damages for infringement on the exclusive right to use a trademark, the parties concerned may apply to the administrative department for industry and commerce that addresses the infringing dispute for mediation, or may bring a lawsuit to the people's court in accordance with the Civil Procedure Law of the People's Republic of China. Where the parties concerned fail to reach any agreement upon mediation by the administrative department for industry and commerce, or fail to execute the mediation agreement after it becomes effective, the parties may bring a lawsuit to the people's court in accordance with the Civil Procedure Law of the People's Republic of China.

Article 61 The administrative department for industry and commerce shall have the power to investigate any act infringing upon the exclusive right to the use of a registered trademark. Where a crime is suspected to have been committed, it shall promptly transfer the case to a judicial department in accordance with law.

Article 62 When an administrative department for industry and commerce at

or above the county level, on the basis of the evidence or report, obtained for a suspected violation of law, conducts investigation into a suspected infringement of another person's exclusive right to the use of a registered trademark, it may exercise the following functions and powers:

- (1) Questioning the parties concerned to find out the facts regarding the infringement of another person's exclusive right to the use of a registered trademark;
- (2) Checking and reproducing the parties' contracts, invoices, account books, and other materials relating to the infringement;
- (3) Conducting on-the-spot inspection of the premises where the suspected party carries out activities infringing upon another person's exclusive right to the use of a registered trademark; and
- (4) Inspecting articles involved in the infringement; sealing or seizing the articles that are proven to have been used for infringing upon another person's exclusive right to the use of a registered trademark.

When the administrative department for industry and commerce exercises the functions and powers provided for in the preceding paragraph in accordance with law, the parties shall assist and cooperate with it and may not refuse to cooperate or obstruct the process.

During the investigation and handling of a trademark infringement case, an administrative department for industry and commerce may suspend the investigation and handling of the case if disputes arise over the ownership of the trademark or if the right holders simultaneously bring a trademark infringement lawsuit to the people's courts. The investigation and handling procedures shall be resumed or terminated after the circumstances for suspension are eliminated.

Article 63 The amount of damages for infringement on the exclusive right to use a trademark shall be determined based on the actual loss suffered by the right holder as a result of the infringement; if it is difficult to determine the actual loss, the amount of damages may be determined according to the proceeds gained therefrom by the infringer, if it is difficult to determine both the loss of the right holder and the proceeds gained by the infringing party, the amount of damages may be reasonably determined by reference to the multiples of the trademark royalties. Where an infringer maliciously infringes upon another party's exclusive right to use a trademark, in the case of serious circumstances, the amount of damages may be determined as not less than one time but not more than five times the amount that is determined according to the aforesaid methods. The amount of damages shall cover the

reasonable expenses paid by the right holder for stopping the infringing act.

Where the right holder has exhausted its efforts in fulfilling the obligation of burden of proof, but the account books and materials related to the infringing acts are mainly controlled by the infringer, the people's court may, for the purpose of determining the amount of damages, order the infringer to submit account books and materials related to the infringing acts. Where the infringer fails to provide such account books or materials or provides false account books or materials, the people's court may render a judgment on the amount of damages by reference to the claims of the right holder and the evidence furnished thereby.

Where it is difficult to determine the actual loss suffered by the right holder as a result of the infringement, the proceeds gained by the infringer from the infringement or the royalties of the registered trademark concerned, the people's court shall render a judgment awarding damages in an amount not more than RMB five million yuan based on the circumstances of the infringing acts.

Except under exceptional circumstances, the people's court, in adjudicating cases involving trademark disputes, shall order, at the request of the right owner, the destruction of the commodities bearing counterfeit trademarks; the people's court shall order the destruction of the materials and tools mainly used for manufacturing commodities bearing counterfeit registered trademarks, without granting any indemnity, or under exceptional circumstances, shall forbid such materials or tools from re-entering the business channel, without granting any indemnity.

The commodities bearing counterfeit trademarks shall not enter the business channel with the mere removal of the counterfeit trademarks from such products.

Article 64 Where the holder of the exclusive right to use a registered trademark claims for damages, and the alleged infringer counterclaims that the right holder has never used the registered trademark, the people's court may require the right holder to provide evidence of its actual use of the registered trademark during the past three years prior to the lawsuit. The alleged infringer shall not be liable for compensation if the right holder is neither able to prove its actual use of the registered trademark during the past three years prior to the lawsuit, nor able to prove other losses suffered as a result of the infringement.

Where a party is unaware that the goods he sells infringe upon another party's exclusive right to use a registered trademark, and the party is able to prove that the goods are obtained by legitimate means and provide information on the suppliers of the goods, it shall not be liable for

compensation.

Article 65 Where a trademark registrant or an interested party has evidence proving that another party is committing or is soon to commit an act that infringes upon the former's exclusive right to use the registered trademark and that such an act, unless promptly stopped, will cause irreparable damage to its legitimate rights and interests, the trademark registrant or interested party may, in accordance with the law, apply to the people's court, seeking for an injunction and asset preservation measures before filing a lawsuit.

Article 66 In order to stop an infringing act, and where evidence may be destroyed or vanished, or may become unobtainable in the future, the relevant trademark registrant or interested party may, in accordance with the law, apply to the people's court for evidence preservation before filing a lawsuit.

Article 67 Where any party, without permission of the owner of a registered trademark, uses a trademark that is identical with the owner's on the same kind of goods, which constitutes a crime, he shall, in addition to compensating losses suffered by the infringed, be subject to criminal prosecution in accordance with law.

Anyone who counterfeits or makes without permission the representations of another person's registered trademark or sells such representations which constitutes a crime, shall, in addition to compensating the losses suffered by the infringed, be subject to criminal prosecution in accordance with law.

Anyone who knowingly sells goods bearing counterfeit registered trademarks, which constitutes a crime, shall, in addition to compensating the losses suffered by the infringed, be subject to criminal prosecution in accordance with law.

Article 68 A trademark intermediary that commits any of the following acts shall be ordered to make rectifications within a time limit by the administrative department for industry and commerce, be given a warning, and be fined not less than RMB 10,000 yuan but not more than RMB100,000 yuan; the persons in charge who are directly responsible and other persons directly responsible shall be given a warning and be fined not less than RMB 5,000 yuan but not more than RMB 50,000 yuan; where a crime is constituted, criminal liabilities shall be pursued in accordance with the law:

(1) Fabricating or tampering with legal documents, seals or signatures, or using fabricated or tempered legal documents, seals or signatures during the handling of trademark-related matters;

(2) Soliciting trademark agency business by defaming other trademark intermediaries, or disrupting the order of the trademark agency market by other unfair means; or

(3) Violating the provisions of Article 4, the third or fourth paragraph of Article 19 of this Law.

Where a trademark intermediary commits any of the acts prescribed in the preceding paragraph, the administrative department for industry and commerce shall record such matters in the credit dossier; in the case of serious circumstances, the trademark office or the trademark review and adjudication board may concurrently decide to cease the acceptance and handling of the trademark matters submitted by the trademark intermediary, and shall make an announcement thereon.

The trademark intermediary shall bear civil liabilities in accordance with the law if it violates the principle of good faith and infringes the legitimate rights and interests of a principal, and shall be given sanctions by the trade association of the trademark intermediaries pursuant to its articles of association.

The trademark intermediaries filing for the registration of trademarks in bad faith shall be subject to warnings, fines or other administrative punishment, based on the circumstances of the acts. Those initiating trademark proceedings in bad faith shall be subject to the sanctions of the people's courts in accordance with laws.

Article 69 Functionaries of State organs engaged in trademark registration, administration, and review shall be impartial in implementing the law, honest and self-disciplined, and devoted to their duties, and shall provide services with civility.

No functionaries of State organs working in the trademark office and the trademark review and adjudication board or engaged in trademark registration, administration, and review may work for trademark agencies or engage in the manufacture or marketing of goods.

Article 70 Administrative departments or industry and commerce shall establish and improve an internal supervision system to supervise and inspect the way State organ functionaries in charge of trademark registration, administration, and review, implement laws and administrative regulations and observe discipline.

Article 71 Where a State organ functionary engaged in trademark registration, administration, and review neglects his duty, abuses his power,

and engages in malpractice for personal gain, violates the law in trademark registration, administration, and review, accepts money or things of value from a party, or seeks illegitimate interests, and where the case is so serious as to constitute a crime, he shall be subject to criminal prosecution in accordance with law. Where the case does not constitute a crime, he shall be given sanction in accordance with law.

Chapter VIII Supplementary Provisions

Article 72 Applicants for trademark registration and persons having other trademark matters handled shall pay a fee, the specific rates of which shall be determined separately.

Article 73 This Law shall go into effect as of March 1, 1983. The Regulations on Trademark Administration promulgated by the State Council on April 10, 1963 shall be annulled simultaneously, and any other provisions concerning trademark administration that conflict with the provisions of this Law shall be nullified at the same time.

Trademarks registered before this Law goes into effect shall remain valid.

Comparative table of the 2013 and 2019 Trademark Law (Articles revised)

Trademark Law 2013 Version	Trademark Law 2019 Version
Article 4.1 Any natural person, legal person or other organization that needs to obtain the exclusive right to use a trademark for its goods or services during production and business operations shall apply for trademark registration with the trademark office.	Article 4.1 Any natural person, legal person or other organization that needs to obtain the exclusive right to use a trademark for its goods or services during production and business operations shall apply for trademark registration with the trademark office. Any bad faith application for the registration of a trademark that is not intended for use shall be rejected.
Article 19.3 A trademark intermediary shall not accept the entrustment of a principal if it knows or should have	Article 19.3 A trademark intermediary shall not accept the entrustment of a principal if it knows or should have

<p>known that the trademark entrusted by the principal for registration application falls under any of the circumstances as prescribed by Article 15 and Article 32 of this Law.</p>	<p>known that the trademark entrusted by the principal for registration application falls under any of the circumstances as prescribed by Article 4, Article 15 and Article 32 of this Law.</p>
<p>Article 33</p> <p>If a holder of prior rights or an interested party holds that the trademark announced upon preliminary examination is in violation of the second or third paragraph of Article 13, Article 15, the first paragraph of Article 16, Article 30, Article 31, or Article 32 of this Law, he may, within three months from the date of the preliminary examination announcement, raise objections to the trademark office. Any party that is of the opinion that the aforesaid trademark is in violation of Article 10, Article 11 or Article 12 of this Law may raise objections to the trademark office within the same three-month period. If no objection is raised upon expiry of the announcement period, the trademark office shall approve the registration application, issue the certificate of trademark registration, and make an announcement thereon.</p>	<p>Article 33</p> <p>If a holder of prior rights or an interested party holds that the trademark announced upon preliminary examination is in violation of the second or third paragraph of Article 13, Article 15, the first paragraph of Article 16, Article 30, Article 31, or Article 32 of this Law, he may, within three months from the date of the preliminary examination announcement, raise objections to the trademark office. Any party that is of the opinion that the aforesaid trademark is in violation of Article 4, Article 10, Article 11, Article 12 or the fourth paragraph of Article 19 of this Law may raise objections to the trademark office within the same three-month period. If no objection is raised upon expiry of the announcement period, the trademark office shall approve the registration application, issue the certificate of trademark registration, and make an announcement thereon.</p>
<p>Article 44.1</p> <p>A registered trademark shall be declared invalid by the trademark office if it is in violation of Article 10, Article 11 or Article 12 of this Law, or its registration is obtained by fraudulent or other unfair means. Other entities or individuals may</p>	<p>Article 44.1</p> <p>A registered trademark shall be declared invalid by the trademark office if it is in violation of Article 4, Article 10, Article 11, Article 12 or the fourth paragraph of Article 19 of this Law, or its registration is obtained by fraudulent or other</p>

<p>request the trademark review and adjudication board to declare the aforesaid registered trademark invalid.</p>	<p>unfair means. Other entities or individuals may request the trademark review and adjudication board to declare the aforesaid registered trademark invalid.</p>
<p>Article 63</p> <p>The amount of damages for infringement on the exclusive right to use a trademark shall be determined based on the actual loss suffered by the right holder as a result of the infringement; if it is difficult to determine the actual loss, the amount of damages may be determined according to the proceeds gained therefrom by the infringer, if it is difficult to determine both the loss of the right holder and the proceeds gained by the infringing party, the amount of damages may be reasonably determined by reference to the multiples of the trademark royalties. Where an infringer maliciously infringes upon another party's exclusive right to use a trademark, in the case of serious circumstances, the amount of damages may be determined as not less than one time but not more than three times the amount that is determined according to the aforesaid methods. The amount of damages shall cover the reasonable expenses paid by the right holder for stopping the infringing act.</p> <p>Where the right holder has exhausted its efforts in fulfilling the obligation of burden of proof, but the account books and materials related to the infringing acts are mainly controlled by the infringer, the people's court may, for the</p>	<p>Article 63</p> <p>The amount of damages for infringement on the exclusive right to use a trademark shall be determined based on the actual loss suffered by the right holder as a result of the infringement; if it is difficult to determine the actual loss, the amount of damages may be determined according to the proceeds gained therefrom by the infringer, if it is difficult to determine both the loss of the right holder and the proceeds gained by the infringing party, the amount of damages may be reasonably determined by reference to the multiples of the trademark royalties. Where an infringer maliciously infringes upon another party's exclusive right to use a trademark, in the case of serious circumstances, the amount of damages may be determined as not less than one time but not more than five times the amount that is determined according to the aforesaid methods. The amount of damages shall cover the reasonable expenses paid by the right holder for stopping the infringing act.</p> <p>Where the right holder has exhausted its efforts in fulfilling the obligation of burden of proof, but the account books and materials related to the infringing acts are mainly controlled by the infringer, the people's court may, for the</p>

<p>purpose of determining the amount of damages, order the infringer to submit account books and materials related to the infringing acts. Where the infringer fails to provide such account books or materials or provides false account books or materials, the people's court may render a judgment on the amount of damages by reference to the claims of the right holder and the evidence furnished thereby.</p> <p>Where it is difficult to determine the actual loss suffered by the right holder as a result of the infringement, the proceeds gained by the infringer from the infringement or the royalties of the registered trademark concerned, the people's court shall render a judgment awarding damages in an amount not more than RMB three million yuan based on the circumstances of the infringing acts.</p>	<p>purpose of determining the amount of damages, order the infringer to submit account books and materials related to the infringing acts. Where the infringer fails to provide such account books or materials or provides false account books or materials, the people's court may render a judgment on the amount of damages by reference to the claims of the right holder and the evidence furnished thereby.</p> <p>Where it is difficult to determine the actual loss suffered by the right holder as a result of the infringement, the proceeds gained by the infringer from the infringement or the royalties of the registered trademark concerned, the people's court shall render a judgment awarding damages in an amount not more than RMB five million yuan based on the circumstances of the infringing acts.</p> <p>Except under exceptional circumstances, the people's court, in adjudicating cases involving trademark disputes, shall order, at the request of the right owner, the destruction of the commodities bearing counterfeit trademarks; the people's court shall order the destruction of the materials and tools mainly used for manufacturing commodities bearing counterfeit registered trademarks, without granting any indemnity, or under exceptional circumstances, shall forbid such materials or tools from re-entering the business channel, without granting any indemnity.</p> <p>The commodities bearing counterfeit trademarks shall not enter the business channel with the</p>
---	---

	mere removal of the counterfeit trademarks from such products.
Article 68 A trademark intermediary that commits any of the following acts shall be ordered to make rectifications within a time limit by the administrative department for industry and commerce, be given a warning, and be fined not less than RMB 10,000 yuan but not more than RMB100,000 yuan; the persons in charge who are directly responsible and other persons directly responsible shall be given a warning and be fined not less than RMB 5,000 yuan but not more than RMB 50,000 yuan; where a crime is constituted, criminal liabilities shall be pursued in accordance with the law: (1) Fabricating or tampering with legal documents, seals or signatures, or using fabricated or tempered legal documents, seals or signatures during the handling of trademark-related matters; (2) Soliciting trademark agency business by defaming other trademark intermediaries, or disrupting the order of the trademark agency market by other unfair means; or (3) Violating the provisions of the third or fourth paragraph of Article 19 of this Law. Where a trademark intermediary commits any of the acts prescribed in the preceding paragraph, the administrative department for industry and commerce shall record such matters in the credit dossier; in the case of serious	Article 68 A trademark intermediary that commits any of the following acts shall be ordered to make rectifications within a time limit by the administrative department for industry and commerce, be given a warning, and be fined not less than RMB 10,000 yuan but not more than RMB100,000 yuan; the persons in charge who are directly responsible and other persons directly responsible shall be given a warning and be fined not less than RMB 5,000 yuan but not more than RMB 50,000 yuan; where a crime is constituted, criminal liabilities shall be pursued in accordance with the law: (1) Fabricating or tampering with legal documents, seals or signatures, or using fabricated or tempered legal documents, seals or signatures during the handling of trademark-related matters; (2) Soliciting trademark agency business by defaming other trademark intermediaries, or disrupting the order of the trademark agency market by other unfair means; or (3) Violating the provisions of Article 4 , the third or fourth paragraph of Article 19 of this Law. Where a trademark intermediary commits any of the acts prescribed in the preceding paragraph, the administrative department for industry and commerce shall record such matters in the credit dossier; in the case of serious

<p>circumstances, the trademark office or the trademark review and adjudication board may concurrently decide to cease the acceptance and handling of the trademark matters submitted by the trademark intermediary, and shall make an announcement thereon.</p> <p>The trademark intermediary shall bear civil liabilities in accordance with the law if it violates the principle of good faith and infringes the legitimate rights and interests of a principal, and shall be given sanctions by the trade association of the trademark intermediaries pursuant to its articles of association.</p>	<p>circumstances, the trademark office or the trademark review and adjudication board may concurrently decide to cease the acceptance and handling of the trademark matters submitted by the trademark intermediary, and shall make an announcement thereon.</p> <p>The trademark intermediary shall bear civil liabilities in accordance with the law if it violates the principle of good faith and infringes the legitimate rights and interests of a principal, and shall be given sanctions by the trade association of the trademark intermediaries pursuant to its articles of association.</p> <p>The trademark intermediaries filing for the registration of trademarks in bad faith shall be subject to warnings, fines or other administrative punishment, based on the circumstances of the acts. Those initiating trademark proceedings in bad faith shall be subject to the sanctions of the people's courts in accordance with laws.</p>
--	---

A2: Regulations for the Implementation of the Trademark Law of the People's Republic of China (2014)

(Promulgated by Decree No. 358 of the State Council of the People's Republic of China on August 3, 2002, revised and promulgated by Decree No. 651 of the State Council of the People's Republic of China on April 29, 2014, and effective as of May 1, 2014)

Chapter I General Provisions

Article 1 These Regulations are formulated in accordance with the Trademark Law of the People's Republic of China (hereinafter referred to as the Trademark Law).

Article 2 Provisions concerning the trademarks in these Regulations shall apply to service marks.

Article 3 Where a trademark holder requests the protection of his trademark as a well-known trademark in accordance with Article 13 of the Trademark Law, he shall submit evidence to prove that his trademark constitutes a well-known trademark. The Trademark Office and the Trademark Review and Adjudication Board shall, based on the needs of case examination or investigation, as well as the evidence submitted by the party, make a determination as to whether his trademark is well-known in accordance with Article 14 of the Trademark Law.

Article 4 For geographical indications prescribed in Article 16 of the Trademark Law, applications may be filed to register them as certification marks or collective marks in accordance with the provisions of the Trademark Law and these Regulations.

Where a geographical indication is registered as a certification mark, any natural person, legal person or other organization whose goods satisfy the conditions under which the geographical indication is used may request the use of the certification mark, and the organization in control of such certification mark shall permit such use. Where a geographical indication is registered as a collective mark, any natural person, legal person or other organization whose goods satisfy the conditions under which the geographical indication is used may apply for the membership of the society, association or any other organization that registered the geographical indication as a collective mark, and the society, association or any other organization shall admit such natural person, legal person or organization as a member in accordance with its articles of association; those who do not apply for the membership of the society, association or any other organization that registered the geographical indication as a collective mark

may legitimately use the geographical indication, and the society, association or any other organization is not entitled to prohibit such use.

Article 5 Where a party entrusts a trademark agency with the application for trademark registration or other trademark matters, a Power of Attorney shall be submitted. The Power of Attorney shall state the contents and the scope of competence; a Power of Attorney issued by a foreigner or a foreign enterprise shall also state his or its nationality.

Procedures for notarizing and legalising a Power of Attorney and certifying documents relating to a foreigner or a foreign enterprise shall be undertaken in line with the principle of reciprocity.

In applying for trademark registration or trademark assignment, the applicant or the assignee that is a foreigner or a foreign enterprise shall appoint in the application a recipient within Chinese territory to be responsible for receiving subsequent legal documents issued by the Trademark Office or the Trademark Review and Adjudication Board. Subsequent legal documents issued by the Trademark Office or the Trademark Review and Adjudication Board shall be served on the recipient within Chinese territory.

A foreigner or a foreign enterprise in Article 18 of the Trademark Law refers to a foreigner or a foreign enterprise having no habitual residence or premises in China.

Article 6 The Chinese language shall be used in the application for trademark registration or other trademark matters.

Where any certificate, certifying document or evidence submitted in accordance with the provisions of the Trademark Law and these Regulations is in a foreign language, a Chinese translation shall be attached; where no Chinese translation is attached, it shall be deemed that the certificate, certifying document or evidence has not been submitted.

Article 7 Under any of the following circumstances, a staff member of the Trademark Office or the Trademark Review and Adjudication Board shall recuse himself from the case, and a party or an interested party may request his recusal:

- (1) where he is a party, or a close relative of a party or the agent;
- (2) where he has any other relationship with a party or the agent that may affect impartiality; or

(3) where he has a stake in the application for trademark registration or other trademark matters.

Article 8 Applications for trademark registration and other related documents submitted in data message as specified in Article 22 of the Trademark Law, shall be submitted through the Internet as prescribed by the Trademark Office or the Trademark Review and Adjudication Board.

Article 9 Except as otherwise provided in Article 18 of these Regulations, the date on which a party submits documents or materials to the Trademark Office or the Trademark Review and Adjudication Board shall be the date of delivery when the documents or materials are submitted in person, or the date of mailing indicated by the postmark when they are sent by mail, or the actual date on which the documents or materials are received by the Trademark Office or the Trademark Review and Adjudication Board when the date of mailing indicated by the postmark is illegible or where there is no postmark, unless the party can provide evidence of the actual date as indicated by the postmark. Where the documents or materials are submitted by courier services other than the postal services, the date shall be the receiving date of the courier services, or the actual date on which the documents or materials are received by the Trademark Office or the Trademark Review and Adjudication Board when the receiving date is uncertain, unless the party can provide evidence of the actual receiving date of the courier services. Where the documents or materials are submitted in data message, the date shall be the entry date of the documents or materials into the electronic system of the Trademark Office or the Trademark Review and Adjudication Board.

Where a party mails documents to the Trademark Office or the Trademark Review and Adjudication Board, he shall choose to use vouchered postal mail.

Where a party submits documents to the Trademark Office or the Trademark Review and Adjudication Board, and the documents are submitted in writing, the records archived by the Trademark Office or the Trademark Review and Adjudication Board shall prevail; where the documents are submitted in data message, the entries in the database of the Trademark Office or the Trademark Review and Adjudication Board shall prevail, unless the party can provide evidence that the archives or database entries of the Trademark Office or the Trademark Review and Adjudication Board are erroneous.

Article 10 The documents of the Trademark Office or the Trademark Review and Adjudication Board may be served on a party by mail, in person, in data message, or by other means; service of the documents in data message shall be subject to the consent of the party. Where a trademark agency is entrusted by the party, the documents shall be considered served once they

are served on the trademark agency.

The date of service of any document on a party by the Trademark Office or the Trademark Review and Adjudication Board shall be the date on which the party receives the document as indicated by the postmark when the document is sent by mail; where the date indicated by the postmark is illegible or where there is no postmark, the document shall be considered served 15 days after the date on which the document is sent out, unless the party can provide evidence of the actual receiving date; where the document is delivered in person, the date of service shall be the date on which the document is delivered; where the document is sent in data message, the document shall be considered served 15 days after the date on which the document is sent out, unless the party can provide evidence of the entry date of the document into his electronic system. Where the document is unable to be served by the abovementioned means, it may be served by means of publication, and the document shall be considered served 30 days after the date on which its publication is made.

Article 11 The following periods shall not be included into the trademark examination or review time limits:

- (1) the period when documents of the Trademark Office or the Trademark Review and Adjudication Board are served by means of publication;
- (2) the period when a party furnishes supplementary evidence or makes supplements or amendments to the documents, or the period when new responses are to be submitted due to change of a party;
- (3) the period required for providing proof of use, negotiating or drawing lots where the trademark applications are filed on the same day;
- (4) the period required for the confirmation of the right of priority; or
- (5) the period awaiting for the decision of other cases involving a prior right, upon the request of the applicant during the process of examination or review.

Article 12 Except as otherwise provided in the second paragraph of this Article, the first day of the various time limits prescribed by the Trademark Law and these Regulations shall not be included in the time limit. Where the time limit is counted by year or month, the corresponding day of the last month of the time limit shall be the expiration day of the time limit; if there is no corresponding day in that month, the last day of that month shall be the expiration day of the time limit; when the expiration day of the time limit falls on a public holiday, the first working day following the public holiday shall be

the expiration day of the time limit.

The period of validity of a registered trademark prescribed in Articles 39 and 40 of the Trademark Law commences from the statutory date, and expires on the day preceding the corresponding day of the last month of the time limit, and when there is no corresponding day in that month, the last day of that month shall be the expiration day of the time limit.

Chapter II Application for Trademark Registration

Article 13 In applying for registration of a trademark, an application shall be prepared and submitted based on the published Classification of Goods and Services. For each application for trademark registration, one copy of the Application for Trademark Registration and one copy of the reproduction of the trademark shall be submitted to the Trademark Office; where the trademark is a combination of colors or of colored pattern, one copy of the colored reproduction of the trademark and one in black and white shall be submitted; where the trademark does not claim color protection, a reproduction of the trademark in black and white shall be submitted.

The reproduction of a trademark shall be clear, easy to paste, and printed on smooth and durable paper or use photographs as a substitute, with the length and width of the reproduction not more than 10 centimeters and not less than 5 centimeters respectively.

Where an application is filed for registration of a three-dimensional sign as a trademark, a statement shall be made in the application, the method of use of the trademark shall be indicated, a reproduction that can establish the three-dimensional shape shall be submitted, and the reproduction submitted shall include at least a three-view drawing.

Where an application is filed for registration of a combination of colors as a trademark, a statement shall be made in the application, and the method of use of the trademark shall be indicated.

Where an application is filed for registration of sound as a trademark, a statement shall be made in the application, a sound sample that conforms to requirement and a description of the sound for registration as the trademark shall be submitted, and the method of use of the trademark shall be indicated. The description of the sound trademark shall use stave or numbered musical notations of the sound in combination with textual description; where the sound is unable to be described by stave or numbered musical notations, it shall be described in words; the description of the trademark shall be in conformity with the sound sample.

Where an application is filed for registration of a collective mark or a certification mark, a statement shall be made in the application, and documents certifying the qualifications of the applicants and the rules on the administration of use of the trademark shall be submitted.

Where a trademark is in a foreign language, or consists of foreign words, the meaning shall be explained in Chinese.

Article 14 Where an application is filed for registration of a trademark, the applicant shall submit documents certifying his identity. The name of the trademark applicant shall be in conformity with what is shown in the documents submitted.

The provisions of the preceding paragraph on submitting documents certifying the identity of the applicant shall apply to applications to the Trademark Office for handling other trademark matters, such as modification, assignment, renewal, opposition, or cancellation of trademarks.

Article 15 The indications of goods or services shall be given in accordance with the class numbers and terms listed in the Classification of Goods and Services; 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.

Where applications for trademark registration and other related documents are submitted in paper form, they shall be typewritten or printed.

The second paragraph of this Article shall apply to other trademark matters.

Article 16 Where an application is jointly filed for registration of a trademark, or when proceeding to other matters concerning a jointly owned trademark, a representative shall be designated in the application; where no representative is designated, the person named first in the application shall be taken as the representative.

The documents of the Trademark Office or the Trademark Review and Adjudication Board shall be served on the representative.

Article 17 Where an applicant modifies his name, address, agent or recipient or deletes any of the designated goods, he shall go through modification formalities with the Trademark Office.

Where an applicant assigns his application for trademark registration, he shall go through assignment formalities with the Trademark Office.

Article 18 The filing date of an application for trademark registration shall be the date on which the application documents are received by the Trademark Office.

Where the application formalities for trademark registration are completed, the application documents are filled in as required, and the fees are paid, the Trademark Office shall accept the application and notify the applicant in writing; where the application formalities are not completed, the application documents are not filled in as required or the fees are not paid, the Trademark Office shall not accept the application and shall notify the applicant in writing and state the reasons. Where the application formalities are basically completed or the application documents are basically in compliance with the provisions, but supplements or amendments are necessary, the Trademark Office shall notify the applicant of the supplements or amendments to be made, requiring him to make supplements or amendments to the specified items and send them back to the Trademark Office within 30 days from the date of receipt of the notification. Where the supplements or amendments are made and sent back to the Trademark Office within the specified time limit, the filing date shall be reserved; where no supplements or amendments are made at the expiration of the specified time limit, or the supplements or amendments are not made as required, the Trademark Office shall not accept such application and shall notify the applicant in writing.

The provisions on requirements for acceptance in the second paragraph of this Article shall apply to other trademark matters.

Article 19 Where two or more applicants apply respectively on the same day for the registration of an identical or similar trademark in respect of the same or similar goods, both or all of the applicants shall, within 30 days from the date of receipt of the notification of the Trademark Office, submit evidence of prior use of such trademark before the application is filed. Where the use of the trademark was on the same day or no one has put it into use, both or all of the applicants may, within 30 days from the date of receipt of the notification of the Trademark Office, negotiate on their own and submit a written agreement to the Trademark Office; where the applicants are reluctant to negotiate or fail to reach an agreement through negotiation, the Trademark Office shall notify both or all of the applicants that there will be a lot drawing to determine one of them as the applicant, and the applications filed by others shall be refused. Where any applicant notified by the Trademark Office fails to participate in the lot drawing, the application filed by such applicant shall be considered abandoned, and the Trademark Office shall notify in writing the applicant who fails to participate in the lot drawing.

Article 20 Where a right of priority is claimed in accordance with the provisions of Article 25 of the Trademark Law, the duplicate copies of the

application documents submitted by the applicant for the first time for trademark registration shall be certified by the competent trademark authority which has accepted the application, and the filing date and number of the application shall be indicated.

Chapter III Examination of Application for Trademark Registration

Article 21 The Trademark Office shall, in accordance with the relevant provisions of the Trademark Law and these Regulations, examine the applications for trademark registration which have been accepted, preliminarily approve those applications that are in compliance with the provisions in respect of registration of a trademark either on all goods or on certain designated goods, and make a publication to that effect; where an application is not in compliance with the provisions in respect of registration of a trademark on all goods or on certain designated goods, the Trademark Office shall refuse the application for registration of the trademark on all goods or on certain designated goods, notify the applicant in writing and state the reasons.

Article 22 Where the Trademark Office refuses an application for registration of a trademark on certain designated goods, the applicant may divide the application and make the part of the application for which the preliminary approval has been granted another application. For the divided application, the filing date of the original application shall be reserved.

Where an applicant applies to divide an application, he shall file an application for division to the Trademark Office within 15 days from the date of receipt of the Notification of Partial Refusal to an Application for Trademark Registration issued by the Trademark Office.

Upon receipt of the application for division, the Trademark Office shall divide the original application into two separate applications, generate a new application number for the divided application for which preliminary approval has been granted and make a publication.

Article 23 Where the Trademark Office deems that the content of an application for trademark registration needs explanation or correction in accordance with the provisions of Article 29 of the Trademark Law, the applicant shall provide explanation or make correction within 15 days from the date of receipt of the notification of the Trademark Office.

Article 24 Where filing an opposition against a trademark which has been preliminarily approved and published by the Trademark Office, the opponent shall submit in duplicate the following opposition materials to the Trademark Office, and shall make an indication of the original copy and the duplicate

copy:

- (1) an Application for Trademark Opposition;
- (2) documents that certify the identity of the opponent; and
- (3) documents certifying that the opponent is a holder of the prior right or an interested party, where the opposition is filed on the grounds of violation of the second or third paragraph of Article 13, Article 15, the first paragraph of Article 16, Article 30, Article 31 or Article 32 of the Trademark Law.

An Application for Trademark Opposition shall indicate explicit requests and factual basis, with the relevant evidence attached.

Article 25 Upon receipt of an Application for Trademark Opposition, the Trademark Office shall, after examination, accept it if it satisfies the conditions for acceptance, and issue a Notification of Acceptance to the applicant.

Article 26 Where an Application for Trademark Opposition falls within any of the following circumstances, the Trademark Office shall not accept the application and shall notify the applicant in writing and state the reasons:

- (1) the application is not filed within the statutory time limit;
- (2) the qualification of the applicant or the grounds of the opposition are not in compliance with Article 33 of the Trademark Law;
- (3) the grounds, facts and legal basis of the opposition are not explicit; or
- (4) the application for opposition is filed by the same opponent once again against the same trademark on the same grounds, facts and legal basis.

Article 27 The Trademark Office shall promptly send the duplicate copy of the opposition materials to the opposed party, who shall be required to respond within 30 days from the date of receipt of the duplicate copy of the opposition materials. Where the opposed party fails to make a response, the making of a decision by the Trademark Office shall not be affected.

Where a party needs to supplement related evidence after filing an application for opposition or after making a response, a statement shall be made in the Application for Trademark Opposition or in the response, and the evidence shall be submitted within 3 months from the date on which the application is filed or the response is made; where no evidence is submitted

at the expiration of the time limit, the party shall be considered giving up making supplements to related evidence. However, where evidence accrued after the expiration of the time limit or a party failed to submit the evidence within the time limit for other justifiable reasons, and when such evidence is submitted after the expiration of the time limit, the Trademark Office shall send the evidence to the other party and may accept it after cross-examination.

Article 28 A decision to disapprove the registration of a trademark provided in the third paragraph of Article 35 and the first paragraph of Article 36 of the Trademark Law shall include a decision to disapprove the registration of a trademark on certain designated goods.

Where a trademark is under opposition but a publication of its registration has already been made prior to the decision of the Trademark Office to approve or disapprove its registration, the publication of registration shall be cancelled. Where the opposition is not justified after examination and the registration of the trademark has been approved, the trademark shall be republished after the entry into force of the decision to approve its registration.

Article 29 Where a trademark applicant or a trademark registrant applies for correction in accordance with Article 38 of the Trademark Law, an Application for Correction shall be filed with the Trademark Office. Where the application satisfies the conditions as required, the Trademark Office shall approve the application and correct the corresponding content; where the application fails to satisfy the conditions as required, the Trademark Office shall not approve the application, and shall notify the applicant in writing and state the reasons.

Where there is any correction in respect of a trademark after a publication of preliminary approval granted to the trademark or a publication of its registration has already been made, a publication of the correction shall be made.

Chapter IV Modification, Assignment and Renewal of Registered Trademarks

Article 30 Where the name or address of a trademark registrant or any other registration particular is modified, an Application for Modification shall be filed with the Trademark Office. Where the name of a trademark registrant is modified, the modification certification document issued by the relevant registration authority shall be also submitted. The Trademark Office shall, upon approval, issue a corresponding certification to the trademark registrant and publish the modification; where the application is not approved, the Trademark Office shall notify the applicant for modification in writing and state the reasons.

Where the name or address of a trademark registrant is modified, the trademark registrant shall make the modification in respect of all his registered trademarks in a lump; where the modification is not made in a lump, the Trademark Office shall notify the trademark registrant to make corrections within a specified time limit; where no corrections are made at the expiration of the time limit, the application for modification shall be considered abandoned, and the Trademark Office shall notify the applicant for modification in writing.

Article 31 Where a registered trademark is assigned, both the assignor and the assignee shall jointly file an Application for Assignment of the Registered Trademark to the Trademark Office. The assignor and the assignee shall jointly go through the formalities for the application for assignment of the registered trademark. The Trademark Office shall, upon approval of the application for assignment of the registered trademark, issue a corresponding certification to the assignee and publish the assignment.

Where a registered trademark is assigned and the trademark registrant does not assign in a lump all his trademarks that are identical or similar to each other in respect of the same or similar goods, the Trademark Office shall notify the trademark registrant to make corrections within a specified time limit; where no corrections are made at the expiration of the time limit, the application for assignment of the registered trademark shall be considered abandoned, and the Trademark Office shall notify the applicants for assignment in writing.

Article 32 Where the exclusive right to use a registered trademark is transferred due to inheritance or reasons other than assignment, the party who accepts the exclusive right to use the registered trademark shall, by virtue of the relevant certification documents or legal instruments, go through the formalities for the transfer of the exclusive right to use the registered trademark with the Trademark Office.

Where the exclusive right to use a registered trademark is transferred, all of the right holder's trademarks that are identical or similar to each other in respect of the same or similar goods shall be transferred in a lump; where all the trademarks are not transferred in a lump, the Trademark Office shall notify the transferee to make corrections within a specified time limit; where no corrections are made at the expiration of the time limit, the application for transfer of the registered trademark shall be considered abandoned, and the Trademark Office shall notify the applicant for the transfer in writing.

The transfer of a trademark shall be published upon the approval of the application for the transfer. The party who accepts the transfer of the exclusive right to use the registered trademark shall enjoy the exclusive right to use the trademark from the date of publication.

Article 33 Where a registered trademark needs to be renewed, an Application for Renewal of the Registered Trademark shall be filed with the Trademark Office. The Trademark Office shall, upon approval of the application for renewal of the registered trademark, issue a corresponding certification and publish the renewal.

Chapter V International Registration of Trademarks

Article 34 The international registration of trademarks in Article 21 of the Trademark Law refers to the Madrid international registration of trademarks filed under the provisions of the Madrid Agreement Concerning the International Registration of Marks (hereinafter referred to as the Madrid Agreement), the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (hereinafter referred to as the Madrid Protocol) and the Common Regulations under the Madrid Agreement Concerning the International Registration of Marks and the Protocol Relating to that Agreement.

Applications for the Madrid international registration of trademarks include the applications for international registration of trademarks with the People's Republic of China being the country of origin, the applications designating territorial extensions to the People's Republic of China, and other relevant applications.

Article 35 Where an international registration of a trademark with the People's Republic of China being the country of origin is applied for, the applicant shall have a real and effective premises in the People's Republic of China, or be domiciled in the People's Republic of China, or be a Chinese national.

Article 36 Where an applicant eligible as prescribed in Article 35 of these Regulations has registered his trademark in the Trademark Office, he may apply for international registration of the trademark under the Madrid Agreement.

Where an applicant eligible as prescribed in Article 35 of these Regulations has registered his trademark in the Trademark Office, or has already filed an application for trademark registration which is accepted by the Trademark Office, he may apply for international registration of the trademark under the Madrid Protocol.

Article 37 Where an international registration of a trademark with the People's Republic of China being the country of origin is applied for, the application shall be filed through the intermediary of the Trademark Office to the International Bureau of the World Intellectual Property Organization

(hereinafter referred to as the International Bureau).

An application with the People's Republic of China being the country of origin in respect of subsequent designation, renunciation, or cancellation of the international registration of a trademark under the Madrid Agreement shall be filed through the intermediary of the Trademark Office to the International Bureau; where any assignment, deletion, modification or renewal of a registered international trademark under the Madrid Agreement is applied for, the application may be filed through the intermediary of the Trademark Office to the International Bureau or directly to the International Bureau.

An application with the People's Republic of China being the country of origin in respect of subsequent designation, assignment, limitation, renunciation, cancellation, modification or renewal of the international registration of a trademark under the Madrid Protocol may be filed through the intermediary of the Trademark Office to the International Bureau or directly to the International Bureau.

Article 38 Where a party files an application for international registration of a trademark or other relevant applications through the intermediary of the Trademark Office to the International Bureau, he shall submit application forms and relevant materials in compliance with the requirements of both the International Bureau and the Trademark Office.

Article 39 The goods or services designated in an application for international registration of a trademark shall not go beyond the scope of the goods or services as covered in its national basic application or basic registration.

Article 40 Where the application formalities for international registration of a trademark are not completed, or the application documents are not filled in as required, the Trademark Office shall not accept it and its filing date shall not be reserved.

Where the application formalities are basically completed or the application documents are basically in compliance with the provisions, but supplements or amendments are necessary, the applicant shall make supplements or amendments within 30 days from the date of receipt of the Notification of Supplements or Amendments. Where no supplements or amendments are made at the expiration of the specified time limit, the Trademark Office shall not accept it and shall notify the applicant in writing.

Article 41 Where a party files an application for international registration of a trademark or other relevant applications through the intermediary of the Trademark Office to the International Bureau, he shall pay fees in

accordance with the provisions.

The applicant shall pay fees to the Trademark Office within 15 days from the date of receipt of the Notification of Payment of Fees issued by the Trademark Office. Where no fees are paid at the expiration of the time limit, the Trademark Office shall not accept the application and shall notify the applicant in writing.

Article 42 The Trademark Office shall, within the period of refusal prescribed by the Madrid Agreement and the Madrid Protocol (hereinafter referred to as the period of refusal), make a decision after examining an application designating territorial extension to the People's Republic of China in accordance with the relevant provisions of the Trademark Law and these Regulations, and notify the International Bureau of the decision. Where neither refusal nor partial refusal is notified by the Trademark Office within the period of refusal, the application designating territorial extension shall be considered as approved.

Article 43 When applying for a territorial extension to the People's Republic of China and requesting the protection of a three-dimensional sign, a combination of colors or sound as a trademark, or the protection of a collective mark or a certification mark, the applicant shall submit the materials required by Article 13 of these Regulations through a trademark agency established in accordance with law to the Trademark Office, within 3 months from the date on which the trademark is recorded in the International Register at the International Bureau. Where no relevant materials are submitted within the said time limit, the Trademark Office shall refuse the application for territorial extension.

Article 44 The World Intellectual Property Organization publishes the particulars in relation to the international registration of trademarks, and the Trademark Office shall make no other publication.

Article 45 An opponent who is in compliance with Article 33 of the Trademark Law may file an opposition to the Trademark Office against an application designating territorial extension to the People's Republic of China within 3 months from the first day of the next month following the publication of the Gazette of International Marks by the World Intellectual Property Organization.

The Trademark Office shall notify the International Bureau of the opposition in the form of provisional refusal within the period of refusal.

The opposed party may respond within 30 days from the date of receipt of the Notification of Provisional Refusal transmitted by the International Bureau,

and the response and related evidence shall be submitted to the Trademark Office through a trademark agency established in accordance with law.

Article 46 The period of validity of an international registration of a trademark protected in the People's Republic of China shall be counted from the date of international registration or the date of subsequent designation. The registrant may file an application for renewal to the International Bureau before the expiration of the period of validity. Where an application for renewal is not filed within the period of validity, a grace period of 6 months may be granted. The Trademark Office shall make an examination in accordance with law upon receipt of the Notification of Renewal from the International Bureau. The international registration of the trademark shall be cancelled where the Notification of Non-renewal is issued by the International Bureau.

Article 47 Where an application designating territorial extension to the People's Republic of China is assigned, the assignee shall have a real and effective premises, or be domiciled, in the territory of a contracting party, or be a national of a contracting party.

Where the assignor does not assign in a lump all his trademarks that are identical or similar to each other in respect of the same or similar goods or services, the Trademark Office shall notify the registrant to make corrections within 3 months from the date on which the notification is sent; where no corrections are made at the expiration of the time limit, or where the assignment is liable to cause confusion or have other adverse effects, the Trademark Office shall decide that the assignment has no effect in the People's Republic of China and shall make a declaration to the International Bureau.

Article 48 Where an application designating territorial extension to the People's Republic of China is filed for a deletion of the list of goods and/or services, and the goods or services after the deletion are not in compliance with the requirements of the classification of goods and services in the People's Republic of China, or exceed the original scope of designated goods or services, the Trademark Office shall decide that the deletion has no effect in the People's Republic of China and shall make a declaration to the International Bureau.

Article 49 An application to cancel an international registration of a trademark as prescribed in the second paragraph of Article 49 of the Trademark Law shall be filed with the Trademark Office 3 years after the date of expiration of the period of refusal of the application for international registration of the trademark; where the international registration of the trademark is still under review against a refusal or under opposition at the expiration of the period of refusal, the application for cancellation shall be

filed with the Trademark Office 3 years after the date of the entry into force of the decision to approve the registration made by the Trademark Office or the Trademark Review and Adjudication Board.

An application to declare the invalidation of an international registration of a trademark as prescribed in the first paragraph of Article 44 of the Trademark Law shall be filed with the Trademark Review and Adjudication Board at the expiration of the period of refusal of the application for international registration of the trademark; where the international registration of the trademark is still under review against a refusal or under opposition at the expiration of the period of refusal, the application to declare the invalidation shall be filed with the Trademark Review and Adjudication Board after the entry into force of the decision to approve the registration made by the Trademark Office or the Trademark Review and Adjudication Board.

An application to declare the invalidation of an international registration of a trademark as prescribed in the first paragraph of Article 45 of the Trademark Law shall be filed with the Trademark Review and Adjudication Board within 5 years from the date of expiration of the period of refusal of the application for international registration of the trademark; where the international registration of the trademark is still under review against a refusal or under opposition at the expiration of the period of refusal, the application to declare the invalidation shall be filed with the Trademark Review and Adjudication Board within 5 years from the date of the entry into force of the decision to approve the registration made by the Trademark Office or the Trademark Review and Adjudication Board. Where a registration is obtained in bad faith, the owner of a well-known trademark shall not be bound by this 5-year time limit.

Article 50 The following provisions of the Trademark Law and these Regulations shall not apply to matters concerning international registration of trademarks:

- (1) the provisions on the time limit for examination and review in Article 28 and the first paragraph of Article 35 of the Trademark Law;
- (2) Article 22 and the second paragraph of Article 30 of these Regulations; and
- (3) the provisions that the assignor and the assignee shall jointly file an application and go through the formalities for assignment of a trademark, as prescribed in Article 42 of the Trademark Law and Article 31 of these Regulations.

Chapter VI Review and Adjudication of Trademarks

Article 51 Trademark review and adjudication means that the Trademark Review and Adjudication Board reviews relevant trademark dispute cases in accordance with the provisions of Articles 34, 35, 44, 45 and 54 of the Trademark Law. Where a party files an application for trademark review to the Trademark Review and Adjudication Board, he shall indicate explicit requests, facts, grounds and legal basis, and shall submit relevant evidence.

The Trademark Review and Adjudication Board shall, on the basis of facts, conduct review in accordance with law.

Article 52 When reviewing a case filed against a decision made by the Trademark Office to refuse an application for trademark registration, the Trademark Review and Adjudication Board shall review the refusal decision made by the Trademark Office, as well as the facts, grounds and requests filed by the applicant in the review application and the factual status when the review is conducted.

Where, in reviewing a case filed against a decision made by the Trademark Office to refuse an application for trademark registration, the Trademark Review and Adjudication Board finds that the trademark which is the subject of the application for trademark registration is in violation of the provisions of Article 10, Article 11, Article 12, or the first paragraph of Article 16 of the Trademark Law, and that the Trademark Office has not made the refusal decision in accordance with such provisions, the Trademark Review and Adjudication Board may make a review decision to refuse the application in accordance with such provisions. The Trademark Review and Adjudication Board shall listen to the opinions of the trademark applicant prior to making the review decision.

Article 53 When reviewing a case filed against a decision made by the Trademark Office to disapprove the registration of a trademark, the Trademark Review and Adjudication Board shall review the decision made by the Trademark Office to disapprove registration, as well as the facts, grounds and requests filed by the applicant in the review application and the opinions raised by the opponent.

When reviewing a case filed against a decision made by the Trademark Office to disapprove the registration of a trademark, the Trademark Review and Adjudication Board shall notify the opponent to participate in the review of the case and raise his opinions. Where the opinions of the opponent have a substantive impact on the result of the case, such opinions may be admitted as bases for the decision of the review; where the opponent fails to participate in the review of the case or raise his opinions, the review of the case shall not be affected.

Article 54 When reviewing a case filed to declare the invalidation of a registered trademark in accordance with the provisions of Article 44 or 45 of the Trademark Law, the Trademark Review and Adjudication Board shall review the facts, grounds and requests filed or responded by the parties.

Article 55 When reviewing a case filed against a decision made by the Trademark Office to declare the invalidation of a registered trademark in accordance with the provisions of the first paragraph of Article 44 of the Trademark Law, the Trademark Review and Adjudication Board shall review the decision made by the Trademark Office and the facts, grounds and requests filed by the applicant in the review application.

Article 56 When reviewing a case filed against a decision made by the Trademark Office to cancel or maintain the registration of a trademark in accordance with the provisions of Article 49 of the Trademark Law, the Trademark Review and Adjudication Board shall review the decision made by the Trademark Office to cancel or maintain the registration of the trademark and the facts, grounds and requests filed by the party in the review application.

Article 57 When applying for trademark review, the applicant shall file an application to the Trademark Review and Adjudication Board, and submit duplicate copies of the application that corresponds with the number of the other party; where an application for review is filed on the basis of a decision made by the Trademark Office, the duplicate copies of the decision shall also be attached.

Where, after receipt of an application, the Trademark Review and Adjudication Board, after examination, finds that the application meets the requirements for acceptance, it shall accept the application; where the application fails to meet the requirements for acceptance, it shall not accept the application, and shall notify the applicant in writing and state the reasons; where supplements or amendments are necessary for the application, the applicant shall be notified of the supplements or amendments to be made within 30 days from the date of receipt of the notification. Where the application still fails to comply with the provisions after supplements or amendments, the Trademark Review and Adjudication Board shall not accept the application, and shall notify the applicant in writing and state the reasons; where no supplements or amendments are made at the expiration of the specified time limit, the application shall be considered withdrawn and the Trademark Review and Adjudication Board shall notify the applicant in writing.

Where, after an application for review is accepted, the Trademark Review and Adjudication Board finds that the application does not satisfy the requirements for acceptance, it shall refuse the application, notify the

applicant in writing and state the reasons.

Article 58 The Trademark Review and Adjudication Board shall, upon acceptance of an application for trademark review, send promptly a duplicate copy of the application to the other party, requiring him to respond within 30 days from the date of receipt of such copy; where no response is made at the expiration of the time limit, the review of the case by the Trademark Review and Adjudication Board shall not be affected.

Article 59 Where a party needs to supplement related evidence after filing an application for review or after making a response, a statement shall be made in the application or in the response, and the evidence shall be submitted within 3 months from the date on which the application is filed or the response is made; where no evidence is submitted at the expiration of the time limit, the party shall be considered giving up making supplements to related evidence. However, where evidence accrued after the expiration of the time limit or a party failed to submit the evidence within the time limit for other justifiable reasons, and such evidence is submitted after the expiration of the time limit, the Trademark Review and Adjudication Board shall send the evidence to the other party and may accept it after cross-examination.

Article 60 The Trademark Review and Adjudication Board may, at the request of a party or on the basis of practical needs, decide to hold an oral hearing in respect of an application for review.

Where the Trademark Review and Adjudication Board decides to hold an oral hearing in respect of an application for review, it shall notify in writing, 15 days prior to the oral hearing, the parties of the date, venue and review officers of the oral hearing to be held. The parties shall respond within the time limit specified in the notification.

Where the applicant for review neither responds nor participates in the oral hearing, his application for review shall be considered withdrawn, and the Trademark Review and Adjudication Board shall notify the applicant for review in writing; where the other party neither responds nor participates in the oral hearing, the Trademark Review and Adjudication Board may review the application by default.

Article 61 An applicant may, before the Trademark Review and Adjudication Board makes a decision or ruling, request the withdrawal of his application for review in writing to the Trademark Review and Adjudication Board and state the reasons. Where the Trademark Review and Adjudication Board deems that the application may be withdrawn, the review proceedings shall be terminated.

Article 62 Where an application for trademark review is withdrawn, the applicant shall not file an application for review of the trademark again on the basis of the same facts and grounds. Where the Trademark Review and Adjudication Board has already made a ruling or decision on an application for trademark review, no application for review shall be filed again on the basis of the same facts and grounds, with the exception of an application filed with the Trademark Review and Adjudication Board to declare the invalidation of a registered trademark, the registration of which has been approved in the review proceedings against a decision to disapprove its registration.

Chapter VII Administration of Use of Trademarks

Article 63 When putting a registered trademark in use, such words as "registered trademark" or a registration sign may be indicated on the goods, packages, manuals or other attachments.

The registration signs include ® and ®, which shall be indicated on the upper or lower right corner of the trademark when used.

Article 64 Where a Trademark Registration Certificate is lost or damaged, an application for reissuance of the Trademark Registration Certificate shall be filed with the Trademark Office. Where a Trademark Registration Certificate is lost, a statement of loss shall be published in the Trademark Gazette. A damaged Trademark Registration Certificate shall be returned to the Trademark Office when the application for reissuance is filed.

Where a trademark registrant needs the reissuance of a certification on modification, assignment or renewal of a trademark, or the issuance of a certification on the registration of a trademark, or where a trademark applicant needs the issuance of documents verifying a right of priority by the Trademark Office, he shall file a corresponding application with the Trademark Office. Where the application is in compliance with the requirements, the Trademark Office shall issue corresponding certifications; otherwise, the Trademark Office shall not process the application, and shall notify the applicant, stating the reasons.

Whoever forges or alters a Trademark Registration Certificate or other trademark certifications shall be subject to criminal prosecution in accordance with the provisions of the Criminal Law on the crime of forging or altering certificates of State organs or on other crimes.

Article 65 Where a registered trademark falls under the circumstances prescribed in Article 49 of the Trademark Law and has become the generic name of the goods on which its use is approved, any organization or

individual may apply to the Trademark Office for cancellation of the registered trademark, and evidence shall be attached when the application is filed. Upon acceptance of the application, the Trademark Office shall notify the trademark registrant, requiring him to respond within 2 months from the date of receipt of the notification; where no response is made at the expiration of the time limit, the making of a decision by the Trademark Office shall not be affected.

Article 66 Where a registered trademark falls under the circumstances prescribed in Article 49 of the Trademark Law and has not been in use for 3 consecutive years without a justifiable reason, any organization or individual may apply to the Trademark Office for cancellation of the registered trademark, and the relevant facts shall be stated when the application is filed. Upon acceptance of the application, the Trademark Office shall notify the trademark registrant, requiring him to provide evidence proving the use of the trademark prior to the filing of the application for cancellation, or explain the justifiable reason for its non-use, within 2 months from the date of receipt of the notification; where no evidence of use is provided at the expiration of the time limit, or the evidence provided is invalid and there is no justifiable reason for its non-use, the Trademark Office shall cancel the registered trademark.

The evidence proving the use of a registered trademark referred to in the preceding paragraph includes that of use of the trademark by the trademark registrant and that of use of the trademark by others under the license of the trademark registrant.

For an application for cancellation of a registered trademark on the grounds of non-use for 3 consecutive years without a justifiable reason, it shall be filed 3 years after the date of the publication of the registration of the registered trademark.

Article 67 The following circumstances shall be considered as justifiable reasons prescribed in Article 49 of the Trademark Law:

- (1) force majeure;
- (2) restrictions imposed by government policy;
- (3) bankruptcy liquidation; and
- (4) other justifiable reasons not attributable to the trademark registrant.

Article 68 Where the Trademark Office or the Trademark Review and Adjudication Board is to cancel or declare invalid a registered trademark, and where the grounds for cancellation or declaration of invalidation involve only

certain designated goods, the Trademark Office or the Trademark Review and Adjudication Board shall cancel or declare invalid the registration of the trademark used only on those designated goods.

Article 69 Where a licensor authorizes others to use his registered trademark, he shall, within the term of validity of the license contract, apply to the Trademark Office for recordation, with materials attached. The materials shall indicate the licensor and licensee of the registered trademark, the period of the license, and the scope of goods or services covered under the license.

Article 70 Where the exclusive right to use a registered trademark is pledged, the pledger and the pledgee shall sign a written pledge contract, and jointly apply for the recordation of the pledge to the Trademark Office, which shall make a publication of the pledge.

Article 71 Where anyone violates the second paragraph of Article 43 of the Trademark Law, the administrative department for industry and commerce shall order him to make corrections within a specified time limit; where no corrections are made within the time limit, the offending party shall be ordered to stop the sale, and where the offending party refuses to stop the sale, he shall be fined not more than 100,000 yuan.

Article 72 Where a trademark holder requests the protection of his trademark as a well-known trademark in accordance with Article 13 of the Trademark Law, he may submit a request to the administrative department for industry and commerce. Once the trademark is determined as a well-known trademark by the Trademark Office in accordance with Article 14 of the Trademark Law, the administrative department for industry and commerce shall order the infringer to stop using the trademark in violation of Article 13 of the Trademark Law, and confiscate and destroy the trademark representations used illegally; where it is difficult to separate the trademark representations from the goods involved, they shall be confiscated and destroyed together.

Article 73 Where a trademark registrant applies for the withdrawal of his registered trademark, or of his trademark registration on certain designated goods, he shall file an Application for the Withdrawal of the Trademark to the Trademark Office, and return the original Trademark Registration Certificate.

Where a trademark registrant applies for the withdrawal of his registered trademark, or of his trademark registration on certain designated goods, and where the withdrawal is approved by the Trademark Office, the exclusive right to use the registered trademark or the effect of the exclusive right to use the registered trademark on the designated goods shall be terminated from the date on which the Trademark Office receives the application for withdrawal.

Article 74 Where a registered trademark is cancelled, or is withdrawn in accordance with Article 73 of these Regulations, the original Trademark Registration Certificate shall be nullified and a publication shall be made; where the registration of a trademark on certain designated goods is cancelled or a trademark registrant applies for the withdrawal of his trademark registration on certain designated goods, a new Trademark Registration Certificate shall be issued and a publication shall be made.

Chapter VIII Protection of the Exclusive Right to Use a Registered Trademark

Article 75 An act of providing such facilities as storage, transport, mailing, printing, concealing, business premises, or an online goods trading platform for infringing upon another person's exclusive right to use a registered trademark constitutes an act of providing convenience prescribed in subparagraph (6) of Article 57 of the Trademark Law.

Article 76 The use of a sign which is identical with or similar to another person's registered trademark on the same or similar goods as the name or decoration of the goods, thus misleading the public, constitutes an infringement upon the exclusive right to use a registered trademark prescribed in subparagraph (2) of Article 57 of the Trademark Law.

Article 77 In the case of an infringement upon the exclusive right to use a registered trademark, anyone may lodge a complaint with or report to the administrative department for industry and commerce.

Article 78 The following factors may be taken into consideration when calculating the illegal business revenue prescribed in Article 60 of the Trademark Law:

- (1) the selling price of the infringing goods;
- (2) the marked price of the unsold infringing goods;
- (3) the ascertained average price of the infringing goods already sold;
- (4) the median market price of the infringed goods;
- (5) the business income of the infringing party generated by the infringement; and
- (6) other factors that could reasonably serve to calculate the value of the infringing goods.

Article 79 The following circumstances shall be considered as being able to prove that the goods are obtained by legitimate means prescribed in Article 60 of the Trademark Law:

- (1) having the supply list and payment receipt bearing the legitimate

signature and seal of the supplier, which are verified as true or recognized by the supplier;

(2) having the purchase contract signed by both the supplier and the seller, which is verified as having been truly implemented;

(3) having the legitimate purchase invoice, on which the items indicated are corresponding to the goods in question; or

(4) other circumstances which could prove that the goods have been legitimately obtained.

Article 80 Where a seller sells goods infringing upon the exclusive right to use a registered trademark without the knowledge of the infringing nature of such goods, and is able to prove that the goods are obtained by legitimate means and provide information on the supplier of the goods, the administrative department for industry and commerce shall order him to stop the sale, and shall notify the information of the case to the administrative department for industry and commerce of the place where the supplier of the infringing goods is located.

Article 81 Where the ownership of a registered trademark in question is subject to the examination of the Trademark Office, or the review of the Trademark Review and Adjudication Board, or the trial of the people's court, and where the outcome arising therefrom may affect the determination of a case, it shall be considered as the ownership of a trademark in dispute prescribed in the third paragraph of Article 62 of the Trademark Law.

Article 82 During the investigation and handling of a trademark infringement case, the administrative department for industry and commerce may require the right owner to identify whether the goods involved in the case are produced by the right owner or under his licensing.

Chapter IX Trademark Agency

Article 83 Trademark agency services in the Trademark Law refers to the handling of application for trademark registration, trademark review or other trademark matters entrusted by and in the name of a client.

Article 84 Trademark agencies in the Trademark Law include agencies engaging in trademark agency services registered at the administrative department for industry and commerce and law firms engaging in trademark agency services.

For a trademark agency providing trademark agency services on trademark matters that are administered by the Trademark Office or the Trademark Review and Adjudication Board, it shall apply to the Trademark Office for recordation in accordance with the following provisions:

- (1) submitting for verification the registration certification document issued by the administrative department for industry and commerce or the certification document proving approval of the establishment of the law firm issued by the administrative department of justice, with the photocopies of the documents kept for records;
- (2) submitting the basic information of the trademark agency including the name, address, responsible person and contact information; and
- (3) submitting the list of trademark practitioners and their contact information.

The administrative department for industry and commerce shall establish credit dossiers for trademark agencies. Where an agency violates the provisions of the Trademark Law or these Regulations, the Trademark Office or the Trademark Review and Adjudication Board shall make the case known to the public, and keep a record in its credit dossiers.

Article 85 Trademark practitioners in the Trademark Law refer to the personnel engaging in trademark agency services in trademark agencies.

A trademark practitioner shall not accept the entrustment of a client in his own name.

Article 86 The application documents submitted by a trademark agency to the Trademark Office or the Trademark Review and Adjudication Board shall be sealed by the trademark agency and signed by the relevant trademark practitioner.

Article 87 Where a trademark agency applies for registration of a trademark, or for assignment of a trademark as the assignee, on goods or other services than its agency services, the Trademark Office shall not accept the application.

Article 88 Any of the following acts constitutes an act of disturbing the order of the trademark agency market by other improper means prescribed in subparagraph (2) of the first paragraph of Article 68 of the Trademark Law:

- (1) soliciting business by means of fraud, false advertising, misleading, or commercial bribery;

(2) concealing facts, providing false evidence, or threatening or inducing others to conceal facts or provide false evidence; or

(3) accepting the entrustments of both parties who have conflict of interests in the same trademark case.

Article 89 Where a trademark agency commits any of the acts prescribed in Article 68 of the Trademark Law, the administrative department for industry and commerce at or above the county level of a place where the agency is located or the illegal act occurs, shall investigate and handle the case, and notify the Trademark Office of the result.

Article 90 Where the Trademark Office or the Trademark Review and Adjudication Board stops the acceptance of the trademark matters submitted through a trademark agency as prescribed in Article 68 of the Trademark Law, it may make a decision to stop the acceptance of the trademark matters submitted through the trademark agency for at least 6 months and up to even perpetuity. Upon the expiration of the period of non-acceptance, the Trademark Office or the Trademark Review and Adjudication Board shall resume the acceptance.

The decisions made by the Trademark Office or the Trademark Review and Adjudication Board to stop or resume the acceptance of the trademark matters submitted through an agency shall be published on its website.

Article 91 The administrative department for industry and commerce shall provide strict supervision and guidance to trademark agency industry organizations.

Chapter X Supplementary Provisions

Article 92 A service mark continuously in use until July 1, 1993, which is identical with or similar to any service mark registered by another person on the same or similar services, may continue to be used; however, if such use is suspended for a period of 3 years or more after July 1, 1993, it shall not be used any longer.

Where a trademark has been in continuous use until the date on which the goods or services are newly open for registration by the Trademark Office for the first time, and is identical with or similar to any trademark registered by another person on the same or similar goods or services which are newly open for registration, it may continue to be used; however, if such use is suspended for a period of 3 years or more after the date on which such goods or services are firstly accepted, it shall not be used any longer.

Article 93 The Classification of Goods and Services for the registration of trademarks shall be formulated and promulgated by the Trademark Office.

The formats of the documents for applying for trademark registration or for other trademark matters shall be formulated and promulgated by the Trademark Office and the Trademark Review and Adjudication Board.

The review rules of the Trademark Review and Adjudication Board shall be formulated and promulgated by the administrative department for industry and commerce of the State Council.

Article 94 The Trademark Office shall establish and keep a Trademark Register recording registered trademarks and relevant registration particulars.

Article 95 The Trademark Registration Certificate and relevant certifications are proofs that a right owner enjoys the exclusive right to use a registered trademark. The registration particulars recorded in the Trademark Registration Certificate shall be in conformity with those in the Trademark Register; in case of discrepancy, the Trademark Register shall prevail, unless there is clear evidence proving that the information recorded in the Trademark Register is erroneous.

Article 96 The Trademark Office shall issue the Trademark Gazette publishing trademark registration and other relevant matters.

The Trademark Gazette is published in paper or in electronic format.

Except for service by means of publication, the content of a publication shall be considered as already known or ought to be known by the public as of the date of the publication.

Article 97 Fees shall be paid for applying for trademark registration or for other trademark matters. The items and standards for collecting the fees shall be respectively formulated by the finance department and the competent pricing department of the State Council.

Article 98 These Regulations shall be effective as of May 1, 2014.

A3: Interpretation of the Supreme People's Court on Several Matters Regarding the Application of Law in Trial of Trademark Civil Dispute Cases (2002)

Fa Shi [2002] No. 32

(Promulgated by the Supreme People's Court on 12 October 2002 and effective as of 16 October 2002)

In order to correctly adjudicate trademark dispute cases, the following interpretations are made regarding several issues relating to the application of the law in accordance with the provisions of laws such as the General Principles of the Civil Law of the People's Republic of China, the Contract Law of the People's Republic of China, the Trademark Law of the People's Republic of China and the Civil Procedure Law of the People's Republic of China:

Article 1 The following acts constitute acts causing other harm to another's exclusive right to use a registered trademark as set out in Item (5) of Article 52 of the Trademark Law:

1. using prominently wording that is identical with or similar to another's registered trademark as a business name on identical or similar goods, thereby is liable to cause misidentification among the relevant public;
2. reproducing, imitating or translating another's registered well-known trademark or its main part and using it as a trademark on non-identical or dissimilar goods thereby misleading the public and potentially prejudicing the interests of the registrant of the well-known trademark;
3. registering words that are identical with or similar to another's registered trademark as a domain name and using such domain name for electronic commerce business that involves the transaction of related goods, thereby is liable to cause misidentification among the relevant public.

Article 2 In accordance with the first paragraph of Article 13 of the Trademark Law, reproduction, imitation and translation of another's well-known trademark that has not been registered in China or the main part thereof and using such as a trademark on identical or similar goods, thereby is liable to cause confusion, civil liability to stop the infringement should be undertaken.

Article 3 Trademark licenses as set out under Article 40 of the Trademark Law cover the following three categories:

1. “exclusive licenses”, which means that the trademark registrant licenses a single licensee to use its registered trademark for an agreed period, within a specified territory and in an agreed manner and where the trademark registrant, in accordance with the agreement, may not use the registered trademark;
2. “sole licences, which means that the trademark registrant licenses a single licensee to use its registered trademark for an agreed period, within a specified territory and in an agreed manner and where the trademark registrant, in accordance with the agreement, may use the registered trademark but may not license other parties to use the registered trademark;
3. “non-exclusive licenses”, which means that the trademark registrant licenses a third party to use its registered trademark for an agreed period, within a specified territory and in an agreed manner and where the trademark registrant may itself use the registered trademark and may license others to use its registered trademark.

Article 4 “Stakeholders” as set out in Article 53 of the Trademark Law includes licensees under trademark licensing contracts for registered trademarks, legitimate successors to the property rights of registered trademark, etc.

When exclusive rights to use a registered trademark are infringed, licensees under exclusive licensing contracts may bring a suit to the people's courts. Licensees under sole licensing contracts may bring a joint suit with the trademark registrant or bring a suit on their own accord if the trademark registrant decides not to bring a suit. Licensees under non-exclusive licensing contracts may bring a suit provided that they have been given clear authorization to do so by the trademark registrant.

Article 5 Where a trademark registrant or a stakeholder brings a suit on the ground that a third party is infringing the exclusive rights to use the registered trademark after filing a renewal application during the grace period yet before the approval of such renewal application, the people's court should accept the suit.

Article 6 Civil suits that have been brought on the ground of the infringement of the exclusive rights to use a registered trademark, shall fall under the jurisdiction of the people's court of the place where the act of infringement has been carried out, of the place where the infringing products are stored, sealed or detained, or of the place where the defendant is domiciled as prescribed by Article 13 or Article 52 of the Trademark Law.

The “place where the infringing products are stored” prescribed in the

preceding paragraph, refers to the place where large quantities of the infringing products are stored or hidden, or the place where the infringing products are often stored or hidden. The place where the infringing products are “sealed or detained” refers to the place where an administrative body such as Customs, administration for industry and commerce, etc. has sealed or detained the infringing products.

Article 7 Where a joint suit is brought against multiple defendants whose acts of infringement are committed in different locations, the plaintiff may choose the people's court of the place where one of the defendants has carried out his infringing act as the competent court. Where a suit is brought against one of the defendants only, the people's court of the place where that defendant carried out his infringing act shall have jurisdiction.

Article 8 The “relevant public” as prescribed in the Trademark Law refers to consumers that are associated with certain products or services branded with a trademark or other business operators that are closely associated with the marketing of the afore-mentioned products or services.

Article 9 “Identical trademark” as prescribed in Item (1) of Article 52 of the Trademark Law refers to the accused infringing trademark that hardly exhibits any visual difference from the plaintiff's registered trademark.

“Similar trademark” as prescribed in Item (1) of Article 52 of the Trademark Law refers to the accused infringing trademark, when compared with the plaintiff's registered trademark, the font, pronunciation or meaning of the words or the composition or coloring of the device are similar, or the overall structure of its combined elements is similar, or its three-dimensional shape and color combination are similar thereby is liable to mislead the relevant public to misidentify the source of the products or to misconstrue that their source is somewhat associated with products bearing the plaintiff's registered trademark.

Article 10 Where a people's court ascertains in accordance with Item (1) of Article 52 of the Trademark Law whether a trademark is identical with or similar to another, it shall apply the following principles:

1. When the relevant public is paying general level of attention;
2. Comparison shall be made between the trademarks both as a whole and their major parts under the state of isolation of the objects of comparison;
3. The distinctiveness and reputation of the registered trademark for which protection is being sought should be considered when ascertaining whether another trademark is similar to such registered trademark.

Article 11 “Similar goods” as prescribed in Item (1) of Article 52 of the Trademark Law refer to goods that share identical functions, uses, production sectors, sales channels, target consumers, etc. or goods that the relevant public would generally deem as having certain association and thus are liable to cause confusion.

“Similar services” refer to services sharing identical purpose, content, method of provision, target users, etc. or services that the relevant public would generally deem as having certain association and thus are liable to cause confusion.

“When certain goods are deemed similar to some services” refers to the circumstance where there is a certain association between the goods and services that is liable to cause confusion among the relevant public.

Article 12 Where a people's court determines whether goods or services are similar in accordance with Item (1) of Article 52 of the Trademark Law, it should make an overall assessment based on the general knowledge of the relevant public with regard to the goods or services. The International Classification of Goods and Services for the Purposes of the Registration of Marks and the Classification of Similar Goods and Services could serve as a reference for determining the similarity of goods or services.

Article 13 People's court may calculate the amount of damages by adopting the methodology chosen by the rights holder, when ascertaining an infringer's liability for compensation in accordance with the first paragraph of Article 56 of the Trademark Law.

Article 14 The profits gained from the infringement as prescribed in the first paragraph of Article 56 of the Trademark Law may be calculated by multiplying the unit profit by the sales quantity of the infringing product. Where it is impossible to ascertain the unit profit, the unit profit of the products bearing the infringed registered trademark shall be used for the calculation.

Article 15 The losses suffered from the infringement as prescribed in the first paragraph of Article 56 of the Trademark Law may be calculated according to the reduction in the sales amount of the product suffered by the rights holder as a result of the infringement or may be calculated by multiplying the sales amount of the infringing product by the unit profit of the products bearing the registered trademark.

Article 16 Where it is difficult to calculate either the profits gained by the infringer from the infringement or the loss suffered by the rights holder as a result of the infringement, the people's court may, in accordance with the

parties' request or on an ex officio basis, apply the provisions of the second paragraph of Article 56 of the Trademark Law in ascertaining the amount of damages.

When a people's court is determining the amount of damages, it should make an overall assessment considering factors such as the nature, the period and the consequences of the infringement, the reputation of the trademark, the amount of trademark licensing royalties, the types, periods and scope of trademark licenses for the mark, the reasonable expenses incurred in stopping the infringement, etc.

Where the parties reach an agreement on the amount of damages in accordance with the first paragraph of this Article, the people's court should allow.

Article 17 The "reasonable expenses incurred in stopping the infringement" as prescribed in the first paragraph of Article 56 of the Trademark Law include reasonable expenses incurred by the rights holder or an authorised agent in investigating and collecting evidence regarding the infringing act.

In accordance with a party's claim or the specific circumstance of the case, a people's court may include attorney fees that comply with the stipulations of the relevant State departments when calculating compensation.

Article 18 The statute of limitation for bringing a suit against the infringement of a registered trademark is two years, starting from the date when the trademark registrant or a stakeholder knew or should have known about the act of infringement. Where a trademark registrant or a stakeholder brings a suit at the expiry of the two-year statute of limitation, if the infringing act is still continuing at the time the suit is brought and the exclusive rights to use the registered trademark are still in the period of validity, the people's court should issue a judgment ordering the defendant to stop the infringing act. The amount of damages for the infringement should be calculated by reckoning back two years from the date when the rights holder brought the suit before the people's court.

Article 19 Where a trademark licensing contract has not been recorded with the China Trademark Office, this shall not affect its validity, unless otherwise agreed by the parties.

A trademark licensing contract that has not been recorded with the Trademark Office may not be used against third parties acting in good faith.

Article 20 The assignment of registered trademarks shall not affect the validity of trademark licensing contracts that had already entered into effect

prior to the assignment, unless otherwise provided by the trademark licensing contracts.

Article 21 Where a people's court is adjudicating a dispute involving the infringement of exclusive rights to use a registered trademark, in accordance with the provisions of Article 134 of the General Principles of the Civil Law and Article 53 of the Trademark Law, by taking into consideration the specific circumstances of the case, the court may order the infringer to bear such civil liability as stopping the infringement, removing obstructions, eliminating dangers, indemnifying loss, eliminating the effect of the infringement, etc. It may also issue a decision for such civil sanctions as imposing fines and/or confiscating the infringing goods, the forged trademark representations and property such as materials, tools and equipment, etc. specifically used to manufacture the infringing products. The amount of fines may be determined by reference to the relevant provisions under the Regulations for the Implementation of the Trademark Law of the People's Republic of China.

Where an administrative department for industry and commerce has already imposed an administrative penalty in respect of the same act of infringing the exclusive rights to use a registered trademark, the people's court shall not impose any additional civil sanction.

Article 22 Where a people's court is adjudicating a trademark dispute case, it may, at the request of a party and in accordance with the actual circumstances of the case, make a determination in accordance with law as to whether the registered trademark in question has constituted well-known trademark.

Recognition of a well-known trademark should be carried out in accordance with the provisions of Article 14 of the Trademark Law.

Where a party requests protection in respect of a trademark that has been previously determined as a well-known trademark by administrative authorities or a people's court and the other party does not dispute the mark in question being well-known, the court shall not conduct any further scrutinization. If the other party does dispute the trademark being well-known, the people's court shall scrutinize in accordance with Article 14 of the Trademark Law.

Article 23 The provisions under the Interpretation applying to product trademarks also apply to service trademarks.

Article 24 In case of any discrepancies between previous provisions and the Interpretation, the Interpretation shall prevail.

A4: 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 (2008)

Fa Shi [2008] No. 3

(Adopted at the 1444th meeting of the Judicial Committee of the Supreme People's Court on February 18, 2008 and effective as of March 1, 2008)

With a view to properly adjudicating 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 111.3 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.

A5: Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Involving Protection of Well-Known Trademarks (2009)

Fa Shi (2009) No. 3

(Adopted at the 1467th Meeting of the Judicial Committee of the Supreme People's Court on April 22, 2009 and effective as of May 1, 2009)

With a view to protection of well-known trademarks in the adjudication of civil disputes involving trademark infringements, this Interpretation is formulated in accordance with the Trademark 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, by taking into consideration trial practice.

Article 1 For the purpose of this Interpretation, a well-known trademark refers to a trademark that has been widely known to the relevant public within the territory of China.

Article 2 In the following civil disputes, where a party seeks to base the case on the fact that his trademark has become well-known, the court, if, after assessing the relevant circumstances of the case, finds it necessary to ascertain whether such trademark constitutes well-known trademark, shall rule on such matter:

(1) trademark infringement actions filed on the ground of violation of Article 13 of the Trademark Law;

(2) trademark infringement or unfair competition actions filed on the ground that a business name is identical with or similar to the plaintiff's well-known trademark;

(3) actions involving defenses or counter-claims as prescribed in Article 6 of this Interpretation.

Article 3 The court shall not examine whether the trademark involved is well-known in the following civil disputes:

(1) where the establishment of the accused trademark infringement or unfair competition acts does not base on the fact that the trademark is well-known;
(2) where the accused trademark infringement or unfair competition acts does not stand due to the failure to meet other requirements as prescribed by

laws or regulations.

Where a tort action is filed based on the ground that the defendant registers or uses a domain name that is identical with or similar to the plaintiff's registered trademark and uses such domain name for electronic commerce business that involves the transaction of related goods, thereby is liable to cause misidentification among the relevant public, Item (1) of the preceding paragraph shall apply.

Article 4 The court shall establish its well-known trademark recognition on the fact that proves its well-known status, by taking into account various factors stated in Article 14 of the Trademark Law, unless the circumstances of the case enables the court to establish its well-known trademark recognition without considering each and all the factors as prescribed in the foresaid article.

Article 5 Any party that claims his trademark has reached well-known status shall, depending on the circumstances of the case, provide following evidence to prove that its trademark has become well-known by the time the accused trademark infringement act or unfair competition act occurs:

- (1) market share, sales regions, profits and taxes relating to the goods on which the trademark is used;
- (2) duration of continuous use of the trademark;
- (3) method, duration, extent, investment and geographical scope in respect of the advertising or promotion of the trademark;
- (4) record of the trademark being granted protection as a well-known trademark;
- (5) market reputation enjoyed by the trademark; and
- (6) other facts proving that the trademark has reached well-known status.

The duration, scope, and method of use of the trademark as mentioned in the preceding article include its continuous use before it was registered.

The court shall comprehensively and objectively examine evidence such as the duration of use, industry rankings, market surveys and market evaluation reports of the trademark, and whether such trademark has been recognized well-known, along with other evidence that may assist the court's recognition.

Article 6 In the event that the plaintiff files a civil action against a trademark allegedly infringing upon its right to exclusive use of registered trademarks, and the defendant bases its defense or files a counter-claim on the ground that the plaintiff's registered trademark is a copy, imitation or translation of its prior unregistered well-known trademark, the burden of proof is on the defendant to prove that its prior unregistered trademark has become well-known.

Article 7 Where a trademark was once recognized by a court or an administration for industry and commerce under the State Council as a well-known trademark prior to the occurrence of alleged trademark infringement or unfair competition act, if the defendant raises no objection to this fact, the court should affirm such fact in its finding. If the defendant raises objection, the burden of proof is on the plaintiff in respect of proving the well-known trademark status of its trademark.

Unless otherwise specified in this Interpretation, party admission rules in civil action do not apply when the court ascertains whether a trademark has become well-known.

Article 8 With regards to a trademark that has been widely known by the relevant public in China, where the plaintiff has provided basic evidence to prove that such trademark has reached well-known or where the defendant raises no objection, the court shall affirm that this trademark has become well-known mark.

Article 9 Where the relevant public is liable to misidentify the source of origin of the goods to which the well-known trademark is attached and that of those to which the accused trademark is attached, or where the relevant public is likely to misconstrue that there is certain association such as license or affiliation between the business operator of the well-known trademark and that of the accused trademark, the court shall find that it falls under the circumstance of "being likely to cause confusion" as prescribed in the first paragraph of Article 13 of the Trademark Law.

Where the relevant public is likely to assume that there is considerable degree of association between the accused trademark and the well-known trademark so as to weaken the distinctiveness of the well-known trademark, to tarnish or to take advantage of its market reputation, , the court shall find that it falls under the circumstance of "misleading the public so that the interests of the owner of the registered well-known trademark are likely to be impaired" as prescribed in the second paragraph of Article 13 of the Trademark Law.

Article 10 Where the plaintiff petition the court that the defendant shall be prohibited from using a trademark or company name that is identical with or

similar to the plaintiff's well-known registered trademark on goods that are not similar to those of the plaintiff, the court shall consider relevant circumstances of the case, by taking into account the following factors, before awarding a ruling:

- (1) the extent of distinctiveness of the well-known trademark;
- (2) the extent to which the well-known trademark is known to the relevant public of the goods bearing the accused trademark or company name;
- (3) the extent of association between the goods bearing the well-known trademark and those bearing the accused trademark or company name; and
- (4) other relevant factors.

Article 11 Where the defendant's registered trademark is a copy, imitation or translation of the plaintiff's well-known trademark so as to breach Article 13 of the Trademark Law and infringes upon the plaintiff's trademark rights, the court shall, at the plaintiff's request, prohibit the defendant from using its registered trademark. However, under any of the following circumstances, the court shall not uphold the plaintiff's claim:

- (1) where the time period of cancellation as prescribed by paragraph 2 of Article 41 of the Trademark Law has elapsed; or
- (2) the plaintiff's trademark has not reached well-known when the defendant filed for registration of its trademark.

Article 12 Where the unregistered trademark that the party concerned seeks for well-known trademark protection falls under the circumstances of being prohibited from being used or registered as a trademark as pursuant to provisions of Articles 10, 11 and 12 of the Trademark Law, the court shall not uphold such request.

Article 13 In respect of civil disputes involving the protection of well-known trademarks, the court's recognition of a well-known trademark shall be stated as case facts and grounds of decision but shall not be included in the court decision. Where a dispute is resolved by mediation, the fact that a trademark is well-known shall not be stated in the mediation award.

Article 14 Where any earlier judicial interpretation promulgated by the Supreme People's Court is inconsistent with this Interpretation, this Interpretation shall prevail.

A6: Provisions of the Supreme People's Court on Several Issues Concerning the Hearing of Administrative Cases Involving the Granting and Affirmation of Trademark Rights (2017)

Fa Shi [2017] No. 2

(Adopted at the 1703rd meeting of the Judicial Committee of the Supreme People's Court on December 12, 2016 and effective as of March 1, 2017)

These Provisions are promulgated to facilitate the Court's impartial hearing of administrative cases involving the granting and affirmation of trademark rights, in accordance with the laws and regulations of the "Trademark Law of the People's Republic of China" ("Trademark Law") and the "Administrative Procedure Law of the People's Republic of China" ("Administrative Procedure Law"), while taking into consideration the Court's trial practice.

Article 1 The administrative cases involving the granting and affirmation of trademark rights (trademark administrative cases) referred to in the Provisions are the litigations brought before the Courts by the administrative counterparts or interested parties against the decisions rendered by the Trademark Review and Adjudication Board (TRAB) under the State Administration for Industry & Commerce in respect of cases of review on trademark refusal, review on disapproval of trademark registration, review on trademark revocation, trademark invalidation declaration, review on trademark invalidation declaration, etcetera.

Article 2 In principle, the Court shall rule on the merits of an administrative action involving the granting and affirmation of trademark rights within the scope as determined by the claims and grounds of actions raised by the plaintiff. With respect to grounds that the plaintiff has not raised in the litigation, the Court may, after hearing the statements of all parties, examine and rule on the basis of such grounds if it concludes the TRAB's findings was obviously inappropriate.

Article 3 "Trademarks identical with or similar to the State name of the People's Republic of China" as provided in Article 10.1.1 of the "Trademark Law", refers to trademarks that are identical with or similar to the State name as a whole.

With regard to signs that contain the State name of the People's Republic of China, but are NOT identical with or similar to the State name as a whole, if the registration of such sign as a trademark may be detrimental to the national dignity, the Court may determine that such sign fall under the circumstances as provided in Article 10.1.8 of the "Trademark Law".

Article 4 With regard to those signs or the signs whose components that are deceptive and are likely to mislead the public to misidentify the quality or other characteristics or place of origin of the goods, the Court shall uphold decisions of the TRAB if the said decisions were based on the findings that it falls under the circumstances as provided in Article 10.1.7 of the 2001 version of the *“Trademark Law”*.

Article 5 With regard to those signs or the signs whose components that may have negative or adverse effects on China’s public interests or order, the Court may determine that such signs fall under the category of signs *“having other unhealthy influences”* as provided in Article 10.1.8 of the *“Trademark Law”*.

Where the name of a public figure in the political, economic, cultural, religious, ethnic or other field is filed to be registered as a trademark, the Court shall find such action constitute *“other unhealthy influences”* as provided in the preceding paragraph.

Article 6 With regard to those signs that are the combination of geographical names as administrative divisions at or above the county level or the foreign geographical names well-known to the public and other elements, if the sign as a whole has the meaning that could distinguish it from geographical name, the Court shall determine that it does not fall under the circumstance as provided in Article 10.2 of the *“Trademark Law”*.

Article 7 The Court finding on the distinctiveness of a litigious trademark shall be made based on the common perception of the relevant public of the goods on which such mark is designated to be used, by taking the said trademark into consideration as a whole. Where the descriptive component of a sign does not affect its distinctiveness as a whole, or a descriptive sign is displayed in a specific manner so as to serve as a source identifier of the goods to which it is attached by the relevant public, the Court shall find such sign distinctive.

Article 8 The Court shall base its distinctiveness finding over a litigious trademark in foreign language on the common perception of the relevant public within Chinese territory. Where the inherent meaning of the litigious mark in the said foreign language may affect its distinctiveness on designated goods, but the relevant public is hardly aware of that meaning so that the mark could still function as a source identifier of the goods to which it is attached, the Court may find it distinctive.

Article 9 Where an application is filed to register the shape or partial shape of a product as a three-dimensional trademark, if under most circumstances, the relevant public is not likely to take such sign as a source identifier of the goods to which it is attached, such sign should be found non-distinctive as a

trademark.

The fact that a three-dimensional sign has been originally created by or firstly used by the applicant shall not necessarily be admitted as proof of distinctiveness of such sign.

Whereas an inherently non-distinctive sign as mentioned in the first paragraph has become, through long-term or extensive use, source identifier of the goods to which it is attached by the relevant public, the Court may recognise such sign as distinctive.

Article 10 With regard to those litigious trademarks that are statutory or customary name of the goods to which it is attached, the Court shall find that it constitutes the generic name as provided in Article 11.1.1 of the “Trademark Law”. Where, in accordance with laws, regulations, national or industry standards, a litigious mark is categorized as the generic name of the goods to which it is attached, the Court shall determine that mark as generic name. A specific name that is commonly perceived by the relevant public as the name of a category of goods, shall be ruled as customary generic name. The fact that a name has been classified as name of certain goods by professional reference books, dictionary, etcetera, may serve as the point of reference for the findings that said name has become the customary generic name of such goods.

In general, common perception of the relevant public nationwide shall be benchmarked in determination of the customary generic name of certain goods. The name being generally used to refer to those goods in its fixed relevant market due to historical tradition, local customs and practices, geographical environment or other reasons, may be ruled by the Court as generic name.

Where the applicant of a litigious trademark definitely knows or should have known that his applied trademark has become the customary name of certain goods within some areas, the Court may find such mark as generic name of such goods.

In general, the Court shall base its finding of generic name on the de facto status at the time of the application date of the litigious trademark. Where the de facto status has changed at the time when litigious trademark is approved for registration, the Court finding shall be based on the de facto status at the time of registration.

Article 11 With regard to those signs that merely or mainly describes or demonstrates the quality, major raw materials, function, usage, weight, quantity, origin or other features of the goods in respect of which the

trademark is used, the Court shall find that it falls under the circumstances as provided in Article 11.1.2 of the *“Trademark Law”*. Those signs or the signs whose components insinuating the features of the goods in respect of which the trademark is used, but does not affect its identifying function, shall be excluded from the circumstances as provided in this article.

Article 12 Where a party concerned requests the disapproval of the registration of a litigious trademark or the invalidation of a litigious registered trademark based on Article 13.2 of the *“Trademark Law”* by claiming that such trademark is a duplication, imitation or translation of its unregistered well-known trademark, the Court shall determine whether the registration of such trademark is likely to cause confusion by taking into consideration the factors listed below and the interplays among them:

1. The extent of similarity of the trademarks;
2. The extent of similarity of the goods on which the trademarks are designated to be used;
3. The extent of distinctiveness and reputation of the trademark that requests protection;
4. The degree of attention of the relevant public; and
5. Other pertinent factors.

The intention of the trademark applicant and the evidence of actual confusion may also be taken into consideration when determining the likelihood of confusion.

Article 13 Where a party concerned requests the disapproval of the registration of a litigious trademark or the invalidation of a litigious registered trademark based on Article 13.3 of the *“Trademark Law”* by claiming that such trademark is a duplication, imitation or translation of its registered well-known trademark, the Court shall determine whether the use of such trademark would lead the relevant public to construe that there is certain level of association between the litigious mark and the well-known trademark so as to mislead the public and harm the interests of the well-known trademark owner, by taking into consideration the factors listed below:

1. The distinctiveness and extent of reputation of the Cited trademark;
2. Whether the trademarks are sufficiently similar;
3. The goods on which the trademarks are designated to be used;
4. The extent of overlapping of the relevant public and the degree of attention thereof;
5. Signs similar to the Cited trademark that are legitimately used by other market entities or other pertinent factors.

Article 14 Where a party concerned requests the disapproval of the registration of a litigious trademark or the invalidation of a litigious registered

trademark based on the grounds that such trademark is a duplication, imitation or translation of his registered well-known trademark, and the TRAB adjudicates to uphold such claim based on the provisions of Article 30 of the *“Trademark Law”*, the Court, after hearing the statements of all parties, may 1) apply Article 30 of the *“Trademark Law”* if the litigious trademark has been registered less than 5 years; or 2) apply Article 13.3 of the *“Trademark Law”* if the litigious trademark has been registered for more than 5 years.

Article 15 Where a trademark agent, representative or a dealer, intermediary, or other agent, representative in the sense of sales agency relations, applies, without authorization, for the registration of a trademark identical with or similar to that of the party being represented, on the same or similar goods, the Court shall apply Article 15.1 of the *“Trademark Law”*.

If during the stage of negotiation relating to the conclusion of an agency or representative relation, the agent or representative as provided in the preceding paragraph applies for the registration of the trademark of the party being represented, the Court shall apply Article 15.1 of the *“Trademark Law”*.

Where a trademark applicant is kin to or has a specific personal status relationship with the agent or representative, based on which his trademark application action could be presumed to be the result of bad faith colluding with such agent or representative, the Court shall apply Article 15.1 of the *“Trademark Law”*.

Article 16 The circumstances below may be recognised as falling under *“other relations”* as provided in Article 15.2 of the *“Trademark Law”*.

1. The trademark applicant is kin to the prior user;
2. The trademark applicant has labour relations with the prior user;
3. The trademark applicant is in the proximity of the prior user's business location;
4. The trademark applicant and the prior user have negotiated for the conclusion of an agency or representative relation but such relation has not been concluded;
5. The trademark applicant and the prior user have negotiated for the conclusion of contractual or business relation but such relation has not been concluded.

Article 17 Where the interested party of a geographic indication (GI) requests the disapproval of the registration of other's trademark or the invalidation of other's registered trademark based on Article 16 of the *“Trademark Law”*, if the goods designated by the litigious trademark and by the GI are not identical, yet the interested party can still prove that the litigious trademark when being used on its designated goods may still mislead the public to believe that such goods originate from the place

indicated by the GI, and thus has its specific quality, prestige or other features, the Court shall uphold such claim.

If such GI has been registered as a collective trademark or certification trademark, its owner or interested party thereof may claim protection of its right based on this Article, or Article 13 and Article 30 of the *“Trademark Law”*.

Article 18 The prior rights as provided in Article 32 of the *“Trademark Law”* include the civil rights the party concerned enjoys before the application date of the litigious trademark or other legitimate rights and interests that should be protected. The prior right that has ceased to exist when the litigious trademark is approved for registration shall not affect its registration.

Article 19 Where the party concerned claims that the litigious trademark infringes his prior copyright, the Court shall examine in accordance with the provisions of the *“Copyright Law”*: 1) whether the prior right claimed by the party concerned constitutes a work protected by copyright, 2) whether the party concerned is the copyright owner or an interested party eligible to claim prior copyright, and 3) whether the litigious trademark would infringe the copyright of the party concerned.

With respect to the signs that constitute copyrighted works, the design manuscript, original copy, contract vouchering the acquisition of rights, copyright registration certification prior to the application date of the litigious trademark, or other proof adduced by the party concerned that is pertinent to the said signs, may be allowed as preliminary evidence to prove the ownership over the copyright of the work.

Trademark gazettes and trademark registration certificates may be allowed as preliminary evidence to prove that the trademark applicant is entitled to claim his rights, as an interested party, over the copyright of the sign involved.

Article 20 Where a party concerned claims that the litigious trademark infringes his name right, if the relevant public believes that such trademark refers to this natural person and tends to believe that the goods to which such trademark is attached are authorized by or have certain association with such person, the Court may determine that the litigious trademark infringes the name right of this person.

Where a party concerned requests the protection of his right over his pseudonym, stage name, translation name, or other specific name, if such specific name has a certain reputation and has established a stable corresponding relation with the natural person so that the relevant public use such name to refer to that person, the Court shall uphold such claim.

Article 21 Where a trademark filed without authorization, is identical with or similar to the trade name of a party concerned that has certain reputation in the market, so that it is likely to cause confusion among the relevant public over the source of the goods, and the party concerned claims prior right based on this, the Court shall uphold such claim.

Where a party concerned bases his claim on the abbreviated form of his business name that has certain reputation in the market and has established stable corresponding relation with his business, the preceding paragraph shall apply.

Article 22 Where a party concerned claims that the litigious trademark infringes his copyright over a character image, the Court shall examine in accordance with Article 19 in the Provisions.

With respect to those works within copyright terms, if the title of a work or the name of a character in the work enjoys a high reputation, and its use as a trademark in respect of relevant goods is likely to mislead the relevant public to believe that such goods are authorized by or have certain associations with the copyright owner of the work, and the party concerned claims prior right based on this, the Court shall uphold such claim.

Article 23 Where a prior user claims that a trademark applicant filed an application for the pre-emptive registration by unfair means for a trademark which has been prior used by this party and has gained certain influence, if the Court finds that the prior used trademark has a certain influence and the said applicant definitely knows or should have known this prior trademark, the registration action may be presumed to constitute “pre-emptive registration by unfair means”, unless the said applicant adduces evidence to prove that he has no bad faith in exploiting the business reputation of the prior used trademark.

Where a prior user adduces evidence to prove that the prior trademark has been continuously used for a certain period of time, or has certain geographical coverage, sales volume or advertisement, the Court may determine that such trademark has certain influence.

Where a prior user claims that a trademark applicant's action is in violation of the provisions of Article 32 of the “*Trademark Law*” because the trademark applied in respect of goods dissimilar to those designated by his prior used trademark with a certain influence, the Court shall not uphold such claim.

Article 24 With respect to those who disrupt the trademark registration order, harm the public interests, improperly exploit public resources or make illicit gains by using means other than fraud, the Court may determine that it falls

under the “*other unfair means*” as provided in Article 44.1 of the “Trademark Law”.

Article 25 The Court, when ruling whether the litigious trademark applicant registers other’s well-known trademark in bad faith, shall determine the intent of the litigious trademark applicant by taking into account the reputation of the cited trademark, the applicant’s reasons for filing the litigious trademark registration as well as the status of use of the litigious trademark. Where the cited trademark has a high reputation and the applicant has no proper cause to justify his application of the litigious trademark, the Court may presume that such registration constitutes “*bad faith registration*” as provided in Article 45.1 of the “Trademark Law”.

Article 26 The use of a trademark either by its owner or by a licensee, or those trademark use that does not go against the will of its owner may be categorized as trademark use as provided in Article 49.2 of the “Trademark Law”.

Where the mark that is actually being used has nuances from the registered trademark, as long as the distinctive features of that trademark are not altered, such use may be deemed as use of the said registered trademark.

Where a registered trademark has not been put in actual use, the mere assignment or licensing act of such registered trademark, the publication of the trademark registration information or a declaration made to claim the exclusive right over such registered trademark does not qualify as trademark use.

Where the trademark owner has the real intention to use his trademark and has made necessary preparation for such use, but has not put such registered trademark into actual use due to objective causes, the Court may determine that the owner has a just cause.

Article 27 Where a party concerned claims that the TRAB has committed one of the acts mentioned below so as to “*violate legal procedure*” as provided in Article 70.3 of the “Administrative Procedure Law”, the Court shall uphold its claim:

1. Where the TRAB misses the argument raised by the party concerned, which may have substantial influence on his rights;
2. Where the TRAB fails to notify the party concerned or the interested party the composition of the collegial panel, and due to such failure, certain member of the panel did not recuse himself/herself from the procedure, which the Court confirms;

3. Where the TRAB fails to inform the competent party to join the review and adjudicating procedure, and such party raises objection to the TRAB;
4. Other circumstances that violate the statutory procedure.

Article 28 Where during the Court's hearing of the trademark administrative case, the cause based on which the TRAB's decision on refusal of litigious trademark application, disapproval of litigious trademark registration or invalidation declaration of the litigious trademark no longer exists, the Court may revoke the TRAB's decision on the basis of new facts and order the TRAB to re-make its decision according to the changed facts.

Article 29 Where a party concerned files another application for review and adjudication based on new evidence discovered after the previous administrative act, or based on evidence that due to objective causes, was either unattainable during the previous administrative proceeding or was impossible to be produced during the prescribed time limit, or where such party files its application based on new legal grounds, this circumstance shall not be deemed as filing another application for review and adjudication on the basis of "*the same facts and grounds*".

During the review on trademark refusal procedure, where the TRAB finds that the applied trademark and the cited trademark do not constitute identical or similar trademark used on the same or similar goods and approves the preliminary publication of the applied trademark, the circumstances below shall not be deemed as filing another application for review and adjudication on the basis of "*the same facts and grounds*".

1. Where the Trademark Office upholds an opposition filed by the owner of a cited trademark, or an interested party, and the opposed party applies for a review;
2. Where an opposed trademark has been approved for registration and the owner of the cited trademark, or interested party, files an invalidation application.

Article 30 Where an administrative counterpart or an interested party brings an appeal against a decision of the TRAB that is based on an effective judgment of the Court in which the Court has made clear determination on the relevant facts and application of laws, the Court shall reject such appeal according to law, or dismiss the appeal in the event that the case has been put on docket.

Article 31 The Provisions shall come into force as of March 1, 2017. Court may refer to the Provisions when hearing the administrative cases involving the granting and affirmation of trademark rights in accordance with the 2001 version of the "*Trademark Law*".

A7: Beijing High People's Court Guidelines for the Adjudication of Cases Involving Granting and Affirmation of Trademark Right (2019)^①

IP Division, Beijing High People's Court, April 24th, 2019

(This English translation of the Guidelines is for reference only. In case of any discrepancy, the Chinese version of the Guidelines shall prevail.)

Part I Relevant Procedural Issues**1. Determination of subject eligibility****1.1 Scope of prior rights holders**

The trademark owner and other legitimate prior rights owners under the protection of law shall be deemed as the “prior rights holders” as provided in Articles 33 and 45.1 of the Trademark Law.

1.2 Scope of interested parties

The licensees of prior rights, the lawful successors of prior rights, or the controlling shareholders of the prior rights holders shall be deemed as the “interested parties” as provided in Articles 33 and 45.1 of the Trademark Law.

If a broker submits a special authorization document issued by a model, an actor and so forth for relevant personal rights thereof, he/she shall be deemed as an “interested party”.

A subject that is affected by the application for the registration of a litigious trademark but does not have a direct stake in the prior rights shall not be deemed as an “interested party”.

1.3 Time for the determination of interested parties

In general, the interested parties shall be ascertained in the light of the status quo at the time of application for trademark opposition or declaration of trademark invalidation.

^① This translation is based on the official English version issued by the Beijing High People's Court, but with some modifications.

After the court of first instance accepts an administrative case, change of interested parties will in general not affect the litigation status of the original interested parties. The current interested parties, as per their applications, may be notified to participate in the administrative lawsuit.

After the court of first instance rendered a judgment, in the event that there is change to the interested parties, the court of second instance may, as per the application of the current interested parties, notify them to participate in the administrative lawsuit in the capacity of third parties.

1.4 Effect of assignment of a cited trademark on the litigation status of the parties

If a cited trademark has been approved for assignment in a first-instance administrative lawsuit, the assignee as per its application may be notified to participate in the lawsuit, yet the assignor may continue to participate in the lawsuit; in the event that the assignor discontinues by explicitly waive its participation in the lawsuit, the assignee may fill in for the assignor in the proceeding, and the litigation actions completed by the assignor shall be binding on the assignee.

If a cited trademark has been approved for assignment in the second-instance administrative lawsuit, an assignee may be notified to participate in the lawsuit as per its application, and the assignor may continue to participate in the lawsuit.

1.5 Legal consequences of not notifying the assignee of the litigious trademark to participate in the review and adjudication procedure

If, in the trademark review and adjudication process, a litigious trademark has been assigned, yet the trademark review and adjudication department of National Intellectual Property Administration, PRC (hereinafter referred to as "trademark review and adjudication department") does not notify the assignee to participate in the review and adjudication process and directly makes an administrative ruling against the assignee, and the assignee is able to prove the illegality of the grounds and conclusions of the disputed administrative ruling, the assignee's claim on revocation of the disputed administrative ruling may be supported; however, if the assignee is unable to prove the illegality of the grounds and conclusions of the disputed administrative ruling in the lawsuit, the assignee's claim on revocation of the disputed administrative ruling cannot be supported.

1.6 Effect of assignment of the litigious trademark on the litigation status of the parties

If, in the trademark review and adjudication process, the litigious trademark has been assigned and the assignee participates in the subsequent review and adjudication process, the assignor shall in general cease to be an administrative counterpart. In the event that the assignor files an administrative lawsuit, such lawsuit may be dismissed.

The litigation actions completed by the assignor during the trademark review and adjudication process shall be binding on the assignee.

1.7 Scope of adding litigants

In an administrative case concerning review of trademark refusal, in general, litigants shall be limited to the counterparties of the disputed administrative act and other persons having a stake in the administrative act. It would be inappropriate to proactively add the cited trademark owner or other parties that have not participated in the trademark review and adjudication process.

1.8 Grounds for opposition and determination of subject eligibility

In the event that the opponent also alleges that the litigious trademark violates the provisions of Articles 10, 11, 12, 13.2, 13.3, 15, 16.1, 30, 31 and 32 of the Trademark Law, whether such opponent is eligible to file the application according to Articles 13.2, 13.3, 15, 16.1, 30, 31 and 32 of the Law shall be examined. If the opponent is not a “prior right holder” or an “interested party” as prescribed by Article 33 of the Trademark Law, the court shall not examine any grounds raised by such opponent other than those provided in Articles 10, 11 and 12 of the Law.

1.9 Determination of subject eligibility of foreign parties

The determination of subject eligibility of foreign parties shall be subject to the provisions of Article 14 of the Law on the Application of Laws for Foreign-related Civil Relations.

If a party claims that the opposite party has ceased to be an eligible litigation subject according to the laws of another country or region, it shall provide evidence as regards the elimination of registration of such opposite party as well as the legal provisions on the elimination of subject eligibility in such country or region.

If the subject eligibility, in accordance with the laws of another country or

region, may be reinstated after its removal from the register, the party shall be allowed to make corrections and give a statement as regards the continuation of its subject status. In the event of the party's laches in fulfilling its obligation of burden of proof, such party shall bear the corresponding legal consequences.

2. Scope of examination

2.1 Legal consequences of omitting review and adjudication grounds

The scope of trademark review and adjudication is generally limited to the grounds and the corresponding legal provisions explicitly set out in the application and supplementary grounds submitted by the applicant. Those facts and grounds the respondent raises in response may be examined in conjunction with the aforesaid application items, provided that they are directly related to the latter, except those exceeding the time limit specified by the Trademark Law. In the event that the trademark review and adjudication department fails to examine the aforesaid circumstance, which poses substantial impact on the party's rights, where the party argues procedural violation, such argument may be supported.

In the trademark review and adjudication process, if the facts and grounds, subsequent cross-examination arguments and so forth of the applicant or the respondent are obviously beyond the scope of application, or the applicant merely enumerates the legal provisions in the application and supplementary grounds without stating relevant facts and grounds throughout the text, where the party argues that the trademark review and adjudication department omits review and adjudication grounds, such argument shall not be supported.

2.2 Application of Articles 13 and 30

Where a party makes an application citing Article 13 or both Articles 13 and 30 of the Trademark Law, if the trademark review and adjudication department fails to review according to Article 13 of the Trademark Law and does not support the application of the party, the court shall find that the act of the trademark review and adjudication department constitutes omission of review and adjudication grounds; if such omission poses a substantial impact on the party's rights, where the party argues procedural violation, such argument shall be supported.

2.3 Legal consequences of examination beyond the scope

If a party has evidence to prove that without any legal grounds, the content of the disputed ruling is beyond the scope of refusal of the application for

trademark registration, the decision disapproving the application for trademark registration, the decision to cancel or maintain the registered trademark, and the review application and defense of the party, where the party argues the illegality of the exceeding content, such argument may be supported.

2.4 Supplementing review and adjudication evidence

In the trademark review and adjudication process, if a party states the needs to supplement evidence in accordance with the provisions of Article 59 of the Regulations for the Implementation of the Trademark Law, yet the trademark review and adjudication department directly renders the disputed ruling before the expiration of the time limit prescribed by law, where the party argues violation of the legal procedure, such argument may be supported.

2.5 Scope of examination of review of trademark refusal

In an administrative case concerning review of trademark refusal, if trademark review and adjudication department, without hearing the applicant's arguments, directly makes, beyond the decision of refusal of trademark application, the disputed ruling pursuant to the provisions of Article 10, 11, 12 or 16.1 of the Trademark Law, where the party argues procedural violation, such argument may be supported.

2.6 Scope of examination for review of disapproving trademark registration

In an administrative case concerning review of disapproving trademark registration, if the content of the disputed ruling exceeds the scope of goods or services that are not approved for registration, where the party argues procedural violation, such argument may be supported.

In general, the trademark review and adjudication department, in the review of disapproving trademark registration, shall determine the grounds in accordance with the scope of examination of the decision disapproving trademark registration, the review arguments of the applicant, and the claims the original opponent raises in the review of opposition proceeding and applies during the opposition process.

2.7 Scope of examination of invalidation of trademark rights

In an administrative case concerning the declaration for the invalidation of trademark rights, the trademark review and adjudication department shall generally examine the facts, grounds and requests in the application and defense of the parties. If the trademark review and adjudication department

reviews beyond the foregoing scope, where the party argues procedural violation, such argument may be supported.

2.8 Determination of the examination scope in trademark administrative litigation

In trademark administrative litigation, the scope of examination shall generally be determined in accordance with the plaintiff's claims and grounds. In the event that the plaintiff fails to raise certain claims and yet the disputed ruling is obviously inappropriate, after the parties state their arguments, a court ruling shall be made on relevant issues and shall not exceed the examination scope of the disputed ruling.

If a party has raised a number of grounds in the trademark review and adjudication process, and the trademark review and adjudication department only makes the disputed ruling based on part of the reasons and the conclusion is erroneous, where the party argues that the disputed ruling should be revoked, such argument may be supported. However, those grounds that have not been examined by the trademark review and adjudication department shall not be supported directly.

2.9 Simultaneous application of “absolute grounds” and “relative grounds”

If the trademark review and adjudication department makes a ruling to reject the litigious application for trademark registration based on provisions of Articles 10, 11, 12, 30 and 31 of the Trademark Law, the disputed ruling shall not be revoked simply because the trademark review and adjudication department applies simultaneously during its examination provisions of Articles 10, 11, 12, 30 and 31 of the Trademark Law.

3. Service

3.1 Determination of service address

If a party confirms the service address during the trademark review and adjudication procedure and agrees to apply the same in the trademark administrative proceeding, it may be served at that address.

3.2 Electronic service

In the case of service by fax or e-mail, fax numbers for sending and receiving faxes, e-mail addresses for sending and receiving e-mails, time of sending, and the name of the litigation documents being served shall be recorded, and

the confirmation forms of fax delivery and the web page indicating successful delivery of e-mails shall be printed for filing and future reference.

In the case of service by short message service, Wechat or otherwise, the number of the mobile phone of receiving and sending, time of sending, and the name of the litigation documents being served shall be recorded, the content being served by short message service, Wechat or otherwise shall be photographed for filing and future reference.

3.3 Parameters for Determination of service

During the trademark review and adjudication procedure, the party's receipt of the notice for acceptance, proof, defense and evidence exchange, evidence and other materials relevant to the trademark review and adjudication case sent by mailing service shall be deemed as proper service of such documents.

3.4 Burden of proof for service

If a party argues in trademark administrative litigation, service procedural violation on the grounds that it has not received the relevant materials of the case, the trademark review and adjudication department shall provide evidence proving that the party has received these materials and the mailing list printed by the postal department in batches may serve as *prima facie* evidence.

The checklist of official documents issued and other documentations of internal process, as well as the vouchers evidencing collection of such documentations by a property company or a doorman that has not been authorised by the party to collect documentations on its behalf, do not suffice to prove that the party has received the relevant materials.

3.5 Improper service procedure

If the trademark review and adjudication department fails to provide direct evidence proving that the party has received materials relevant to the case and yet is able to provide *prima facie* evidence that the party has been notified to participate in the review and adjudication process, and the reasons and conclusions of the disputed ruling are not inappropriate, where the party argues service procedural violation, such argument may not be supported in any of the following circumstances:

- (1) the party fails to raise any substantive grounds other than service procedural violation; or

(2) in addition to service procedural violation, the party also raises substantive grounds, but such grounds is unsubstantiated or does not fall under the scope of examination in this case.

4. Determination of “non bis in idem”

4.1 “Same facts”

Where a party submits an application based on the evidence that is either newly discovered after the original administrative act or that due to objective reasons cannot be obtained or cannot be provided within the prescribed time limit during the original administrative procedure, such application does not constitute a reapplication based on the “same facts”.

The following circumstances constitute a reapplication based on the “same facts”:

(1) the party reapplys without justifiable reasons based on evidence such as library inquiries that are available in the original administrative procedure but are not submitted;

(2) the party claims infringement upon the prior copyright and has submitted relevant works in the original administrative procedure, and reapplys based on the copyright registration certificate newly obtained.

4.2 “Same reasons”

The following circumstances do not constitute a reapplication based on the “same facts”:

(1) in the original administrative procedure, only part of the reasons claimed by the party are adjudicated, such party reapplys based on the other reasons that have not been adjudicated;

(2) the party reapplys based on the cited trademarks that are not involved in the original administrative procedure;

(3) in the original administrative procedure, the party applies based on Article 13 of the Trademark Law, and the trademark review and adjudication department takes the liberty to switch to apply Article 30 of the Trademark Law and does not support the same; and the party reapplys based on Article 13 of the Trademark Law;

(4) in the trademark opposition review procedure, the party files an

application based on Article 10.1.7 of the 2001 Trademark Law, and the trademark review and adjudication department takes the liberty to switch to apply Article 10.1.8 of the 2001 Trademark Law and supports the same. Such application is found by the administrative litigation proceeding to be not tenable and the litigious trademark has been approved for registration. The party files a request for declaration of invalidation in accordance with Article 10.1.8 of the 2013 Trademark Law.

4.3 Refiling a review and adjudication application based on the “same facts and reasons”

In the event that the party refiles a review and adjudication application based on the “same facts and reasons” and the trademark review and adjudication department refuses to accept or decides to dismiss the same based on the provision of Article 57 of the Regulations for the Implementation of the Trademark Law, where the party argues procedural violation, such argument shall not be supported.

5. Matters relating to remake administrative acts

5.1 Submission of evidence

In the case of an administrative case involving the litigious reexamination ruling, if a party claims that the act of the trademark review and adjudication department in rejecting the supplementary evidence provided by such party constitutes procedural violation, such claim shall generally not be accepted, except that the content involved in the evidence has not been ascertained by effective ruling and such evidence suffices to affect the outcome of the case and yet is not admitted by the trademark review and adjudication department.

5.2 Review procedure for reexamination ruling

If according to an effective judgment, the trademark review and adjudication department is to remake the disputed ruling, at least one member of the panel shall be replaced. If the trademark review and adjudication department fails to make the replacement and a party argues procedural violation, such argument may be supported.

If an effective judgement has made substantive determination conclusion, and yet the trademark review and adjudication department has not notified the parties of the defense, exchange of evidence, cross-examination and so forth procedures and directly makes the disputed ruling, where the party argues procedural violation, such argument shall not be supported.

5.3 Filing a lawsuit

If the trademark review and adjudication department remakes, according to an effective judgment, the disputed ruling, against which the party files an administrative lawsuit, such case shall not be accepted; if such case has been accepted, it shall be dismissed. However, the above shall not apply, provided that the causes based on which the trademark review and adjudication department makes the disputed ruling has ceased to exist.

6. Other procedural matters

6.1 Parameters for Determination of trademark registration items

In the event of inconsistency between the registration items indicated on the *Trademark Registration Certificate* and those set out in the *Trademark Register*, the *Trademark Register* shall prevail and serve as the point of reference in the determination of trademark registration items unless there is evidence to prove that the *Trademark Register* is erroneous.

6.2 Calculation of the date of action

If the plaintiff opposes to an administrative act and for which it brings a lawsuit, the statute of limitation runs from the second day from its receipt of the disputed ruling.

6.3 Burden of proof of the trademark review and adjudication department

In trademark administrative litigation, if the trademark review and adjudication department fails to provide evidence within the time limit without justifiable reasons, it may be deemed to have constituted the circumstance as provided in Article 34 of the Administrative Procedure Law, unless the disputed ruling involves the legitimate rights of a third party and such third party provides evidence.

6.4 Disputed ruling made overdue

In trademark administrative litigation, if the trademark review and adjudication department fails to make the disputed ruling within the statutory time limits as provided in Articles 34, 35, 44, 45 and 49 of the Trademark Law, yet the overdue ruling has no substantive influence on the parties' rights, where the party argues procedural violation, such argument shall not be supported.

6.5 Submission and admission of evidence in administrative cases concerning review of cancellation

In an administrative case concerning review of cancellation, if a party explicitly indicates that it argues the actual use of the litigious trademark based on the original of evidence submitted prior to the making of the cancellation decision, and the trademark review and adjudication department cancels the registration of the litigious trademark on the mere ground of the party's failure to submit evidence, the party's request to revoke the disputed decision may be supported.

6.6 Legal consequences of failure to prepay the case acceptance fee as required

In trademark administrative litigation, if the plaintiff or the appellant fails to prepay the case acceptance fee within the time limit as provided in Article 22 of Measures on Payment of Litigation Fees without filing an application to delay, reduce or waive the payment, or if an application to delay, reduce or waive the payment is filed yet not approved, it shall be deemed that the complaint has been voluntarily withdrawn pursuant to the provision of Article 61 of the Interpretation of the Supreme People's Court on the Application of the Administrative Procedure Law of the People's Republic of China.

6.7 Bearing the litigation costs

In trademark administrative litigation, if the disputed ruling is revoked due to admission of the evidence supplemented by a party during the litigation proceeding, the litigation fee shall be borne by the party that submits the supplementary evidence.

6.8 Failure to apprise the party of the members of the panel

If the trademark review and adjudication department does not apprise the party of the members of the panel such that the party is unable to exercise the right to recusal, where the party argues procedural violation without raising any substantive grounds for recusal, such argument may not be supported.

6.9 Intermediary of both parties

If, in the same case, the same intermediary or agent represents respectively both parties in different stages of the trademark administrative procedure, the disputed administrative act may be determined to violate the legal procedure unless otherwise explicitly agreed by the parties.

6.10 Application of termination of litigation

In an administrative case concerning declaration of invalidation, if the registration of the litigious trademark has been cancelled, it does not constitute termination of litigation as provided in Article 88 of the Interpretation of the Supreme People's Court on the Application of the Administrative Procedure Law of the People's Republic of China.

6.11 A party's rejection to submit the "translated text"

In trademark administrative litigation, if the third party is a foreigner, in the event that the plaintiff fails to submit the translated text provided by an eligible translation institution and fails to commission the translation and pay the corresponding fees, and after elucidation, the plaintiff still fail to submit the foregoing within a reasonable period of time, thus resulting in the failure of service to such foreign party, the complaint may be dismissed.

The text that needs to be translated as specified in the preceding paragraph includes the complaint and the court summons.

Part II Relevant Substantive Matters

7. Basic Principles

7.1 Application of Article 4 of the Trademark Law

Any trademark applicant that obviously lacks the true intention of use and is engaged in any of the followings, shall be determined as having violated the provisions of Article 4 of the Trademark Law:

- (1) applying for registration of trademarks identical with or similar to various entities' trademarks which have acquired certain reputation or are of strong distinctiveness , and the circumstance is serious;
- (2) applying for registration of trademarks identical with or similar to a certain entity's trademarks which have acquired certain reputation or are of strong distinctiveness , and the circumstance is serious;
- (3) applying for registration of trademarks identical with or similar to any other commercial signs other than trademarks of others, and the circumstance is serious;
- (4) applying for registration of trademarks identical with or similar to any name of place, scenic spot, building and others with certain reputation, and

the circumstance is serious; or

(5) applying for registration of a large number of trademarks without justifiable reasons.

If the aforesaid trademark applicant claims that he has the true intention of use, but fails to present the relevant evidence, this claim shall not be supported.

7.2 Application of good faith principle

In trademark administrative case, any application for registration of the litigious trademark shall not violate the provisions of Article 7.1 of the Trademark Law.

7.3 Components of trademarks

The components of the litigious trademark shall be subject to the contents as expressly set out in the trademark registration gazette, the application document of the trademark, the trademark register or others.

7.4 Trademark assignment not affecting determination of relevant clauses

If an application for registration of the litigious trademark violates the relevant provisions of the Trademark Law, and the applicant or registrant of the litigious trademark claims that the litigious trademark should be registered or maintained valid only on the ground that the applicant or registrant has no fault in being assigned the trademark, this claim shall not be supported.

7.5 Revocation or cancellation of registrant

In an administrative case concerning review of cancellation or declaration of invalidation, if the business license of the registrant of the litigious trademark is revoked or this registrant has been canceled, it would be inappropriate to cancel the registration of, or declare the invalidation of the litigious trademark based merely on the aforesaid grounds.

8. Application of Article 10 of the Trademark Law

8.1 Parameters for application of Article 10.1 of the Trademark Law

If the sign of the litigious trademark has various semantic meanings or

methods of use, of which one meaning or method of use is likely to make the public believe that this mark falls under the circumstances as provided in Article 10.1 of the Trademark Law, this litigious trademark may be deemed to violate the provisions of Article 10.1, without considering its use conditions.

8.2 Marks containing the country name of China

In the event that the sign of the litigious trademark contains, but as a whole is neither identical with nor similar to, the country name of the People's Republic of China, if registration of this mark as a trademark would harm the national dignity of China, then this mark may be determined to fall under the circumstances as provided in Article 10.1.8 of the Trademark Law.

8.3 Marks containing a foreign country name

The name of a foreign country includes the full or abbreviated name in Chinese and foreign language of this country, and the official documents and others may be used as the basis for determining the foreign country name.

The sign of the litigious trademark contains, but as a whole is neither identical with nor similar to a foreign country name, if registration of this mark as a trademark would harm the national dignity of this country, then it may be determined to fall under the circumstances as provided in Article 10.1.8 of the Trademark Law.

The following circumstances may be presumed to fall under the circumstance "with the consent of such country's government" as prescribed in Article 10.1.2 of the Trademark Law, until proven otherwise:

- (1) where the party concerned has submitted the documents proving that this country's government consents to application for registration of the litigious trademark;
- (2) where the party concerned has submitted the documents proving that the same applicant has been approved in this country to register the litigious trademark on identical goods or services.

8.4 Determination of "fraudulence"

If the public, on the basis of their daily life experience and others, does not misidentify the quality or other characteristics or origins of the goods or services designated by the litigious trademark, this trademark shall not be deemed as fall under the circumstances as provided in Article 10.1.7 of the Trademark Law.

8.5 Registering corporate names as trademarks

If a litigious trademark contains the full or abbreviated name of a company, and there is any substantial difference between the full or abbreviated name of the applicant and that of such company, where it is likely for the public to misidentify the sources of goods or services, this trademark may be determined to fall under the circumstances as provided in Article 10.1.7 of the Trademark Law.

If the sign of the litigious trademark is composed only of the full or abbreviated corporate name of the applicant, or its distinctive identifying part is only the full or abbreviated corporate name, where this trademark does not fall under the circumstance as provided in the preceding paragraph, it may be determined to fall under the circumstances as provided in Article 11.1.3 of the Trademark Law, except for trademarks with distinctive characteristics and in line with the commercial practice.

The full or abbreviated corporate names as prescribed in the preceding paragraphs shall be ascertained on the prerequisite that the public tend to deem those names as the identifying sign of a company.

8.6 Parameters for ascertaining “any other adverse effect”

If the sign of the litigious trademark or its components could be confirmed to have any negative or adverse effect on the public interests and public order of China according to the daily life experience of the public, or according to the dictionaries, reference books or other official documents, or according to the common knowledge of the people in the field of religion and others, it may be determined to have “any other adverse effect” as provided in Article 10.1.8 of the Trademark Law.

The subjective intention, methods of use, results of damage and others of the party concerned may be taken as the reference factors for determining whether there is “any other adverse effect”.

8.7 Time of determination of “any other adverse effect”

When examining whether the sign of the litigious trademark or any of its components has “any other adverse effect”, examination shall be subject to the state of facts at the time of application for registration of the litigious trademark. If the state of facts changes at the time when the registration application is approved, the examination shall be subject to the state of facts at the time when the registration is approved.

8.8 Protection of the deceased celebrities

If the sign of the litigious trademark or any of its components is identical with or similar to the name, portrait or others of a deceased celebrity in a specific field or region, so much so that the public would misidentify the quality, reputation, craftsmanship and other characteristics of the goods or services designated by the litigious trademark, this trademark may be determined to fall under the circumstances as provided in Article 10.1.7 of the Trademark Law.

If the sign of the litigious trademark or any of its components is identical with or similar to the name, portrait and others of a deceased political, economic, cultural, religious, or national public figure, this trademark shall be determined to have “any other adverse effect” as provided in Article 10.1.8 of the Trademark Law.

8.9 Determination of the “standard use of words”

If the sign of the litigious trademark or any of its components fails to use Chinese characters or idioms in a standardized manner, which would have any negative or adverse effect on China's cultural education, this trademark may be determined to have “any other adverse effect” as provided in Article 10.1.8 of the Trademark Law.

8.10 Other meanings of trademarks using geographical names

If the sign of the litigious trademark or any of its components contains the geographical names of administrative regions at or above county level or foreign geographical names acquainted by the public, but has other meanings as a whole, this trademark may be determined to fall outside the circumstances as provided in Article 10.2 of the Trademark Law.

In the case of any of the following, the litigious trademarks may be determined to have other meanings:

- (1) if the litigious trademark is composed only of a geographical name with other meanings;
- (2) if the litigious trademark contains a geographical name, but can be distinguished from the geographical name as a whole; or
- (3) if the litigious trademark contains a geographical name, and cannot be distinguished from the geographical name as a whole, yet, through use, the public could distinguish it from the geographical name.

8.11 Determination on extending registration of the approved trademarks using “geographical names”

Any trademark using geographical name that was registered prior to the prohibition by the Trademark Law on the registration or use of any geographical name as trademark shall remain valid within its original scope of registration. If the party concerned claims that the application for other trademarks is based on such trademark with the geographical names, this claim shall not be supported in general.

9. Application of Article 11 of the Trademark Law**9.1 Subjects**

It is the perception of the relevant public that consists of the customers in connection with the designated goods or services of this trademark and other business operators closely associated with the marketing of the aforesaid goods or services, which shall matter in the distinctiveness assessment of a litigious trademark.

9.2 Generalised application of clauses

If a disputed ruling fails to elucidate exactly under which circumstance as provided in the first, second or third paragraph of Article 11.1 of the Trademark Law the litigious trademark falls, but rather concludes that the registration of the litigious trademark falls under the circumstance as provided in Article 11.1 of the Law, and the party concerned argues erroneous application of law, this argument may be supported.

9.3 Concurrent application of specific clauses

The first, second or third paragraph of Articles 11.1 of the Trademark Law respectively provides the circumstances that the litigious trademark is devoid of distinctiveness. When determining whether identical trademark has distinctive characteristics on the identical goods, it would be generally inappropriate to concurrently apply these clauses.

9.4 Determination on the scope of distinctiveness

If the litigious trademark cannot be identified by the relevant public as a trademark, such trademark is devoid of distinctiveness when being designated to be used on any goods.

If a litigious trademark only describes the quality, quantity or other features of

the goods designed by this trademark, it is devoid of distinctiveness on such goods.

9.5 Determination on distinctiveness of unconventional trademarks

The fact that whether a color combination mark, a sound mark, or a three-dimensional mark embodied in the form of the inherent shape, packaging and decoration of the goods is the original creation of the party or is firstly used by the party is irrelevant to the determination on the distinctiveness of such mark.

9.6 Determination on other circumstances of lacking distinctiveness

If a litigious trademark is merely composed of advertising slogans, it generally falls under the circumstances as provided in Article 11.1.3 of the Trademark Law.

9.7 Determination of “the secondary meaning”

Where a party concerned claims that the litigious trademark acquires distinctiveness through use, the following factors may be taken into comprehensive consideration:

- (1) the use of the litigious trademark suffices to enable it to function as a source identifier of the goods;
- (2) the time, territory, scope, scale, reputation and others pertaining to the use of the litigious trademark; and
- (3) the situation on the use of the litigious trademark by other business operators.

Distinctiveness that the litigious trademark is determined to have acquired through use shall be limited to the goods using such mark, excluding any other similar goods.

9.8 Determination on distinctiveness of three-dimensional marks

If a litigious trademark consists of a three-dimensional sign, it shall be judged as a whole as to whether the trademark is distinctive. In general, this trademark shall not be determined as distinctive for containing any words, graphic or other elements.

10. Application of Article 12 of the Trademark Law**10.1 Functions of three-dimensional marks**

If the three-dimensional mark which the party concerned applies for registration as the trademark is composed only of a shape inherent in the nature of the goods or a shape dictated by the need to achieve technical effects or the need to give the goods substantive value, this mark may be determined to fall under the circumstances as provided in Article 12 of the Trademark Law, without considering the use of such three-dimensional mark.

10.2 A shape inherent in the nature of the goods

The shape which must be adopted or is generally adopted in order to achieve the inherent purposes, functions, uses, effects and so on of the goods shall be deemed as a shape inherent in the nature of the goods.

10.3 A shape dictated by the need to achieve technical effects of the goods

The shape that needs to be adopted for the purpose of achieving specific technical parameters, indicators and others shall be deemed as the shape dictated by the need to achieve technical effects of the goods.

10.4 A shape dictated by the need to give the goods substantial value

The appearance, shape and others of the goods which affect the consumers' willingness to purchase shall be the shape dictated by the need to give the goods substantial value.

11. Application of Article 13 of the Trademark Law**11.1 Proof of well-known trademarks**

A party concerned claiming that a prior trademark constitutes a well-known trademark it shall generally submit the evidence that this trademark has reached well-known state prior to the application date of the litigious trademark.

If the evidence adduced by the party concerned, which is formed after the application date of the litigious trademark, is sufficient to prove that the prior trademark has reached well-known state prior to the application date of the litigious trademark, the evidence may be admitted.

11.2 Protection of well-known trademarks

Article 13.3 of the Trademark Law shall apply if the following prerequisites are met:

- (1) the cited trademark has reached well-known state prior to the application date of the litigious trademark;
- (2) the litigious trademark constitutes a replication, imitation or translation of a well-known trademark; and
- (3) the registration of the litigious trademark is likely to mislead the public, so as to prejudice the interests of the well-known trademark owner.

If any of prerequisites as set out in the preceding paragraph is not met, it is not necessary to ascertain whether other prerequisites are met.

11.3 Protection scope of well-known trademarks

The protection scope of a well-known trademark shall be determined by taking comprehensively into account this trademark's distinctiveness, reputation, the extent of similarity between the trademarks, the designed goods, to what extent the relevant public of the trademarks overlaps and the extent of attention of the relevant public, the subjective state of the applicants of the litigious trademark, among others.

11.4 Applicable circumstances of Article 13.3 of the Trademark Law

The following shall fall under those circumstances as provided in Article 13.3 of the Trademark Law:

- (1) an application for registration of a litigious trademark on goods that are neither identical nor similar is a replication, imitation or translation of a cited trademark, insofar as the relevant public is likely to misidentify the source of the goods to which the cited trademark and the litigious trademark are affixed or the relevant public is likely to believe that there are specific relations such as licensed use and affiliation between the business operators using the cited trademark and the litigious trademark; and
- (2) an application for registration of a litigious trademark on goods that are neither identical nor similar is a replication, imitation or translation of a cited trademark, insofar as the relevant public is likely to believe that there is a considerable degree of association between the litigious trademark and the cited trademark so as to undermine the distinctiveness of, derogate or

improperly exploit the market reputation of the cited trademark.

11.5 Well-known state

A prior trademark shall not be determined to have reached well-known state in any of the following circumstances:

- (1) a party concerned has a long history of operations and high reputation, but fails to prove that the prior trademark has been well acquainted by the relevant public in China; or
- (2) the prior trademark has high reputation in other countries or territories, but fails to be well acquainted by the relevant public in China pursuant to the actual use prior to the application date of the litigious trademark.

11.6 Determination of replications, imitations or translations

If the litigious trademark is identical with or is almost visually identical with that of another person's well-known trademark, the litigious trademark shall constitute a replication of other's well-known trademark.

If the litigious trademark uses any distinctive part or features of another person's well-known trademark, the litigious trademark shall constitute an imitation of other's well-known trademark.

If another person's well-known trademark is expressed by the litigious trademark in a different language which has established a corresponding relation with another person's well-known trademark and is widely known or customarily used by the relevant public, the litigious trademark shall constitute a translation of other's well-known trademark.

11.7 Application of Rules Concerning Recognition of well-known trademarks

Subject to the following conditions, if the trademark review and adjudication department makes a disputed ruling by applying Article 30 or 31 of the Trademark Law and supports the application made by the party concerned, where the opposite party argues erroneous application of laws by the trademark review and adjudication department, this argument shall not be supported:

- (1) the party concerned files an application, seeking to disapprove or declare invalid the registration of a litigious trademark in respect of identical or similar goods pursuant to the provisions of Article 13.3 of the Trademark Law;

- (2) the party concerned does not explicitly claim that the application for registration of a litigious trademark violates the provisions of Article 30 or 31 of the Trademark Law;
- (3) the substantial grounds based on which the party concerned seeking to disapprove or declare invalid the registration of a litigious trademark is that it is likely to cause confusion among the relevant public as regards the sources of goods to which the litigious trademark and the cited trademark are affixed;
- (4) the party concerned claims that the application for invalidation of the litigious trademark does not exceed the five-year period as provided in Article 45.1 of the Trademark Law.

11.8 Protection of the registered well-known trademarks on the goods of identical class

If a litigious trademark has been registered for more than five years, and the owner of a well-known trademark claims that the litigious trademark registered on the identical or similar goods should be declared invalid pursuant to the provisions of Article 13.3 of the Trademark Law, this claim may be supported.

12. Application of Article 15 of the Trademark Law

12.1 Determination of “without authorization”

If a principal or an entrusting party does not give explicit consent to the application for the registration of the litigious trademark by its agent or representative, it shall fall under the circumstance of “without authorization” as provided in Article 15.1 of the Trademark Law.

If a principal or an entrusting party is aware of but does not raise any objection against the application for the registration of the litigious trademark, the principal or the entrusting party shall not be presumed to have given its consent to the application of the litigious trademark by its agent or representative.

12.2 “Trademarks of the principal or the entrusting party”

The trademark already registered or applied for by the principal or the entrusting party prior to the application date of the litigious trademark is not “a trademark of the principal or the entrusting party” as provided in Article 15.1 of the Trademark Law.

Whether the principal or the entrusting party actually uses this trademark is not a prerequisite to apply Article 15.1 of the Trademark Law.

12.3 Applicable prerequisites

If the agent or the representative applies without authorization for registration of a trademark identical with or similar to the trademark of its principal or entrusting party in respect of identical or similar goods, it shall be deemed as falling under the circumstance as provided in Article 15.1 of the Trademark Law.

12.4 Applicable subjects

If an applicant of the litigious trademark has kinship with “the agent or the representative” as provided in Article 15.1 or “the applicant” as provided in Article 15.2 of the Trademark Law, or is the legal representative of the company that retains the employment of “the agent or the representative” or “the applicant”, this applicant constitute an applicable subject as provided in Article 15 of the Trademark Law.

12.5 Determination of “prior use”

If a trademark is used only in other countries or regions, this use does not fall under the “prior use” circumstances as provided in Article 15.2 of the Trademark Law.

Among other things, the scale, duration of use and the reputation of the trademark shall not affect the determination of “prior use”.

12.6 Determination of the evidence of “prior use”

If a party concerned seeks protection over a trademark that has been used in prior, it shall submit the evidence of trademark use in China prior to the application date of the litigious trademark. The evidence of this trademark being used in other countries or regions or of such trademark about to be used in China may be adduced as supplementary evidence to prove the prior use of the litigious trademark.

12.7 Determination of “other relations”

If an applicant of the litigious trademark has, with a prior user, any relation, other than the agency or representative relation, insofar as it enables the applicant to be aware of the existence of another person’s trademark so that such applicant should take proactive measures to avoid filing the same, this

relation shall be deemed as falling under the circumstances of “other relations” as provided in Article 15.2 of the Trademark Law.

12.8. Exceptions to Article 15 of the Trademark Law

If an applicant of the litigious trademark can prove by evidence that it uses in prior the litigious trademark before the conclusion of the agency or representative relation, it may be determined to fall outside the circumstances as provided in Article 15.1 of the Trademark Law.

If an applicant of the litigious trademark can prove by evidence that it uses the litigious trademark prior to “another person” as provided in Article 15.2, it may be determined to fall outside the circumstances as provided in Article 15.2 of the Trademark Law.

13. Application of Article 16 of the Trademark Law

13.1 Determination of “misleading the public”

If the application for the registration of a litigious trademark is likely to cause confusion among the relevant public as regards the genuine origin of goods to which this trademark is affixed, this trademark shall be deemed as falling under the circumstances as provided in Article 16.1 of the Trademark Law.

13.2 “Trademarks containing geographical indications of the goods”

If a litigious trademark contains the whole of geographical indication or the main identifying part of a geographical indication, so that it is likely to cause confusion among the relevant public as regards the genuine origin of the goods to which this trademark is affixed, it shall be deemed as constituting the circumstance of “trademarks containing geographical indications of the goods”.

13.3 Application subjects

Any group or association established for the protection of geographical indications or with an objective to protect geographical indications may file an application against the litigious trademark, provided that such group or association believes that the litigious trademark violates the provisions of Article 16.1 of the Trademark Law.

Any producer, processor or business operator of the goods using such geographical indications may file an application against the litigious trademark in the capacity of an interested party.

13.4 Prior protection principles of the country of origin

If a foreigner claims that the application for registration of the litigious trademark violates the provisions of Article 16.1 of the Trademark Law and thus this trademark should not be registered or should be declared invalid, it shall provide proof proving that the relevant geographical indication under its name is protected by the laws of its country of origin.

13.5 Determination of Confusion

If an application for the registration of an ordinary trademark is filed prior to that of a geographical indication collective trademark or certification trademark, objective existence of this geographical indication and its reputation, distinctiveness and the awareness of the relevant public shall be comprehensively considered in ascertaining whether it is likely to cause confusion among the relevant public as regards the sources of the goods or services; if an application for registration of a geographical indication collective trademark or certification trademark is filed prior to an ordinary trademark, determination may be made as regards whether the ordinary trademark unfairly exploits the reputation of the geographical indication collective trademark or certification trademark so as to cause confusion among the relevant public.

13.6 Application of the well-known trademark protection

Article 13.3 of the Trademark Law shall apply, if protection is sought for a geographical indication collective trademark or certification trademark that has reached well-known state.

If an application is filed by a party concerned, seeking to disapprove or declare invalid the registration of the geographical indication collective trademark or certification trademark pursuant to Article 13.3 of the Trademark Law, factors such as the objective existence of this geographical indication, and its reputation, distinctiveness and the awareness of the relevant public shall be comprehensively considered to determine whether the registration of the geographical indication collective trademark or certification trademark is likely to cause confusion among the public so as to harm the interests of the registrant of an ordinary trademark.

13.7 Registering geographical indication as ordinary trademarks

If the applicant or registrant of a litigious trademark applies for registration of the whole of a geographical indication or its main identifying part as a trademark other than the collective trademark or the certification trademark, Article 16.1, 10.2 or 11.1 of the Trademark Law shall apply when hearing this case.

13.8 Erroneous determination of geographical scope

If the geographical scope, indicated by the applicant of a geographical indication collective trademark or certification trademark in the application document is inconsistent with the actual place of origin of the goods to which the aforesaid trademark is affixed, Article 16.1 of the Trademark Law shall apply when hearing this case.

13.9 Application of legal provisions

If a party concerned claims that another person's application for registration of a geographical indication certification trademark or collective trademark violates the provisions of Article 16.2 of the Trademark Law and therefore this trademark should not be approved for registration or the registration should be declared invalid, the clause "where a trademark, for the registration of which an application is filed, that does not conform to the relevant provisions of this Law" as prescribed in Article 30 of the Trademark Law shall apply when hearing this case.

14. Application of Article 19.4 of the Trademark Law

14.1 Determination of trademark intermediaries

Those entities that have filed on record and is engaged in the trademark agency business, or those have indicated trademark agency business in their business licenses or those have not filed on record but are actually engaged in the trademark agency business shall be deemed as "the trademark agencies" as provided in Article 19.4 of the Trademark Law. In general, in the event that the business items recorded in the business license of an entity makes no reference to trademark agency business, it shall not be taken as the basis to exclude the possibility of such entity acting in the capacity of "a trademark intermediary".

14.2 Determination of trademark agency business

As entrusted by the entrusting party, filing on behalf of the entrusting party applications for registration of trademarks, representing the interests of the entrusting party in the trademark review and adjudication procedure and other trademark matters, including trademark registration application, modification, renewal, assignment, opposition, cancellation, review and adjudication, infringement complaint, offering trademark-related legal consulting service, acting in the capacity of the trademark consultant or acting as an agent in other trademark matters, shall be deemed as trademark agency business.

14.3 Assignment of the litigious trademarks shall not affect the determination of subject

In procedures of trademark review and adjudication, if a litigious trademark is assigned from a trademark intermediary to a non-trademark intermediary, Article 19.4 of the Trademark Law may apply when hearing such case.

14.4 Determination of the scope of application for registration of the litigious trademarks

The “agency service” is limited to the service items as indicated by subgroup 4506 in class 45 of the International Classification of Goods and Services.

Other than trademark agency service, any trademark applications filed by trademark intermediaries on other classes of goods and services shall not be supported.

15. Application of Articles 30 and 31 of the Trademark Law**15.1 Restrictions on extended trademark registration**

If another person registers, after the registration of the prior trademark of the litigious trademark applicant but before the application for the litigious trademark, a trademark identical with or similar to the litigious trademark on identical or similar goods, where the litigious trademark applicant argues thereon that the litigious trademark shall be approved for registration, such argument shall not be supported, provided that the aforesaid trademark has been continuously used by such other person and has acquired certain reputation, yet the litigious trademark applicant fails to prove the prior trademark has been put into use and has acquired reputation through use, insofar as it is unlikely to cause confusion among the relevant public.

15.2 Parameters for determining similar trademarks

When applying Articles 30 and 31 of the Trademark Law, comprehensive consideration shall be taken by factoring in the degree of similarity between the trademarks and the goods, the distinctiveness and reputation of the cited trademark, the degree of attention of the relevant public and the subjective intention of the applicant of the litigious trademark, and the interaction between the above factors, and based on whether it is likely to cause confusion among the relevant public.

In the event that the two trademarks and their designated goods are identical, the court may determine that it is direct violation of the provisions of Articles

30 and 31 of the Trademark Law, without considering other factors.

If the cited trademark as a whole or its distinctive identifying part is used as a component of the litigious trademark, these trademarks may be determined as constituting similar marks.

15.3 Determination of trademark similarity in administrative cases concerning review of trademark refusal

In an administrative case concerning review of trademark refusal, the degree of similarity between the litigious trademark and the cited trademark and other factors are mainly taken into consideration in determining whether the litigious trademark is similar to the cited trademark. The reputation of the litigious trademark may not be considered.

15.4 Determination of trademark similarity in the administrative cases concerning review of disapproving trademark registration and request for declaration of invalidation

In an administrative case concerning review of disapproving trademark registration and request for declaration of invalidation, if the applicant of the litigious trademark has no bad faith, and due to specific historical reasons, the litigious trademark and the cited trademark have been coexisting for a long time so much so that an established market pattern has been formed, where a party concerned claims that the coexistence of the two trademarks will not cause confusion among the relevant public, these trademarks may be determined to be dissimilar.

Factors such as evidence provided by the applicant of the litigious trademark and the owner of the cited trademark and the subjective state of the registrant of the litigious trademark may be comprehensively considered to determine whether the litigious trademark is similar to the cited trademark.

15.5 Market survey reports

A party concerned may submit market survey reports to prove that the litigious trademark and the cited trademark do not constitute similar trademarks. These reports whose conclusions are neither authentic nor scientific may not be admitted.

15.6 Conditions for application of Articles 30 and 31 of the Trademark Law

In a trademark administrative case, the application date of the litigious

trademark should serve as the point of reference as to determine whether the registration of the cited trademark has been approved or preliminarily examined, or the application of the cited trademark has been filed in prior.

If the application date of the cited trademark predates that of the litigious trademark, but the registration of cited trademark has not been approved or preliminarily examined prior to the application date of the litigious trademark, even though the registration of cited trademark has been approved or preliminarily examined when the trademark review and adjudication department makes a disputed ruling, Article 31 of the Trademark Law shall apply when determining whether the litigious trademark and the cited trademark constitute similar trademarks.

15.7 Cancellation of cited trademark owners

In a trademark administrative case, if the owner of a cited trademark is canceled and there is no evidence to prove the existence of a successor, it may be determined that the cited trademark does not constitute similar mark to the litigious trademark.

15.8 Determination of similarity between Chinese and foreign trademarks

The similarity between Chinese and foreign trademarks may be judged by comprehensively taking into account the following factors:

- (1) the degree of awareness of the semantic meaning of the foreign language by the relevant public;
- (2) the relevance or correspondence such as meanings, pronunciation and so on between Chinese and foreign trademarks;
- (3) the distinctiveness, reputation and methods of use of the cited trademark;
- (4) the actual use of the litigious trademark.

15.9 Comparison of three-dimensional trademarks

The similarity of three-dimensional trademarks shall be determined by comparing the three-dimensional trademarks as a whole, rather than only comparing words and graphics in such trademark with those of the prior registered word or device trademarks.

15.10 Attributes of coexistence agreements

When judging whether the litigious trademark is similar to the cited trademark, the coexistence agreements may be used as *prima facie* evidence to exclude confusion.

15.11 Formality prerequisites of coexistence agreements

The owner of the cited trademark shall give written consent to application for registration of the litigious trademark, and expressly indicates the particulars of the litigious trademark. Those co-existence agreements with strings attached or a specific time limit agreed shall not be admitted in general.

The coexistence agreements shall be true, legitimate and valid, and shall not harm the interests of the state, the public and the third party, otherwise they shall not be admitted.

15.12 Legal effects of coexistence agreements

If the cited trademark and the litigious trademark are identical or substantially identical trademarks designated to be used on identical or similar goods, the application for registration of the litigious trademark shall not be approved based merely on the coexistence agreements.

If the cited trademark and the litigious trademark constitute similar trademarks designated to be used on identical or similar goods, and the owner of the cited trademark issues a coexistence agreement, in the event that there is no any other evidence to prove that the coexistence of two trademarks above suffices to cause confusion among the relevant public as regards the sources of goods, these two trademarks may be determined to be dissimilar.

If after issuing a coexistence agreement, the owner of the cited trademark raises an opposition or requests for the declaration of invalidation of the litigious trademark on the ground that the two trademarks constitutes similar trademarks, this opposition or request for the declaration of invalidation shall not be supported, unless such coexistence agreement is invalid or canceled.

15.13 Determination of similar goods

In an administrative case concerning review of trademark refusal, the existing International Classification of Goods and Services at the time of hearing shall be generally taken as the criteria in determination of similar goods or services.

In an administrative case concerning review of disapproving trademark registration and request for declaration of invalidation, the existing International Classification of Goods and Services at the time of hearing may be taken as the reference in determination of similar goods or services.

15.14 Determination of malice

When judging whether the applicant of the litigious trademark has subjective malice, the following factors shall be taken into account:

- (1) the cited trademark has strong distinctiveness and high reputation;
- (2) the business premises of the litigious trademark applicant is in proximity to that of the cited trademark owner;
- (3) the litigious trademark applicant and the cited trademark owner are practitioners of the same industry; and;
- (4) the litigious trademark is substantially identical with the cited trademark and the litigious trademark applicant fails to give any reasonable explanations.

16. Application of Article 32 of the Trademark Law

16.1 Scope of the prior rights

If a party concerned claims its legitimate prior rights and interests pursuant to Article 6 of the Anti-Unfair Competition Law, Article 32 of the Trademark Law may apply when hearing this case.

The law providing the prior rights shall be generally taken as the basis for determining whether the application for registration of the litigious trademark violates the prior rights of others.

16.2 Temporal requirements of the prior rights

If a party concerned claims that the application for registration of the litigious trademark violates its "prior rights", it shall prove by evidence that the prior rights have been existing prior to the application date of the litigious trademark.

If the prior rights cease to exist at the time the litigious trademark is approved for registration, it shall not affect the registration of the litigious trademark.

16.3 Prior copyright of foreigners

If a foreigner claims that the application for registration of the litigious trademark violates its prior copyright, Article 2 of the Copyright Law shall apply.

16.4 Determination of damage to prior copyright

When determining whether the application for registration of the litigious trademark prejudices the prior copyright of the party concerned, the following prerequisites shall be taken into account:

- (1) the work involved constitute the object protected by the Copyright Law;
- (2) the party concerned is the copyright owner or the interested party of the work involved;
- (3) the litigious trademark applicant may have access to the work involved prior to the application date of the litigious trademark;
- (4) the litigious trademark is substantially similar to the work involved.

If any of prerequisites as set out in the preceding paragraph is not met, it is not necessary to ascertain whether other prerequisites are met.

16.5 Determination of works

Those devoid of originality shall not be determined as works.

In general, the simple ordinary graphics, letters and others are not determined as works.

16.6 Works with lapsed term of protection

If a party concerned claims its copyright in connection with the work whose term of protection has lapsed in accordance with the Copyright Law at the time of application for registration of the litigious trademark, this claim shall not be supported.

In determining whether the litigious trademark is substantially similar to the work involved, the expression having entered the public domain and shared by both the mark and the work above will not be considered.

16.7 Determination of prior copyright ownership

The copyright-related manuscript, original, legal publication, copyright registration certificate prior to the application date of the litigious trademark, the contract for obtaining the rights and others provided by the party concerned may be taken as the *prima facie* evidence for determining the ownership of prior copyright, unless proven otherwise by the litigious trademark applicant.

16.8 Eligibility determination of the interested parties

If a party concerned claims that it is entitled to file an application as an interested party of the prior copyright pursuant to the trademark gazette, trademark registration certificate and so on, this claim may be supported.

16.9 Effect of originality on determination of “substantial similarity”

If the litigious trademark and a work of low originality are almost visually identical, the mark may be determined to be substantially similar to the work.

16.10 Defense of no damage to prior copyright

If a party concerned claims that the application for registration of the litigious trademark does not prejudice the prior copyright of another person, this claim may be supported in the case of any of the following:

- (1) the identical or similar part of the litigious trademark and the work involved falls under the information of public resource and domain;
- (2) the reason why the litigious trademark and the work involved are identical with or similar to each other is that they implement the common standards or the expression forms are limited; or
- (3) the identical or similar part of the litigious trademark and the work involved originates from the works of an outsider, and the creation of such works is completed prior to the work involved.

16.11 Scope of prior copyright protection

If a party concerned claims that registration of the litigious trademark shall not be approved or shall be declared invalid on the ground that registration of such trademark prejudices its prior copyright, the classes of the goods or services designated to be used by the litigious trademark shall not be considered.

16.12 Specific interests of protected by name rights

If a party concerned claims that the application for registration of the litigious trademark violates his/her prior name rights, evidence shall be adduced to prove that the applicant of the litigious trademark is aware of his/her name yet applies for registration of the trademark by misappropriation, fraudulent use or other means.

If the relevant public is inclined to believe that the goods to which the litigious trademark is affixed are licensed by the natural person or have other specific relation with such natural person, this trademark may be determined to fall under the circumstances as provided in Article 32 of the Trademark Law.

16.13 Scope of the name

The name includes the name used in the household registration, alias, pseudonym, stage name, artistic name, nickname and so on.

The subject identifying expression which may establish a correspondence with a specific natural person may be deemed as the name of this natural person.

16.14 Effect of the reputation of a natural person on the name right

A natural person's reputation is not a precondition for protecting his/her name right, but can be taken as a reference factor in determining whether the relevant public could establish a corresponding relation between a name and a specific natural person.

16.15 Protection of portraiture right

If a party concerned claims that an application for registration of the litigious trademark harms his/her portraiture right, he/she shall prove by evidence that the litigious trademark has embodied sufficient personality features that enables the relevant public to identify the corresponding natural person, so as to form a stable correspondence relation between this trademark and this natural person, and to make the relevant public believe that the goods to which the litigious trademark is affixed is licensed by such natural person or have other specific relations with this natural person.

In the event that the silhouette of the human figure does not contain the identifiable personality features of a specific natural person, where a party concerned claims that its prior portraiture right is prejudiced therein, this claim shall not be supported.

16.16 Determination of prior corporate name right

If the abbreviated name or trade name of an enterprise has acquired certain reputation through use and has established a stable correspondence with a party concerned, and the use is not against the will of the party concerned, the party concerned may claim its prior corporate name right therein.

16.17 Protection of foreign corporate names

Where a foreign company's corporate name, trade name or its customary transliteration, prior to the application date of the litigious trademark, has been used commercially in China, thus has acquired certain reputation and has been known by the relevant public, the party concerned may claim its prior corporate name right therein.

16.18 Expression of “merchandising rights”

In the case that the law does not provide the “merchandising rights”, it would be inappropriate to directly use such term in the judgments.

16.19 Restrictions on determination of “merchandising rights”

If the “merchandising rights” a party concerned claims, can be protected as the name right, portraiture right, copyright, the goods (services) name with certain influence or any other rights or interests explicitly provided in laws, it would be inappropriate to ascertain the “merchandising rights” claimed by the party concerned.

If other specific clauses other than Article 32 (“Prior Rights”) of the Trademark Law are insufficient to provide resort to the party concerned, and it is impossible to grant protection in accordance with the circumstance as prescribed in the preceding paragraph, where specific conditions are met, protection may be granted as per the claim of the party concerned by applying Article 32 (“Prior Rights”) of the Trademark Law, but determination shall be made pursuant to the provisions of Article 6 of the Anti-unfair Competition Law.

16.20 Determination of “specific conditions”

The following conditions shall be satisfied simultaneously in order to determine that “specific conditions” as provided in Article 16.19 of these Guidelines are met:

- (1) the “object of protection” is the name of a work, the character name of a

work, etc.;

(2) the “object of protection” has certain reputation prior to the application date of the litigious trademark;

(3) the litigious trademark applicant is subjectively malicious;

(4) the litigious trademark is identical with or similar to the “object of protection”; and

(5) the designated goods of the litigious trademark fall under the scope as covered by the reputation of the “object of protection”, insofar as it is likely to mislead the relevant public into mistakenly believing that the such goods are licensed by the beneficial owner of the “object of protection” or has specific relations with such owner.

16.21 Pre-emptive registration filed in bad faith shall be limited to “unregistered trademarks”

Article 32 of the Trademark Law provides that “an applicant for trademark application may not, by unfair means, preemptively register a trademark that is already in use by another person and has certain influence”. The “trademark” pre-emptively filed for registration means the “unregistered trademark”, including the trademarks whose registration application has not been filed or which has become invalid prior to the application date of the litigious trademark.

16.22 Prerequisites for application of Pre-emptive registration filed in bad faith

If an application for registration of the litigious trademark is determined to fall under the circumstances of “preemptively registering by unfair means a trademark that is already in use by another person and has certain influence”, the following conditions shall be met simultaneously:

(1) the unregistered trademark has already been used and has acquired certain influence prior to the application date of the litigious trademark;

(2) the litigious trademark is identical with or similar to the prior used unregistered trademark;

(3) the designated goods of the litigious trademark constitutes identical or similar goods with the prior used unregistered trademark; and

(4) the applicant of the litigious trademark knows or should have known the trademark which is used in prior by another person.

If a trademark applicant can prove by evidence that it does not exploit in bad faith the good will of the prior used trademark, its application shall fall outside the circumstances set out in the preceding paragraph.

16.23 Determination of “know or should have known”

The following factors may be comprehensively considered to determine whether the applicant of the litigious trademark knows or should have known the unregistered trademark of another person:

- (1) the applicant of the litigious trademark and the prior trademark user have been in contact with respect to the trademark license, assignment and otherwise;
- (2) upon determination by relevant organs, the applicant of the litigious trademark has engaged in trademark infringement act;
- (3) the applicant of the litigious trademark and the prior trademark user are practitioners of the same industry; and
- (4) the litigious trademark is highly similar to the prior trademark of strong distinctiveness.

16.24 Determination of “already in use”

If a party concerned, through business promotion or production and operation activities, enables the “unregistered” trademark for which protection is sought to function as a source identifier of goods the “unregistered trademark” shall be deemed as falling under the circumstance of “already in use” as provided in Article 32 of the Trademark Law.

If the relevant publicity has established a connection between the “unregistered trademark” and the party concerned, the “unregistered trademark” may be determined to fall under the circumstance of “already in use”, provided that it is not against the will of the party concerned.

16.25 Determination of “certain influence”

If a party concerned proves by evidence that the reputation of its prior unregistered trademark is sufficient to enable the applicant of the litigious trademark to know or should have known existence of the prior unregistered

trademark, the prior unregistered trademark may be determined to have “certain influence”.

If the evidence of the prior unregistered trademark provided by the party concerned, including the duration of use, region, sales or advertising, is sufficient to prove that the prior unregistered trademark is known by the relevant public within certain scope, the prior unregistered trademark may be determined to have “certain influence”.

16.26 Determination of pure export behavior

If the goods to which the prior unregistered trademark is affixed are directly exported without being circulated within the Chinese territory, and a party concerned claims that the application for registration of the litigious trademark should fall under the circumstances of “preemptively registering by unfair means a trademark that is already in use by another person and has certain influence” as provided in Article 32 of the Trademark Law, this claim shall not be supported.

17. Application of Article 44.1 of the Trademark Law

17.1 Determination of “fraudulent means”

A trademark registration may be determined to fall under the circumstances “the registration is obtained by fraudulent means” as provided in Article 44.1 of the Trademark Law, if the following circumstances are met simultaneously:

- (1) it is the intention of the litigious trademark applicant to deceive the competent trademark administrative organ into having misperceptions;
- (2) the litigious trademark applicant acquires the trademark registration from the competent trademark administrative organ by deceptive means; and
- (3) the administrative acts taken by the competent administrative organ with misperceptions could be attributed to the acts of the litigious trademark applicant, and there is a direct causal relation between such two acts.

17.2 Determination of “other improper means”

“Other improper means” mean the acts that disrupt the trademark registration order, harm public interests, improperly occupy public resources or seek illegal gains in ways other than the fraudulent means for the purpose of obtaining the registration of the litigious trademark, including measures employed by the litigious trademark applicant in preemptively registering, in a

massive scale, others' trademarks that have certain influence.

A trademark registration simultaneously meeting the following prerequisites may be determined to fall under the circumstances "the registration is obtained by other improper means" as provided in Article 44.1 of the Trademark Law:

- (1) the applicable subject is the litigious trademark applicant, unless there is evidence to prove that the current registrant and the applicant of the litigious trademark have a specific relation, or there is intention liaison for the application for the registration of the litigious trademark between the parties;
- (2) the applicable object includes the registered trademark and the trademark applied for registration;
- (3) the application disrupts the trademark registration order, harms the public interests, or falls under the circumstances of improperly occupying the public sources or otherwise seeking illegal gains;
- (4) the trademark may not only prejudice certain civil rights and interests.

17.3 Determination of specific circumstances of "other improper means"

A trademark registration may be determined to fall under the circumstances that "the registration is obtained by other improper means" as provided in Article 44.1 of the Trademark Law in any of the following circumstances:

- (1) the applicant of the litigious trademark applies for registration of multiple trademarks which are identical with or similar to others' trademarks of strong distinctiveness or of high reputation, including not only the application for registration of trademarks of different owners on identical or similar goods or services but also the application for registration of trademarks of one owner on the non-identical or dissimilar goods or services;
- (2) the applicant for the litigious trademark applies for multiple trademarks which are identical with or similar to others' corporate names, names of social organization, the names, packaging, decoration and commercial signs of goods with certain influence; or
- (3) the applicant of the litigious trademark peddles the trademark, or bring an infringement lawsuit against the users of the prior trademark after failing to assign such mark at a high price.

17.4 Exceptions to specific circumstances of “other improper means”

If an applicant of the litigious trademark falls under any of the circumstances as provided in Article 17.3 of these Guidelines, yet the litigious trademark had been applied for registration quite early and there is evidence to prove that the applicant of the litigious trademark has genuine intention to use such trademark and has actually put it into commercial use, the litigious trademark may, depending on the specific circumstances, be determined to fall outside the circumstances of “the registration is obtained by other improper means”.

17.5 Restrictions on application of the “other improper means”

When hearing an administrative case concerning review of disapproving registration or request for declaration of invalidation, if the application of the party concerned can be supported by applying other clauses of the Trademark Law according to the documented evidence, Article 44.1 of the Trademark Law shall not apply.

18. Application of Article 45 the Trademark Law**18.1 Determination on the nature of Article 45 of the Trademark Law**

The first, second and third paragraphs of Article 45 of the Trademark Law are procedural clauses.

18.2 Determination of “five-year period”

The clause of “within five years from the date of trademark registration” as provided in Article 45.1 of the Trademark Law means within the five-year period from the date immediately following the registration publication date of the litigious trademark. Suspension, interruption and others circumstances shall not be applicable to this period.

From the date immediately following the registration publication date of the litigious trademark, the applicant may file an application for invalidation pursuant to the provisions of Article 45.1 of the Trademark Law.

18.3 Applicants of beyond the “five-year” period

The “owners of well-known trademarks” as provided in Article 45.1 of the Trademark Law do not cover the interested parties of the well-known trademarks.

18.4 Determination of “bad faith registration”

The following factors may be taken into account in the determination of “bad faith registration” as provided in Article 45.1 of the Trademark Law:

- (1) the litigious trademark is highly similar to the prior well-known trademark;
- (2) the prior well-known trademark is of strong distinctiveness and of high reputation;
- (3) the designated goods of the litigious trademark are closely associated with those of the prior well-known trademark;
- (4) the applicant of the litigious trademark has traded or cooperated with the owner of the prior well-known trademark;
- (5) the business premise of the litigious trademark applicant is in proximity to that of the owner of the prior well-known trademark;
- (6) other disputes arisen between the applicant of the litigious trademark and the owner of the prior well-known trademark enables the applicant to know about this well-known trademark;
- (7) the applicant of the litigious trademark has internal personnel exchanges with the owner of the prior well-known trademark;
- (8) the applicant of the litigious trademark, after its application for registration of such trademark, unfairly exploits the good will of the prior well-known trademark;
- (9) the applicant of the litigious trademark applies for registration of a large number of trademarks of others of strong distinctiveness and of high reputation.

19. Application of Article 49.2 of the Trademark Law**19.1 Determination of generalization of registered trademarks**

When determining whether a litigious trademark constitutes a generic name of the goods, the trademark shall be examined as a whole, and the specific goods designated by the generic name shall be ascertained, without considering the commodities similar to such goods.

If a party concerned claims that the litigious trademark has become a generic name of the goods, it may submit evidence such as dictionaries, reference books, national or industrial standards, affidavits issued by relevant industrial organizations, market survey reports, market promotion and use evidence and the use of the sign of such trademark by other entities in respect of identical goods.

19.2 Determination on the time point of generalization of registered trademarks

Determination on whether the litigious trademark constitutes a generic name shall be based on the status of facts when cancellation application is filed by the party concerned with the trademark cancellation examination department, taking the status of facts at the time of review and adjudication as reference.

19.3 Application of the new and the old Trademark Law

In an administrative case concerning review of cancellation, if the designated three-year period spans May 1, 2014, the 2001 Trademark Law shall apply in terms of substantive matters.

19.4 Determination of use

In any of the following circumstances, if a party concerned claims to maintain the registration of the trademark this claim shall not be supported:

- (1) where the party concerned only uses the litigious trademark on the similar goods or services beyond the scope of designated goods or services;
- (2) where the litigious trademark is used without fulfilling its source identifying function; or
- (3) where the litigious trademark is used symbolically only to maintain registration of such trademark.

19.5 Determination of “illegal” use

If the trademark use clearly violates the prohibitive provisions of the Trademark Law or of other laws, this use shall not be determined as trademark use.

19.6 Determination of user

For the purposes of the provision “non-use for three consecutive years” as prescribed in Article 49.2 of the Trademark Law, the “use” subjects include the trademark owners, trademark licensees and any other persons using such trademark not against the will of the trademark owner.

If a trademark owner has explicitly opposed the use of the litigious trademark by another person, but bases its trademark use argument on such person’s use in an administrative case concerning review of cancellation, this argument shall not be supported.

19.7 Determination of nonstandard goods

If the actually used or designated goods fall outside the standard goods or services enumerated in the International Classification of Goods and Services, in the determination of the class of the specific goods, factors that shall be taken into account include the functions, use, production department, consumption channels and target consumer of the goods as well as the impact of consumption habits, production patterns, industry operation needs, and other market factors upon the nature or designation of the goods.

19.8 Determination of actually used nonstandard goods constituting the use of the designated goods

If actually used goods fall outside standard goods or services enumerated in the International Classification of Goods and Services, yet such goods are in essence the same with those designated goods of the litigious trademark, except they are only different in names, or the actually used goods fall under the subordinate concept of the designated goods, this use may be determined to be the use of the designated goods.

The determination of identical goods shall comprehensively take into account the physical attributes, commercial features and the principles and standards as regards classification of goods set out in the International Classification of Goods and Services, among other factors.

19.9 Scope that the use of litigious trademark may help to maintain in respect of trademark registration

If using a litigious trademark on the designated goods is ascertained to constitute trademark use, such use can help maintain the registration of the trademark on other designated goods similar to such goods.

The similar goods referred to in the preceding paragraph shall be ascertained strictly in accordance with the functions, use, production department, consumption channels and target consumer of the goods, pursuant to the International Classification of Goods and Services.

19.10 Effect of changes in international classification on determination of similar goods

When the registration of the litigious trademark is approved, if the designated goods that are not actually used do not constitute similar goods with those actually used goods according to the International Classification of Goods and Services yet due to the changes in the International Classification of Goods and Services, the aforesaid constitutes similar goods at the time of hearing, the registration of the trademark in respect of those goods not actually used may be maintained by taking into account the status of the facts at the time of the hearing.

When the registration of the litigious trademark is approved, if the designated goods that are not actually used constitute similar goods with those actually used goods according to the International Classification of Goods and Services, yet due to the changes in the International Classification of Goods and Services, the aforesaid constitutes dissimilar goods at the time of hearing, the registration of the trademark in respect of those goods not actually used may be maintained by taking into account the status of the facts at the time of approval for registration.

19.11 Determination of affixing litigious trademark to others' trademarks

In the event that the goods bearing the trademark of another person is simultaneously affixed with the litigious trademark, it may be determined as not constituting use of trademark, provided that the relevant public is unlikely to identify the registrant of the litigious trademark as the source of such goods.

19.12 Determination of using multiple trademarks on one commodity

If a registrant of the litigious trademark uses simultaneously more than one trademark including the litigious trademark on one commodity, and such trademark can still function as the source identifier among the relevant public, this circumstance may be determined as the use of trademark.

19.13 Determination of one registrant with multiple trademarks

In the event that a registrant of the litigious trademark has more than one

registered trademark, if despite the nuances between its actually used trademark and the litigious trademark, this use can be attributed to be the use of other registered trademarks of the registrant, the claim to maintain the registration of the litigious trademark may not be supported.

19.14 Determination of trademark use on the services of “sales promotion for others”

In the event that a registrant of the litigious trademark is a shopping mall, a supermarket or otherwise, where such registrant can prove that it cooperates with the dealers by offering venue or through other means, so that it is ascertained to be engaged in providing advice, planning, promotion, consultation and other services for selling the goods, the litigious trademark may be determined to be used as a trademark on the services of “sales promotion for others”.

19.15 Use after the specified period

If a registered trademark is used in a large-scale manner after the specified period, this use in general shall not constitute the use of trademark within the specified period. However, if there is little evidence that the party concerned uses the trademark within the specified period, yet the litigious trademark is used continuously and extensively after the specified period, the above factors may be comprehensively taken into account in the determination whether it constitutes trademark use.

19.16 Determination of pure export behavior

If the goods to which the litigious trademark is affixed are directly exported without being circulated within the Chinese territory, and the registrant of the litigious trademark claims to maintain the registration of such trademark, this claim may be supported.

Supplementary Provisions

These Guidelines shall be implemented as of the date of their issuance, and the *Guidelines of the Beijing High People's Court on Trial of Administrative Cases Involving Granting and Affirmation of Trademark Right* issued on January 22, 2014 shall no longer apply.

PATENT

B1: Patent Law of the People's Republic of China (2008)

(Adopted at the 4th Session of the Standing Committee of the Sixth National People's Congress on March 12, 1984, amended for the first time in accordance with the Decision of the Standing Committee of the Seventh National People's Congress on Amending the Patent Law of the People's Republic of China at its 27th Session on September 4, 1992, amended for the second time in accordance with the Decision of the Standing Committee of the Ninth National People's Congress on Amending the Patent Law of the People's Republic of China adopted at its 17th Session on August 25, 2000, and amended for the third time in accordance with the Decision of the Standing Committee of the Eleventh National People's Congress on Amending the Patent Law of the People's Republic of China at its 6th Session on December 27, 2008)

Chapter I General Provisions

Article 1 This Law is enacted for the purpose of protecting the lawful rights and interests of patentees, encouraging invention-creation, promoting the application of invention-creation, enhancing innovation capability, promoting the advancement of science and technology and the economic and social development.

Article 2 For the purposes of this Law, invention-creations mean inventions, utility models and designs.

Inventions mean new technical solutions proposed for a product, a process or the improvement thereof.

Utility models mean new technical solutions proposed for the shape and structure of a product, or the combination thereof, which are fit for practical use.

Designs mean, with respect to a product, new designs of the shape, pattern, or the combination thereof, or the combination of the color with shape and pattern, which are rich in an aesthetic appeal and are fit for industrial application.

Article 3 The Patent Administration Department under the State Council shall be responsible for the administration of patent-related work nationwide.

It shall accept and examine patent applications in a uniform way and grant patent rights in accordance with law.

The departments in charge of patent-related work of the people's governments of provinces, autonomous regions and municipalities directly under the Central Government shall be responsible for patent administration within their respective administrative areas.

Article 4 Where an invention-creation for the patent of which an application is filed involves national security or other major interests of the State and confidentiality needs to be maintained, the application shall be handled in accordance with the relevant regulations of the State.

Article 5 Patent rights shall not be granted for invention-creations that violate the law or social ethics, or harm public interests.

Patent rights shall not be granted for inventions that are accomplished by relying on genetic resources which are obtained or used in violation of the provisions of laws and administrative regulations.

Article 6 An invention-creation that is accomplished in the course of performing the duties of an employee, or mainly by using the material and technical conditions of an employer shall be deemed a service invention-creation. For a service invention-creation, the employer has the right to apply for a patent. After such application is granted, the employer shall be the patentee.

For a non-service invention-creation, the inventor or designer has the right to apply for a patent. After such application is granted, the said inventor or designer shall be the patentee.

For an invention-creation that is accomplished by using the material and technical conditions of an employer, if the employer has concluded a contract with the inventor or designer providing the ownership of the right to apply for the patent or the ownership of the patent right, such provision shall prevail.

Article 7 No unit or individual shall prevent the inventor or designer from filing a patent application for a non-service invention.

Article 8 With regard to an invention-creation accomplished by two or more units or individuals in collaboration, or an invention-creation accomplished by an unit or individual under the entrustment of another unit or individual, the right to apply for a patent shall be vested in the units or individuals that have accomplished the invention-creation in collaboration or in the unit or individual that has done so under entrustment, unless it is otherwise agreed

upon. After the application is granted, the applying unit(s) or individual(s) shall be deemed the patentee(s).

Article 9 Only one patent can be granted for the same invention. However, where the same applicant applies for a utility model patent and an invention patent with regard to the same invention on the same day, if the utility model patent acquired earlier is not terminated yet and the applicant declares his waiver of the same, the invention patent may be granted.

If two or more applicants apply for a patent for the same invention separately, the patent right shall be granted to the first applicant.

Article 10 The right to apply for a patent and patent rights may be transferred.

If a Chinese unit or individual intends to transfer the right to apply for a patent or patent rights to a foreigner, foreign enterprise or other foreign organization, it or he shall perform the procedures in accordance with the provisions of relevant laws and administrative regulations.

For the transfer of the right to apply for a patent or of patent rights, the parties concerned shall conclude a written contract and file for registration at the patent administration department under the State Council, and the latter shall make an announcement thereof. The transfer of the right to apply for a patent or of patent rights shall become effective as of the registration date.

Article 11 After the patent right is granted for an invention or a utility model, unless otherwise provided for in this Law, no unit or individual may exploit the patent without permission of the patentee, i.e., it or he may not, for production or business purposes, manufacture, use, offer to sell, sell, or import the patented products, use the patented method, or use, offer to sell, sell or import the products that are developed directly through the use of the patented method.

After a design patent right is granted, no unit or individual may exploit the patent without permission of the patentee, i.e., it or he may not, for production or business purposes, manufacture, offer to sell, sell or import the design patent products.

Article 12 Any unit or individual that intends to exploit the patent of another unit or individual shall conclude a contract with the patentee for permitted exploitation and pay the royalties. The permittee shall not have the right to allow any unit or individual not specified in the contract to exploit the said patent.

Article 13 After the application for an invention patent is published, the applicant may require the unit or individual that exploits the said patent to pay an appropriate amount of royalties.

Article 14 If an invention patent of a State-owned enterprise or institution is of great significance to national or public interests, upon approval by the State Council, the relevant competent department under the State Council or the people's government of the province, autonomous region, or municipality directly under the Central Government may decide to have the patent widely applied within an approved scope and allow the designated units to exploit the patent, and the said units shall pay royalties to the patentee in accordance with the regulations of the State.

Article 15 If there are agreements regarding the exercise of rights by the co-owners of the right to apply for the patent or of the patent right, the agreements shall prevail. In the absence of such agreements, the co-owners may separately exploit the patent or may, in an ordinary manner, permit others to exploit the said patent. Where others are permitted to exploit the patent, the royalties received shall be distributed among the co-owners.

Except under the circumstances specified in the preceding paragraph, exercise of the co-owned right to apply for patent or of the co-owned patent right shall be subject to the consent of all the co-owners.

Article 16 The unit that is granted the patent right shall reward the inventor or designer of a service invention-creation. After such patent is exploited, the inventor or designer shall be given a reasonable amount of remuneration according to the scope of application and the economic results.

Article 17 An inventor or designer shall have the right to state in the patent documents that he is the inventor or designer.

The patentee shall have the right to have his patent mark displayed on the patented products or the package of such products.

Article 18 Where a foreigner, foreign enterprise or other foreign organization without a regular residence or business site in China applies for a patent in China, the application shall be handled in accordance with the agreements concluded by the country he or it belongs to and China or the international treaties to which both the countries have acceded or in accordance with this Law on the principle of reciprocity.

Article 19 If a foreigner, foreign enterprise, or other foreign organization without a habitual residence or business premises in China intends to apply for a patent or handle other patent-related matters in China, he or it shall

entrust a legally established patent agency with the application and such matters.

If a Chinese unit or individual intends to apply for a patent or handle other patent-related matters in China, it or he may entrust a legally established patent agency with the application and such matters.

A patent agency shall abide by laws and administrative regulations and handle patent applications or other patent-related matters as entrusted by its principals. It shall also be obligated to keep confidential the contents of the inventions of its principals, unless the patent applications have been published or announced. The specific measures for administration of the patent agencies shall be formulated by the State Council.

Article 20 Any unit or individual that intends to apply for patent in a foreign country for an invention or utility model accomplished in China shall submit the matter to the patent administration department under the State Council for confidentiality examination. Such examination shall be conducted in conformity with the procedures, time limit, etc. prescribed by the State Council.

A Chinese unit or individual may file for international patent applications in accordance with the relevant international treaties to which China has acceded. The applicant for such patent shall comply with the provisions of the preceding paragraph.

The patent administration department under the State Council shall handle international patent applications in accordance with the relevant international treaties to which China has acceded and the relevant provisions of this Law and regulations of the State Council.

With regard to an invention or utility model for which an application is filed for a patent in a foreign country in violation of the provisions of the first paragraph of this Article, if an application is also filed for the patent in China, patent right shall not be granted.

Article 21 The patent administration department under the State Council and its Patent Reexamination Board shall, handle patent applications and requests in accordance with law with objectivity, fairness and accuracy, in a timely manner.

The patent administration department under the State Council shall release patent-related information in a complete, accurate and timely manner, and publish patent gazettes on a regular basis.

Before a patent application is published or announced, the staff members of the patent administration department under the State Council and the persons concerned shall be obligated to keep such application confidential.

Chapter II Conditions for Granting Patent Rights

Article 22 Inventions and utility models for which patent rights are to be granted shall be ones which are novel, creative and of practical use.

Novelty means that the invention or utility model concerned is not an existing technology; no patent application is filed by any unit or individual for any identical invention or utility model with the patent administration department under the State Council before the date of application for patent right, and no identical invention or utility model is recorded in the patent application documents or the patent documentations which are published or announced after the date of application.

Creativity means that, compared with the existing technologies, the invention possesses prominent substantive features and indicates remarkable progress, and the utility model possesses substantive features and indicates progress.

Practical use means that the said invention or utility model can be used for production or be utilized, and may produce positive results.

For the purposes of this Law, existing technologies mean the technologies known to the public both domestically and abroad before the date of application.

Article 23 A design for which the patent right is granted is not an existing design, and no application is filed by any unit or individual for any identical design with the patent administration department under the State Council before the date of application for patent right and no identical design is recorded in the patent documentations announced after the date of application.

Designs for which the patent right is to be granted shall be ones which are distinctly different from the existing designs or the combinations of the features of existing designs.

Designs for which a patent right is granted shall be ones which are not in conflict with the lawful rights acquired by others prior to the date of application.

For the purposes of this Law, existing designs mean designs that are known to the public both domestically and abroad before the date of application.

Article 24 Within six months before the date of application, an invention for which an application is filed for a patent does not lose its novelty under any of the following circumstances:

- (1) It is exhibited for the first time at an international exhibition sponsored or recognized by the Chinese Government;
- (2) It is published for the first time at a specified academic or technological conference; and
- (3) Its contents are divulged by others without the consent of the applicant.

Article 25 Patent rights shall not be granted for any of the following:

- (1) scientific discoveries;
- (2) rules and methods for intellectual activities;
- (3) methods for the diagnosis or treatment of diseases;
- (4) animal or plant varieties;
- (5) substances obtained by means of nuclear transformation; and
- (6) designs that are mainly used for marking the pattern, color or the combination of the two of prints.

The patent right may, in accordance with the provisions of this Law, be granted for the production methods of the products specified in Subparagraph (4) of the preceding paragraph.

Chapter III Patent Application

Article 26 When a person intends to apply for an invention or utility model patent, he shall submit the relevant documents, such as a written request, a written description and its abstract, and a written claim.

In the written request shall be specified the name of the invention or utility model, the name of the inventor or designer, the name or title and the

address of the applicant and other related matters.

The written description shall contain a clear and comprehensive description of the invention or utility model so that a technician in the field of the relevant technology can carry it out; when necessary, pictures shall be attached to it. The abstract shall contain a brief introduction to the main technical points of the invention or utility model.

The written claim shall, based on the written description, contain a clear and concise definition of the proposed scope of patent protection.

With regard to an invention-creation accomplished by relying on genetic resources, the applicant shall, in the patent application documents, indicate the direct and original source of the genetic resources. If the applicant cannot indicate the original source, he shall state the reasons.

Article 27 When a person intends to apply for a design patent, he shall submit a written request, drawings or pictures of the design, a brief description of the design, and other relevant documents.

In the relevant drawings or pictures submitted by the applicant shall clearly be shown the design of the products for which patent protection is requested.

Article 28 The date when the patent administration department under the State Council receives the patent application documents is the date of application. If the application documents are delivered by post, the date on which the documents are posted as evidenced by the postmark is the date of application.

Article 29 If, within twelve months from the date the applicant first files an application for an invention or utility model patent in a foreign country, or within six months from the date the applicant first files an application for a design patent in a foreign country, he files an application for a patent in China for the same subject matter, he may enjoy the right of priority in accordance with the agreements concluded between the said foreign country and China, or in accordance with the international treaties to which both countries have acceded, or on the principle of mutual recognition of the right of priority.

If, within twelve months from the date the applicant first files an application for an invention or utility model patent in China, he files an application for a patent with the patent administration department under the State Council for the same subject matter, the applicant may enjoy the right of priority.

Article 30 An applicant who requests the right of priority shall submit a written declaration at the time of application and submit, within three months,

duplicates of the patent application documents filed for the first time. Where no written declaration is submitted or no duplicates of the patent application documents are submitted at the expiration of the specified time limit, the applicant shall be deemed to have waived the right of priority.

Article 31 An application for an invention patent or utility model patent shall be limited to one invention or utility model. Two or more inventions or utility models embodied in a single general invention concept may be handled with one application.

An application for a design patent shall be limited to one design. Two or more similar designs of one and the same product or two or more designs of products of the same kind that are sold or used in sets may be handled with one application.

Article 32 An applicant may withdraw his patent application anytime before being granted the patent right.

Article 33 An applicant may amend his patent application documents, provided that the amendment to the invention or utility model patent application documents does not exceed the scope specified in the original written descriptions and claims, or that the amendment to the design patent application documents does not exceed the scope shown in the original drawings or pictures.

Chapter IV Examination and Approval of Patent Applications

Article 34 Upon receipt of an invention patent application, if the patent administration department under the State Council, after preliminary examination, confirms that the application meets the requirements of this Law, it shall publish the application within 18 months from the date of application. And it may do so at an earlier date upon request of the applicant.

Article 35 Within three years from the date an invention patent application is filed, the patent administration department under the State Council may, upon request made by the applicant at any time, carry out substantive examination of the application. If the applicant, without legitimate reasons, fails to request substantive examination at the expiration of the time limit, such application shall be deemed to have been withdrawn.

The patent administration department under the State Council may carry out substantive examination of its own accord, as it deems it necessary.

Article 36 When an applicant for an invention patent requests substantive examination, he shall submit the reference materials relating to the invention

existing prior to the date of application.

If an application has been filed for an invention patent in a foreign country, the patent administration department under the State Council may require the applicant to submit, within a specified time limit, materials concerning any search made for the purpose of examining the application in that country, or materials concerning the results of any examination made in the country. In the event of the applicant's failure to comply at the expiration of the specified time limit without legitimate reasons, the application shall be deemed to be withdrawn.

Article 37 After the patent administration department under the State Council has made the substantive examination of the invention patent application, if it finds that the application does not conform to the provisions of this Law, it shall notify the applicant of the need to state its opinions within a specified time limit or to make amendment to the application. In the event of the applicant's failure to comply at the expiration of the specified time limit without legitimate reasons, the application shall be deemed to be withdrawn.

Article 38 After the applicant states his opinions on or makes amendment to the invention patent application, if the patent administration department under the State Council still believes the application does not conform to the provisions of this Law, it shall reject the application.

Article 39 If no reason for rejection is discerned after an invention patent application goes through substantive examination, the patent administration department under the State Council shall make a decision on granting of the invention patent right, issue an invention patent certificate, and meanwhile register and announce the same. The invention patent right shall become effective as of the date of announcement.

Article 40 If no reason for rejection is discerned after preliminary examination of a utility model or design patent application, the patent administration department under the State Council shall make a decision on granting of the utility model or design patent right, issue a corresponding patent certificate, and meanwhile register and announce the same. The utility model patent right and the design patent right shall become effective as of the date of announcement.

Article 41 The patent administration department under the State Council shall establish a patent reexamination board. If a patent applicant is dissatisfied with the decision made by the Patent Administration Department under the State Council on rejecting of the application, he may, within three months from the date of receipt of the notification, file a request with the patent reexamination board for review. After review, the Patent Reexamination Board shall make a decision and notify the patent applicant

of the same.

If the patent applicant is dissatisfied with the review decision made by the patent reexamination board, he may take legal action before the people's court within three months from the date of receipt of the notification.

Chapter V Duration, Termination and Invalidation of Patent Rights

Article 42 The duration of the invention patent right shall be 20 years and that of the utility model patent right and of the design patent right shall be ten years respectively, all commencing from the date of application.

Article 43 The patentee shall pay annual fees commencing from the year when the patent right is granted.

Article 44 Under any of the following circumstances, the patent right shall be terminated before the expiration of the duration:

- (1) failure to pay the annual fee as required; or
- (2) the patentee waiving of the patent right by a written declaration;

If a patent right is terminated before the duration expires, the patent administration department under the State Council shall register and announce such termination.

Article 45 Beginning from the date the patent administration department under the State Council announces the grant of a patent right, if a unit or an individual believes that such grant does not conform to the relevant provisions of this Law, it or he may request that the patent reexamination board declare the said patent right invalid.

Article 46 The patent reexamination board shall examine the request for declaring a patent right invalid and make a decision in a timely manner and notify the requesting person and the patentee of its decision. The decision on declaring a patent right invalid shall be registered and announced by the patent administration department under the State Council.

A person that is dissatisfied with the patent reexamination board's decision on declaring a patent right invalid or its decision on affirming the patent right may take legal action before a people's court, within three months from the date of receipt of the notification. The people's court shall notify the opposite party in the invalidation procedure to participate in the litigation as a third party.

Article 47 Any patent right that has been declared invalid shall be deemed to be non-existent from the beginning.

The decision on declaring a patent right invalid shall have no retroactive effect on any written judgment or written mediation on patent infringement that has been made and enforced by the people's court, or on any decision concerning the handling of a dispute over the patent infringement that has been performed or compulsively executed, or on any contract for licensed exploitation of the patent or for transfer of patent rights that has been performed prior to the invalidation declaration of the patent right. However, losses caused by the mala fide act of the patentee to another person shall be indemnified.

Where the patent infringement compensation, royalties, and patent right transfer fees are not refunded pursuant to the provisions of the preceding paragraph, which constitutes a blatant violation of the principle of fairness, refund shall be made fully or partly.

Chapter VI Compulsory License for Exploitation of a Patent

Article 48 Under any of the following circumstances, the patent administration department under the State Council may, upon application made by any unit or individual that possesses the conditions for exploitation, grant a compulsory license for exploitation of an invention patent or utility model patent:

(1) When it has been three years since the date the patent right is granted and four years since the date the patent application is submitted, the patentee, without legitimate reasons, fails to have the patent exploited or fully exploited; or

(2) The patentee's exercise of the patent right is ascertained in accordance with law, as monopoly and its negative impact on competition needs to be eliminated or alleviated.

Article 49 In cases of national emergency or extraordinary circumstances, or for the sake of public interests, the patent administration department under the State Council may grant a compulsory license for exploitation of an invention patent or utility model patent.

Article 50 For the benefit of public health, the patent administration department under the State Council may grant a compulsory license for manufacture of the drug, for which a patent right has been obtained, and for its export to the countries or regions that conform to the provisions of the relevant international treaties to which the People's Republic of China has

acceded.

Article 51 If an invention or utility model, for which the patent right has been obtained, represents a major technological progress of remarkable economic significance, compared with an earlier invention or utility model for which the patent right has already been granted, and exploitation of the former relies on exploitation of the latter, the patent administration department under the State Council may, upon application made by the latter, grant it a compulsory license to exploit the earlier invention or utility model.

Under the circumstance where a compulsory license for exploitation is granted in accordance with the provisions of the preceding paragraph, the patent administration department under the State Council may, upon application made by the earlier patentee, grant it a compulsory license to exploit the later invention or utility model.

Article 52 If an invention involved in a compulsory license is a semi-conductor technology, the exploitation thereof shall be limited to the purpose of public interests and to the circumstances as provided for in Subparagraph (2) of Article 48 of this Law.

Article 53 Except for the compulsory license granted in accordance with the provisions of Subparagraph (2) of Article 48 or Article 50 of this Law, compulsory license shall mainly be exercised for the supply to the domestic market.

Article 54 A unit or an individual that applies for a compulsory license in accordance with the provisions of Subparagraph (1) of Article 48 or Article 51 of this Law shall provide evidence to show that it or he has, under reasonable terms, requests the patentee's permission for exploitation of the patent, but fails to obtain such permission within a reasonable period of time.

Article 55 The decision made by the patent administration department under the State Council on granting of a compulsory license for exploitation shall be notified to the patentee in a timely manner and shall be registered and announced.

In a decision on granting of the compulsory license for exploitation shall, according to the reasons justifying the compulsory license, be specified the scope and duration for exploitation. When such reasons cease to exist and are unlikely to recur, the patent administration department under the State Council shall, upon request by the patentee, make a decision to terminate the compulsory license after examination.

Article 56 Any unit or individual that is granted a compulsory license for exploitation shall not have an exclusive right to exploitation and shall not have the right to allow exploitation by others.

Article 57 The unit or individual that is granted a compulsory license for exploitation shall pay reasonable royalties to the patentee, or handle the issue of royalties in accordance with the provisions of the relevant international treaties to which the People's Republic of China has acceded. The amount of royalties to be paid shall be subject to consultation between the two parties. In the event of failure to reach an agreement between the two parties, the patent administration department under the State Council shall make a ruling.

Article 58 If a patentee is dissatisfied with the decision made by the patent administration department under the State Council on granting of the compulsory license for exploitation, or if the patentee, or the unit or individual that has obtained the compulsory license for exploitation is dissatisfied with the ruling made by the patent administration department under the State Council regarding the royalties for the compulsorily licensed exploitation, it or he may take legal action before the people's court within three months from the date of receipt of the notification of the ruling.

Chapter VII Protection of Patent Rights

Article 59 For the patent right of an invention or a utility model, the scope of protection shall be confined to what is claimed, and the written description and the pictures attached may be used to explain what is claimed.

For the design patent right, the scope of protection shall be confined to the design of the product as shown in the drawings or pictures, and the brief description may be used to explain the said design as shown in the drawings or pictures.

Article 60 If a dispute arises as a result of exploitation of a patent without permission of the patentee, that is, the patent right of the patentee is infringed, the dispute shall be settled through consultation between the parties. If the parties are not willing to consult or if consultation fails, the patentee or interested party may take legal action before a people's court, and may also request the administration department for patent-related work to handle the dispute. If, when handling the dispute, the said department believes the infringement is established, it may order the infringer to cease the infringement immediately; if the infringer is dissatisfied with the order, he may, within 15 days from the date of receipt of the notification of the order, take legal action before a people's court in accordance with the Administrative Procedure Law of the People's Republic of China. If the infringer neither takes legal action at the expiration of the time limit nor

ceases the infringement, the said department may file an application with the people's court for compulsory enforcement. The administration department for patent-related work that handles the call shall, upon request of the parties, carry out mediation concerning the amount of compensation for the patent right infringement. If mediation fails, the parties may take legal action before the people's court in accordance with the Civil Procedure Law of the People's Republic of China.

Article 61 If a dispute over patent infringement involves an invention patent for the method of manufacturing a new product, the unit or individual manufacturing the same product shall provide evidence to show that the manufacturing method of their own product is different from the patented method.

If a dispute over patent infringement involves a utility model patent or a design patent, the people's court or the administration department for patent-related work may require the patentee or the interested parties to present a patent right assessment report prepared by the patent administration department under the State Council through searching, analyzing, and assessing the relevant utility model or design, which shall serve as evidence for adjudicating or handling the patent infringement dispute.

Article 62 In a patent infringement dispute, if the accused infringer has evidence to prove that the technology or design exploited is an existing technology or design, the exploitation shall not constitute a patent right infringement.

Article 63 A person who counterfeits the patent of another person shall, in addition to bearing civil liabilities in accordance with law, be ordered by the administration department for patent-related work to rectify its behavior. And the department shall make the matter known to the public, confiscate his unlawful gains and, in addition, impose on him a fine of not more than four times the unlawful gain; if there are no unlawful gains, a fine of not more than RMB 200,000 may be imposed on him; and if a crime is constituted, criminal responsibility shall be pursued in accordance with law.

Article 64 When the administration department for patent-related work investigates and handles the suspected counterfeiting of a patent, it may, based on evidence obtained, inquire the parties concerned, and investigate the circumstances related to the suspected illegal act; it may conduct on-site inspection of the premises where the suspected illegal act is committed; access and duplicate the relevant contracts, invoices, account books and other related materials; and check the products related to the suspected illegal act and seal or detain the products that are proved to be produced by the counterfeited patent.

When the administration department for patent-related work performs its duties as prescribed in the preceding paragraph, the parties concerned shall provide assistance and cooperation, instead of refusing or obstructing.

Article 65 The amount of compensation for patent right infringement shall be determined according to the patentee's actual losses caused by the infringement. If it is hard to determine the actual losses, the amount of compensation may be determined according to the proceeds acquired by the infringer through the infringement. If it is hard to determine the losses of the patentee or the proceeds acquired by the infringer, the amount of compensation may be determined according to the reasonably multiplied amount of the royalties of that patent. The amount of compensation shall include the reasonable expenses paid by the patentee for stopping the infringement.

If the losses of the patentee, proceeds of the infringer, or royalties of the patent are all hard to determine, the people's court may, on the basis of the factors such as the type of patent right, nature of the infringement, and seriousness of the case, determine the amount of compensation within the range from RMB 10,000 to RMB 1,000,000.

Article 66 If the patentee or interested party has evidence to prove that another person is committing or is about to commit a patent infringement, which, unless being promptly stopped, may cause irreparable harm to his lawful rights and interests, he may, before taking legal action, file an application to request that the people's court order to have such act ceased.

When filing such an application, the applicant shall provide guarantee. In the event of failure to provide guarantee, the application shall be rejected.

The people's court shall make a ruling within 48 hours from the time of its acceptance of the application. If an extension is needed under special circumstances, a 48-hour extension may be allowed. If a ruling is made to order to have the relevant act ceased, it shall be enforced immediately. The party that is dissatisfied with the ruling may file once for review, and the enforcement shall not be suspended during the period of review.

If the applicant does not take legal action within 15 days from the date the people's court takes measures to have the relevant act ceased, the people's court shall lift such measures.

If the application is erroneous, the applicant shall compensate the losses suffered by respondent due to ceasing of the relevant act.

Article 67 To stop a patent infringement, when evidence might be lost or

might be hard to acquire thereafter, the patentee or interested party may, before taking legal action, file an application with the people's court for evidence preservation.

If the people's court takes preservation measures, it may order the applicant to provide guarantee. If the applicant fails to provide guarantee, the application shall be rejected.

The people's court shall make a ruling within 48 hours from the time of its acceptance of the application. If it rules to take preservation measures, such a ruling shall be enforced immediately.

If the applicant does not take legal action within 15 days from the date the people's court takes preservation measures, the people's court shall lift such measures.

Article 68 The period of limitation for action against patent right infringement shall be two years, commencing from the date when the patentee or interested party knows or should have known of the infringement.

If an appropriate royalty is not paid for using an invention during the period from the publication of the invention patent application to the grant of the patent right, the period of limitation for taking legal action by the patentee for requesting payment of royalties shall be two years, commencing from the date when the patentee knows or should have known of the use of that patent by another person. However, the period of limitation for action shall commence from the date when the patent right is granted, if the patentee knows or should have known of the use before the patent right is granted.

Article 69 The following shall not be deemed to be patent right infringement:

(1) After a patented product or a product directly obtained by using the patented method is sold by the patentee or sold by any unit or individual with the permission of the patentee, any other person uses, offers to sell, sells or imports that product;

(2) Before the date of patent application, any other person has already manufactured identical products, used identical method or has made necessary preparations for the manufacture or use and continues to manufacture the products or use the method within the original scope;

(3) With respect to any foreign means of transportation that temporarily passes through the territory, territorial waters, or territorial airspace of China, the relevant patent is used in the devices and installations for its own needs, in accordance with the agreement concluded between the country it

belongs to and China, or in accordance with any international treaty to which both countries have acceded, or on the principle of reciprocity;

(4) Any person uses the relevant patent specially for the purpose of scientific research and experimentation; and

(5) Any person produces, uses, or imports patented drugs or patented medical apparatus and instruments, for the purpose of providing information required for administrative examination and approval, or any other person produces or imports patented drugs or patented medical apparatus and instruments especially for that person.

Article 70 Where any person, for the purpose of production and business operation, uses, offers to sell or sells a patent-infringing product without knowing that such product is produced and sold without permission of the patentee, he shall not be liable for compensation provided that the legitimate source of the product can be proved.

Article 71 If, in violation of the provisions of Article 20 of this Law, a person files an application for patent in a foreign country, thereby divulging national secrets, the unit where he works or the competent authority at a higher level shall impose on him an administrative sanction. If a crime is constituted, he shall be investigated for criminal responsibility according to law.

Article 72 If a person usurps the right of an inventor or designer to apply for a non-service invention patent, or usurps any other rights and interests of an inventor or designer specified in this Law, he shall be given an administrative sanction by the unit where he works or by the competent authority at a higher level.

Article 73 The administration department for patent-related work shall not be involved in recommending patented products to the public or engage in any other similar business activities.

If the administration department for patent-related work violates the provisions of the preceding paragraph, its immediate superior or the supervisory authority shall order it to rectify, eliminate the adverse effect and confiscate its unlawful gains, if any; if the circumstances are serious, the principal leading person directly in charge and the other persons directly responsible shall be given administrative sanctions in accordance with law.

Article 74 Where a staff member of the government agency engaged in administration of patent-related work or of a relevant department neglects his duty, abuses his power, or practices favoritism or malpractices for personal gain, which constitutes a crime, he shall be pursued for criminal responsibility

in accordance with law. If the case is not serious enough to constitute a crime, he shall be given an administrative sanction in accordance with law.

Chapter VIII Supplementary Provisions

Article 75 To apply for patent at the patent administrative department under the State Council or go through other formalities, fees shall be paid in accordance with relevant regulations.

Article 76 This Law shall go into effect as of April 1, 1985.

B2: Implementing Regulations of the Patent Law of the People's Republic of China (2010)

(Promulgated by Decree No. 306 of the State Council of the People's Republic of China on June 15, 2001, amended for the first time in accordance with the Decision of the State Council on Amending the Implementing Regulation of the Patent Law of the People's Republic of China on December 28, 2002, amended for the second time in accordance with the Decision of the State Council on Amending the Implementing Regulation of the Patent Law of the People's Republic of China on January 9, 2010, and effective as of February 1, 2010)

Chapter 1 General Provisions

Rule 1 These Implementing Regulations are formulated in accordance with the Patent Law of the People's Republic of China (hereinafter referred to as the Patent Law).

Rule 2 Any formalities prescribed by the Patent Law and these Implementing Regulations shall be complied with in a written form or in any other form prescribed by the Patent Administration Department under the State Council.

Rule 3 Any document submitted in accordance with the provisions of the Patent Law and these Implementing Regulations shall be in Chinese; a standard technical terminology shall be used if it is uniformly prescribed by the State; where no generally accepted translation in Chinese can be found for a foreign name, place or scientific or technical term, the original text shall also be indicated.

Where any certificate or certifying document submitted in accordance with the provisions of the Patent Law and these Implementing Regulations is in a foreign language, the Patent Administration Department under the State Council may, when it deems necessary, request a Chinese translation of the certificate or the certifying document be submitted within a specified time limit; failure to submit the translation thereof at the expiration of the specified time limit, the certificate or certifying document shall be deemed not to have been submitted.

Rule 4 Where any document is sent by mail to the Patent Administration Department under the State Council, the date of mailing indicated by the postmark on the envelope shall be deemed to be the date of filing; where the date of mailing indicated by the postmark on the envelope is illegible, the date on which the Patent Administration Department under the State Council receives the document shall be the date of filing, except where the date of mailing is otherwise proved by the party concerned.

Any document of the Patent Administration Department under the State Council may be served by mail, by personal delivery or by other means. Where the party concerned appoints a patent agency, the document shall be directed to the patent agency; where no patent agency is appointed, the document shall be directed to the liaison person named in the request.

Where any document is sent by mail by the Patent Administration Department under the State Council, the 16th day from the date of mailing shall be presumed to be the date on which the party concerned receives the document.

Where any document is delivered personally in accordance with the provisions of the Patent Administration Department under the State Council, the date of delivery is the date on which the party concerned receives the document.

Where the address of a document is not clear and it cannot be sent by mail, the document may be served by public announcement. At the expiration of one month from the date of the announcement, the document shall be deemed to be served.

Rule 5 The first day of any time limit prescribed in the Patent Law or these Implementing Regulations shall not be counted. Where a time limit is calculated in years or months, it shall expire on the corresponding day of the last month; if there is no corresponding day in such month, the time limit shall expire on the last day of that month; if the date of expiration of a time limit falls on a statutory holiday, it shall expire on the first working day following that holiday.

Rule 6 Where a time limit prescribed in the Patent Law or these Implementing Regulations or specified by the Patent Administration Department under the State Council is not observed by a party concerned due to force majeure, resulting in loss of his or its rights, he or it may, within two months from the date on which the hurdle is removed, at the latest within two years immediately following the expiration of that time limit, request the Patent Administration Department under the State Council to restore his or its rights.

Apart from the circumstances specified in the preceding paragraph, where a time limit prescribed in the Patent Law or these Implementing Regulations or specified by the Patent Administration Department under the State Council is not observed by a party concerned due to any justified reason other than the aforementioned, resulting in loss of his or its rights, he or it may, within two months from the date of receipt of a notification from the Patent Administration Department under the State Council, request the Patent Administration Department under the State Council to restore his or its rights.

When a party requests for the restoration of his or its rights in accordance with the provisions in the paragraph one or two, he or it, shall submit a written application for right restoration, state the reasons, enclose relevant supporting documents if necessary, and go through the relevant formalities that should be done before losing the rights; as well as pay application fees for requesting for restoring his or its rights, according to the provision in paragraph two of this Rule.

Where the party concerned makes a request for an extension of a time limit specified by the Patent Administration Department under the State Council, he or it shall, before the time limit expires, state the reasons to the Patent Administration Department under the State Council and go through the relevant formalities.

The provisions of paragraphs one and two of this Rule shall not be applicable to the time limit referred to in Articles 24, 29, 42 and 68 of the Patent Law.

Rule 7 Where an application for a patent concerning interests of national defense and requires to be kept confidential, the application for patent shall be filed with the National Defense Patent Institution (NDPI) of the State. Where any application for patent accepted by the Patent Administration Department under the State Council relates to interests of national defense and requiring to be kept confidential, the application shall be forwarded to the National Defense Patent Institution (NDPI) of the State for examination in a timely manner, and the Patent Administration Department under the State Council shall issue the decision to grant a national defense patent, on condition that no reason of objection is raised after the examination by the National Defense Patent Institution.

Where the Patent Administration Department under the State Council holds that a patent application for an invention or utility model involves state security or substantial interests other than national defense, and is required to be kept confidential, it shall make a timely decision to handle such applications as an application for confidential patent and notify the applicant accordingly. Special procedure of examination and reexamination of an application for a confidential patent, as well as invalidation declaration shall be subject to the provisions provided by the Patent Administration Department under the State Council.

Rule 8 An invention or utility model accomplished in China as stipulated in Article 20 of the Patent Law refers to the invention or utility model, of which the essence of technical solution is completed within the territory of China.

Any entity or individual intending to file a patent application in a foreign country for an invention or utility model accomplished in China, shall make a request for a confidentiality examination conducted by the Patent

Administration Department under the State Council in one of the following ways:

(1) Where a party intends to directly file a patent application in a foreign country or file an international patent application to a related foreign agency, he or it shall, make a request in advance to the Patent Administration Department under the State Council and describe in detail the technical solution.

(2) Where a party prepares to file a patent application in a foreign country or file an international patent application to a related foreign agency after applying at the Patent Administration Department under the State Council for a patent, he or it shall, make such request before applying in a foreign country or filing the international patent application to a related foreign agency.

Where a party files an international patent application with the Patent Administration Department under the State Council, he or it is regarded as having made such request for confidentiality examination at the same time.

Rule 9 If the Patent Administration Department under the State Council, after deliberating on the request filed in accordance with Rule 8 of these Implementing Regulations, holds that the invention or utility model is likely to involve national security or substantial interests requiring to be kept confidential, it shall timely notify the applicant of confidentiality examination. The applicant who has not received such notification within 4 months after the submitting date of the request may file a patent application in a foreign country or file an international patent application to a related foreign agency.

Where the Patent Administration Department under the State Council notifies the applicant of confidentiality examination as stated in the preceding paragraph, it shall make in time a decision on whether such confidentiality should be kept, and notify the applicant. If the applicant does not receive any decision requiring confidentiality within 6 months upon the submitting date of the request, he or it may file a patent application in a foreign country or file an international patent application to a related foreign agency.

Rule 10 Any invention-creation that is contrary to the laws as referred to in Article 5 of the Patent Law shall not include the invention-creation of which merely its exploitation is prohibited by the laws.

Rule 11 The date of filing referred to in the Patent Law, except for those referred to in Articles 28 and 42, means the priority date where priority is claimed.

The date of filing referred to in these Implementing Regulations, except as otherwise prescribed, means the date of filing prescribed in Article 28 of the Patent Law.

Rule 12 "A service invention-creation made by a person in the execution of duties assigned by the entity to which he belongs" referred to in Article 6 of the Patent Law means any invention-creation made:

- (1) in the course of performing his own duty;
- (2) in execution of any task, other than his own duty, which was entrusted to him by the entity to which he belongs;
- (3) within one year after the retirement, transfer from the entity to which he originally belongs or the labor and personnel relationship being terminated, where the invention-creation relates to his own duty or the other task entrusted to him by the entity to which he previously belonged.

"The entity to which he belongs" referred to in Article 6 of the Patent Law includes the entity in which the person concerned is a temporary staff member. "Material and technical means of the entity" referred to in Article 6 of the Patent Law mean the entity's funds, equipment, spare parts, raw materials or technical materials which are not disclosed to the public.

Rule 13 "Inventor" or "designer" referred to in the Patent Law means any person who makes creative contributions to the substantive features of an invention-creation. Any person who, during the course of accomplishing the invention-creation, is responsible only for organisational work, or who facilitates the use of material and technical means, or who works in the capacity of supporting staff, shall not be considered as inventor or designer.

Rule 14 Except for the assignment of the patent right in accordance with Article 10 of the Patent Law, where the patent right is transferred due to any other causes, the person or persons concerned shall, accompanied by relevant certified documents or legal papers, request the Patent Administration Department under the State Council to register a transfer of patent right.

Any license contract for exploitation of the patent which has been concluded by the patentee with an entity or individual shall, within three months from the date of entry into force of the contract, be submitted to the Patent Administration Department under the State Council for the record.

If a patent right is pledged, the pledger and pledgee shall go through registration procedure of the pledge at the Patent Administration Department

under the State Council jointly.

Chapter 2 Application for a Patent

Rule 15 Anyone who applies for a patent in written form shall file the application documents in duplicate with the Patent Administration Department under the State Council.

Anyone who applies for a patent in other forms as specified by the Patent Administration Department under the State Council shall comply with the specified requirements.

Any applicant who appoints a patent agency to apply for a patent, or to attend to other patent matters at the Patent Administration Department under the State Council, shall submit at the same time a power of attorney indicating the scope of the power entrusted.

Where there are two or more applicants and no patent agency is appointed, unless otherwise stated in the request, the applicant named first in the request shall be the representative.

Rule 16 Request for application of a patent for invention, utility model or design shall clearly state the following items:

(1) The title of invention, utility model or design;

(2) Where the applicant is a Chinese entity or individual, the name, address, post code, organisation code or citizen ID number; where the applicant is a foreign individual, foreign enterprise or other foreign organisation, the name, nationality or the country or region in which the applicant was registered;

(3) Name of the inventor or designer;

(4) Where the applicant has appointed a patent agency, the agency name, agency code, as well as the name, license number and contact number of the patent attorney appointed by the patent agency;

(5) Where the priority of a patent application first filed by the applicant (hereinafter referred to as an earlier application) is claimed, the date and number of application of the prior application as well as the name of the competent authority with which the application was filed;

(6) The signature or seal of the applicant or the patent agency;

- (7) A list of application documents;
- (8) A list of the documents appending to the application; and
- (9) Any other relevant items which need to be indicated.

Rule 17 The description of an application for a patent for invention or utility model shall state the title of the invention or utility model, which shall be consistent with what appears in the request. The description shall include the following:

- (1) Technical field: specifying the technical field to which the technical solution for which protection is sought pertains;
- (2) Background art: indicating the background art which can be regarded as useful for the understanding, searching and examination of the invention or utility model, and if possible, citing the documents reflecting such art;
- (3) Contents of the invention: disclosing the technical problem the invention or utility model aims to resolve and the technical solution adopted to resolve the problem; and stating, with reference to the prior art, the advantageous effects of the invention or utility model;
- (4) Description of figures: briefly describing each figure in the drawings, if any;
- (5) Mode of exploiting the invention or utility model: describing in detail the optimally selected mode contemplated by the applicant for exploiting the invention or utility model; where appropriate, by illustration, and with reference to the drawings, if any.

The manner and order referred to in the preceding paragraph shall be followed by the applicant for a patent for invention or for utility model, and each of the parts shall be preceded by a heading, unless, due to the nature of the invention or utility model, a different manner or order would facilitate a better understanding and a more economical presentation.

The description of the invention or utility model shall use standard terms and be in clear wording, and shall not contain references to the claims such as: "as described in claim...", nor shall it contain commercial advertising.

Where an application for a patent for invention contains disclosure of one or more nucleotide and/or amino acid sequences, the description shall contain a sequence listing in compliance with the standard prescribed by the Patent

Administration Department under the State Council. The sequence listing shall be submitted as a separate part of the description, and a copy of the said sequence listing in machine-readable form shall also be submitted in accordance with the provisions of the Patent Administration Department under the State Council.

The description of the utility model for which a patent is applied for shall contain drawings indicating the shape, structure or their combination of the product for which protection is sought.

Rule 18 Several drawings of the invention or utility model shall be numbered and arranged in numerical order consecutively as "Figure 1, Figure 2..."

Reference signs not mentioned in the text of the description of the invention or utility model shall not appear in the drawings. Reference signs not mentioned in the drawings shall not appear in the text of the description. Reference signs for the same composite part shall be used consistently throughout the application document.

The drawings shall not contain any other explanatory notes, except words which are indispensable.

Rule 19 The claims shall state the technical features of the invention or utility model.

If there are several claims, they shall be numbered consecutively in Arabic numerals.

The technical terminology used in the claims shall be consistent with that used in the description. The claims may contain chemical or mathematical formulae but no drawings. They shall not, except where absolutely necessary, contain such references to the description or drawings as: "as described in part...of the description", or "as illustrated in Figure...of the drawings".

The technical features mentioned in the claims may, in order to facilitate the understanding of the claim, make reference to the corresponding reference signs in the drawings of the description. Such reference signs shall follow the corresponding technical features and be placed in parentheses. They shall not be construed as limiting the claims.

Rule 20 The claims shall have an independent claim, and may also contain dependent claims.

The independent claim shall outline the technical solution of an invention or

utility model and state the essential technical features necessary for the solution of its technical problem.

The dependent claim shall, by additional technical features, further define the claim which it refers to.

Rule 21 An independent claim of an invention or utility model shall contain a preamble portion and a characterising portion, and be presented in the following form:

(1) A preamble portion: indicating the title of the claimed subject matter of the technical solution of the invention or utility model, and those technical features which are necessary for the definition of the claimed subject matter but which, in combination, are part of the most related prior art;

(2) A characterising portion: stating, in such words as "characterised in that..." or in similar expressions, the technical features of the invention or utility model, which distinguish it from the most related prior art. Those features, in combination with the features stated in the preamble portion, serve to define the scope of protection of the invention or utility model.

Where it is unsuitable to follow the manner specified in the preceding paragraphs due to the nature of the invention or utility model, an independent claim may be presented in a different manner.

An invention or utility model shall have only one independent claim, which shall precede all the dependent claims relating to the same invention or utility model.

Rule 22 Any dependent claim of an invention or utility model shall contain a reference portion and a characterising portion, and be presented in the following manner:

(1) A reference portion: indicating the serial number(s) of the claim(s) referred to, and the title of the subject matter;

(2) A characterising portion: stating the additional technical features of the invention or utility model.

Any dependent claim shall only refer to the preceding claim or claims. Any multiple dependent claims, which refer to two or more claims, shall refer to the preceding one in the alternative only, and shall not serve as a basis for any other multiple dependent claims.

Rule 23 The abstract shall consist of a summary of the disclosure as contained in the application for patent for invention or utility model. The summary shall indicate the title of the invention or utility model, and the technical field to which the invention or utility model pertains, and shall be drafted in a way which allows the clear understanding of the technical problem, the gist of the technical solution of that problem, and the principal use or uses of the invention or utility model.

The abstract may contain the chemical formula which best characterises the invention. In an application for a patent which contains drawings, the applicant shall provide a figure which best characterises the technical features of the invention or utility model. The scale and the clarity of the figure shall be as such that a reproduction with a linear reduction in size to 4cm x 6cm would still enable all details to be clearly distinguished. The whole text of the abstract shall contain not more than 300 words. No commercial advertising shall be contained in the abstract.

Rule 24 Where an invention for which a patent is applied for concerns a new biological material which is not available to the public and which cannot be described in such a manner as to enable the invention to be exploited by a person skilled in the art, the applicant shall, in addition to the other requirements provided for in the Patent Law and these Implementing Regulations, go through the following procedures:

(1) Depositing a sample of the biological material with a depositary institution designated by the Patent Administration Department under the State Council before, or at the latest, on the date of filing (or the priority date where priority is claimed), and submit at the time of filing or at the latest, within four months from the filing date, a receipt of deposit and the viability proof from the depositary institution; failure to submit within the specified time limit, the sample of the biological material shall be deemed not to have been deposited;

(2) Providing in the application document relevant information of the characteristics of the biological material;

(3) Indicating, where the application relates to the deposit of the biological material, in the request and the description the scientific name (with its Latin name) of the biological material and the name and address of the depositary institution, the date on which the sample of the biological material was deposited and the accession number of the deposit; such information, if not indicated at the time of filing, shall be provided within four months from the date of filing; failure to provide such information at the expiration of the time limit, the sample of the biological material shall be deemed not to have been deposited.

Rule 25 Where the applicant for a patent for invention has deposited a sample of the biological material in accordance with the provisions of Rule 24 of these Implementing Regulations, and after the application for patent for invention is published, any entity or individual that intends to make use of the biological material to which the application relates, for the purpose of experiment, shall make a request to the Patent Administration Department under the State Council, stating the following items:

- (1) The name and address of the requesting person;
- (2) An undertaking not to make the biological material available to any other person;
- (3) An undertaking to use the biological material for experimental purpose only before the grant of the patent right.

Rule 26 The genetic resources referred to in the Patent Law means any material taken from human, animal, plant or microorganism, containing genetically functioning units with actual or potential value; the invention-creation accomplished depending on the genetic resources means those invention-creation of which the accomplishment uses the genetic function of genetic resources.

Where the applicant seeks to apply for patent for such invention-creation that is accomplished relying on genetic resources, he or it shall so state in the request, fill in prescribed forms issued by the Patent Administration Department under the State Council.

Rule 27 Where an applicant applies for protection of colors, drawings or photos in color shall be submitted.

The applicant shall submit the relevant drawings or photographs concerning the contents of each design product that require protection.

Rule 28 The concise description of the design shall include the name and function of the design product, the essential features of the design, and shall designate one drawing or photo that best indicates the essential features of the design. The brief description shall state the colors for which protection is sought and the omission of the views of the design product.

If one application is made for a design patent for several similar designs of the same product, one of them shall be designated as the basic design in the brief description.

A concise description shall not contain any commercial advertising and shall not be used to indicate the function of the product.

Rule 29 The Patent Administration Department under the State Council may, when it deems necessary, require the applicant for a design patent to submit samples or models of the product incorporating the design. The volume of the sample or model submitted shall not exceed 30cm x 30cm x 30cm, and its weight shall not surpass 15 kilograms. Articles that are perishable, easily damaged or hazardous shall not be submitted as samples or models.

Rule 30 The international exhibition recognised by Chinese government prescribed in article 24, subparagraph (1) of the Patent Law refers to the international exhibitions registered or recognised by the Bureau International des Expositions as prescribed by the Convention Relating to International Exhibitions.

The academic or technological meeting referred to in Article 24, subparagraph (2) of the Patent Law means any academic or technological meeting organised by a competent department concerned under the State Council or by a national academic or technological association.

Where any invention-creation for which a patent is applied falls under the circumstances as prescribed by the provisions of Article 24, subparagraph (1) or (2) of the Patent Law, the applicant shall, when filing the application, make a declaration and, within two months from the date of filing, submit certifying documents issued by the entity which organised the international exhibition or academic or technological meeting, stating the fact that the invention-creation was exhibited or published, together with the date of such exhibition or publication.

Where any invention-creation for which a patent is applied falls under the circumstances as prescribed by the provisions of Article 24, subparagraph (3) of the Patent Law, the Patent Administration Department under the State Council may, when it deems necessary, require the applicant to submit the relevant certifying documents within the specified time limit.

Where the applicant fails to make a declaration and submit certifying documents as required in paragraph 3 of this Rule, or fails to submit certifying documents within the specified time limit as required in paragraph 4 of this Rule, the provisions of Article 24 of the Patent Law shall not apply to the application.

Rule 31 Where foreign priority is claimed in accordance with Article 30 of the Patent Law, the duplicate of the earlier application documents submitted by the applicant shall be certified by the original authority in which the

application was filed. According to the agreement signed between the Patent Administration Department under the State Council and the authority accepted the earlier application, where the Patent Administration Department under the State Council obtains the duplicate of the earlier application documents by way of electronic transmission, it is deemed that the applicant has submitted the duplicate of the earlier application documents that has been certificated by the original authority. Where domestic priority is claimed, the applicant, if has indicated the filing date and the application number of the prior application, will be deemed as having submitted a copy of the earlier application document.

Where priority is claimed, but the earlier filing date, application number or one or two items of information of the authority with which the earlier application was filed are omitted or mistakenly written in the request, the Patent Administration Department under the State Council shall inform the applicant to make amendments within a certain period of time. Failure of making amendments within that period is deemed as having not claimed priority.

Where the name or title of the applicant claiming priority is inconsistent with that recorded in the copy of the earlier application documents, the applicant shall submit document certifying the assignment of priority. Failure of such submission is deemed as having not claimed priority.

Where the applicant for a design patent claims foreign priority and the earlier application does not contain a brief description, if the brief description he or it submits according to Article 28 of the Patent Law does not exceed the scope claimed by the drawing or photo of the earlier application documents, the priority is not affected.

Rule 32 An applicant may claim one or more priorities for an application for a patent; where multiple priorities are claimed, the priority period for the application shall be calculated from the earliest priority date.

Where an applicant claims the right of domestic priority, if the earlier application is one for a patent for invention, he or it may file an application for a patent for invention or utility model for the same subject matter; if the earlier application is one for a patent for utility model, he or it may file an application for a patent for utility model or invention for the same subject matter. However, when filing the later application, if the subject matter of the earlier application falls under any of the following circumstances, it may not be taken as the basis for claiming domestic priority:

- (1) where the applicant has claimed foreign or domestic priority;
- (2) where it has been granted a patent right; or

(3) where it is the subject matter of a divisional application filed as prescribed.

Where domestic priority is claimed, the earlier application shall be deemed to be withdrawn from the date on which the later application is filed.

Rule 33 Where an application for a patent is filed or the right of foreign priority is claimed by an applicant with no habitual residence or business premises in China, the Patent Administration Department under the State Council may, when it deems necessary, require the applicant to submit the following documents:

- (1) A certificate concerning the nationality of an individual applicant;
- (2) A document certifying the country or region where it is registered, if the applicant is an enterprise or other organisation;
- (3) A document certifying that the country, to which the foreigner, foreign enterprise or other foreign organisation belongs, recognises that Chinese entities and individuals are, under the same conditions as those applied to its nationals, entitled to the patent right, the right of priority and other related rights in that country.

Rule 34 Two or more inventions or utility models belonging to a single general inventive concept which may be filed as one application in accordance with the provision of Article 31, paragraph one of the Patent Law shall be technically inter-related and contain one or more of the same or corresponding special technical features. The expression "special technical features" shall mean those technical features that define a contribution which each of those inventions or utility models, considered as a whole, makes over the prior art.

Rule 35 Pursuant to Article 31, paragraph two of the Patent Law, filing an application for multiple similar designs of the same product, other designs of the same product in said application shall be similar to the basic design designated in the concise description. There must not be more than 10 similar designs in one application for a design patent.

"Two or more designs belonging to the same class or sold or used in sets" referred to in Article 31, paragraph two of the Patent Law refers to products belonging to the same general class and are conventionally sold or used at the same time, and the designs of each product have the same design conception.

Where two or more designs are filed as one application, they shall be numbered consecutively and the numbers shall be marked before the titles of

each drawing or photo of the product incorporating the design.

Rule 36 When withdrawing an application for a patent, the applicant shall submit to the Patent Administration Department under the State Council a declaration to that effect stating the title of the invention-creation, the filing number and the date of filing.

Where a declaration to withdraw an application for a patent is submitted after the Patent Administration Department under the State Council has completed the preparations for the publication of the application document, the application document shall be published as scheduled. However, the declaration withdrawing the application for patent shall be published in the next issue of the Patent Gazette.

Chapter 3 Examination and Approval of Patent Applications

Rule 37 Where a person who conducts examination or hears a case has any of the following circumstances, in the procedures of preliminary examination, substantive examination, reexamination or invalidation, such person shall, on his own initiative or upon the request of the parties concerned or any other interested person, recuse himself from the proceeding:

- (1) where he is a close relative of the party concerned or the agent of the party concerned;
- (2) where he has a stake in the application for patent or the patent right;
- (3) where he has any other kinds of relations with the party concerned or with the agent of the party concerned that may influence impartial examination and hearing; or
- (4) where a member of the Patent Reexamination Board who has taken part in the examination of the same application.

Rule 38 Upon the receipt of an application for a patent for invention or utility model consisting of a request, a description (drawings must be included in an application for utility model) and claims, or an application for a patent for design consisting of a request, drawings or photographs showing the design and a brief description, the Patent Administration Department under the State Council shall accord the date of filing, issue a filing number, and notify the applicant.

Rule 39 In any of the following circumstances, the Patent Administration Department under the State Council shall refuse to accept the application

and notify the applicant accordingly:

- (1) where the application for a patent for invention or utility model does not contain a request, a description (the description of utility model does not contain drawings) or claims, or the application for a patent for design does not contain a request, drawings or photographs, or brief description;
- (2) where the application is not written in Chinese;
- (3) where the application is not in conformity with the provisions of Rule121, paragraph one of these Implementing Regulations;
- (4) where the request does not contain the name or title of the applicant, or does not contain the address of the applicant;
- (5) where the application is obviously not in conformity with the provisions of Article 18, or of Article 19, paragraph one of the Patent Law;
- (6) where the type of protection (patent for invention, utility model or design) of the application for a patent is not clear and definite or cannot be ascertained.

Rule 40 Where the description states that it contains explanatory notes to the drawings but the drawings or part of them are missing, the applicant shall, within the time limit specified by the Patent Administration Department under the State Council, either furnish the drawings or make a declaration to delete the explanatory notes. If the drawings are submitted later, the date of their submission, or mailing to the Patent Administration Department under the State Council shall be deemed as the date of filing the application; if the explanatory notes to the drawings are deleted, the original date of filing shall be retained.

Rule 41 If two or more applicants apply separately on the same day (the filing date, or the priority date if available) for a patent on the same invention-creation, the applicants shall upon being informed by the Patent Administration Department under the State Council, negotiate of their own accord to ascertain the applicant.

Where an applicant files an application for a utility model patent and invention patent for the same invention-creation on the same day (the filing date), the applicant shall declare respectively in the application that he or it has applied for the other patent for the same invention-creation. Without such a declaration, the Article 9, paragraph one of the Patent Law shall apply, i.e. only one patent can be granted for a same invention.

The Patent Administration Department under the State Council, when announces the grant of patent for a utility model, shall also announce that the applicant has made the declaration that an invention patent has concurrently been applied for as stated in the paragraph 2 of this Rule.

If no reason of objection was found during the examination of an invention patent application, the applicant shall be notified by the Patent Administration Department under the State Council to declare within prescribed time limit to give up the utility model patent right. Where the applicant makes such a declaration, the Patent Administration Department under the State Council shall make a decision to grant the applicant the invention patent, and announce this declaration while announcing the grant of invention patent; where an applicant refuses to give up the utility model patent right, the Patent Department shall deny the application for invention patent; where the applicant does not respond within the prescribed time limit, the application for an invention patent shall be deemed withdrawn.

The utility model patent right is terminated upon the date of announcing the grant of the invention patent.

Rule 42 Where an application for a patent contains two or more inventions, utility models or designs, the applicant may, before the expiration of the time limit provided for in Rule 54, paragraph one of these Implementing Regulations, submit to the Patent Administration Department under the State Council a divisional application. However, where an application for patent has been rejected, withdrawn or is deemed to have been withdrawn, no divisional application may be filed.

If the Patent Administration Department under the State Council finds that an application for a patent is not in conformity with the provisions of Article 31 of the Patent Law or of Rule 34 or 35 of these Implementing Regulations, it shall invite the applicant to amend the application within a specified time limit; if the applicant fails to make any response after the expiration of the specified time limit, the application shall be deemed to have been withdrawn.

The divisional application may not change the type of protection of the initial application.

Rule 43 A divisional application filed in accordance with Rule 42 of these Implementing Regulations shall be entitled to the filing date and, if priority is claimed, the priority date of the initial application, provided that the divisional application does not go beyond the scope of disclosure contained in the initial application.

The divisional application shall go through all the procedures in accordance

with the provisions of the Patent Law and these Implementing Regulations.

The filing number and the date of filing of the initial application shall be indicated in the request for a divisional application. When the divisional application is filed, it shall be accompanied by a copy of the initial application; if the initial application enjoys priority, a copy of the priority document of the initial application shall also be submitted.

Rule 44 "Preliminary examination" referred to in Articles 34 and 40 of the Patent Law means the preliminary check of an application for a patent to see whether or not it contains the documents as provided for in Articles 26 or 27 of the Patent Law and other necessary documents, and whether or not those documents are in the prescribed form; such check shall also include the following:

(1) Whether or not an application for a patent for invention obviously falls under Articles 5 or 25 of the Patent Law, or is not in conformity with the provisions of Article 18 or of Article 19, paragraph one, or Article 20, paragraph one of the Patent Law, or Rule 16, or Rule 26, paragraph two of these Implementing Regulations, or is obviously not in conformity with the provisions of Article 2 paragraph two, or Article 26, paragraph five, or Article 31, paragraph one, or Article 33 of the Patent Law, or of Rule 17 to Rule 21 of these Implementing Regulations;

(2) whether or not an application for a patent for utility model obviously falls under Article 5 or 25 of the Patent Law, or is not in conformity with the provisions of Article 18 or of Article 19, paragraph one, or Article 20, paragraph one of the Patent Law, or Rule 16 to 19, or Rule 21 to 23 of these Implementing Regulations, or is obviously not in conformity with the provisions of Article 2, paragraph 3 or Article 22, paragraph two or four, or Article 26, paragraph three or four, or of Article 31, paragraph one, or of Article 33 of the Patent Law, or of Rule 20, or of Rule 43, paragraph one of these Implementing Regulations, or is not entitled to a patent right in accordance with the provisions of Article 9 of the Patent Law;

(3) whether or not an application for a patent for design obviously falls under Article 5, or Article 25, paragraph one, Subparagraph 6 of the Patent Law, or is not in conformity with the provisions of Article 18 or of Article 19, paragraph one of the Patent Law, or with the provisions of Rule 16, Rule 27, Rule 28 of these Implementing Regulations, or is obviously not in conformity with the provisions of Article 2, paragraph four, or of Article 23, paragraph one, or Article 27, paragraph two, or Article 31, paragraph two, or Article 33 of the Patent Law, or of Rule 43, paragraph one of these Implementing Regulations, or is not entitled to a patent right in accordance with the provisions of Article 9 of the Patent Law.

(4) whether or not the application documents comply with the provisions of Rule 2 and Rule 3, paragraph one of the Implementing Regulations.

The Patent Administration Department under the State Council shall notify the applicant of its opinions and require the applicant to state the observations or to correct the application within the specified time limit. If the applicant fails to make any response within the specified time limit, the application shall be deemed to have been withdrawn. Where, after the applicant has made the observations or the corrections, the Patent Administration Department under the State Council finds that the application is still not in conformity with the provisions of the preceding subparagraphs, the application shall be rejected.

Rule 45 Apart from the application for patent, any document relating to the patent application which is submitted to the Patent Administration Department under the State Council, shall, in any of the following circumstances, be deemed not to have been submitted:

- (1) where the document is not presented in the prescribed form or the indications therein are not in conformity with the regulations;
- (2) where no certifying document is submitted as prescribed.

The Patent Administration Department under the State Council shall notify the applicant of its opinion on those documents it deems not to have been submitted.

Rule 46 Where the applicant requests an earlier publication of its or his application for a patent for invention, a statement shall be made to the Patent Administration Department under the State Council. The Patent Administration Department under the State Council shall, after preliminary examination of the application, publish it immediately, unless it is to be rejected.

Rule 47 The applicant shall, when indicating the product incorporating the design and the class to which that product belongs, refer to the classification of products for designs published by the Patent Administration Department under the State Council. Where no indication, or an incorrect indication, of the class to which the product incorporating the design belongs is made, the Patent Administration Department under the State Council shall supply the indication or correct it.

Rule 48 Any person may, from the date of publication of an application for a patent for invention till the date of announcing the grant of the patent right, submit to the Patent Administration Department under the State Council his

observations, with reasons therefor, on the application which is not in conformity with the provisions of the Patent Law.

Rule 49 Where the applicant for a patent for invention cannot furnish, for justified reasons, the documents concerning any search or results of any examination specified in Article 36 of the Patent Law, it or he shall make a statement to the Patent Administration Department under the State Council and submit them when the said documents are available.

Rule 50 The Patent Administration Department under the State Council shall, when proceeding on its own initiative to examine an application for a patent in accordance with Article 35, paragraph two of the Patent Law, notify the applicant accordingly.

Rule 51 When a request for substantive examination is made, and that, within the time limit of three months after the receipt of the notification of the Patent Administration Department under the State Council, the application has entered into substantive examination, the applicant for a patent for invention may amend the application of its or his own accord.

Within two months from the date of filing, the applicant for a patent for utility model or design may amend the application on its or his own initiative.

Where the applicant amends the application after receiving the notification of opinions of the substantive examination of the Patent Administration Department under the State Council, he or it shall amend the defects as identified in the notification.

The Patent Administration Department under the State Council may, on its own initiative, correct the obvious clerical mistakes in text and symbol in the documents of application for a patent. Where the Patent Administration Department under the State Council corrects mistakes on its own initiative, it shall notify the applicant.

Rule 52 When an amendment to the description or the claims in an application for a patent for invention or utility model is made, a replacement sheet in prescribed form shall be submitted, unless the amendment concerns only the alteration, insertion or deletion of a few words. Where an amendment to the drawings or photographs of an application for a patent for design is made, a replacement sheet shall be submitted as prescribed.

Rule 53 In accordance with the provisions of Article 38 of the Patent Law, the circumstances where an application for a patent for invention shall be rejected by the Patent Administration Department under the State Council after substantive examination are as follows:

(1) Where the application falls under the provisions of Article 5 or 25 of the Patent Law, or the applicant is not entitled to a patent right in accordance with the provisions of Article 9 of the Patent Law.

(2) Where the application does not comply with the provisions of Article 2, paragraph two, or Article 20, paragraph one, Article 22, Article 26, paragraph three or four or five, or Article 31, paragraph one of the Patent Law ,or of Rule 20, paragraph two of these Implementing Regulations;

(3) Where the amendment to the application does not comply with the provisions of Article 33 of the Patent Law, or the divisional application does not comply with the provisions of Rule 43, paragraph one of the Implementing Regulations.

Rule 54 After the Patent Administration Department under the State Council issues the notification to grant the patent right, the applicant shall go through the procedures of registration within two months from the date of receipt of the notification. If the applicant completes the procedures of registration within the said time limit, the Patent Administration Department under the State Council shall grant the patent right, issue the patent certificate and announce it.

If the applicant does not go through the procedures of registration within the time limit, he or it shall be deemed to have abandoned its or his right to obtain the patent right.

Rule 55 If no reason for rejection was found after the examination of an application for a confidential patent, the Patent Administration Department under the State Council shall issue a decision to grant the confidential patent, issue the confidential patent certificate, and register related items to the confidentiality patent.

Rule 56 After the announcement of the decision to grant a patent for utility model or for a design, the patentee or any other interested person of the said patent as described in Article 60 of the Patent Law may request the Patent Administration Department under the State Council to make an evaluation report on the patent.

Where such person requests for an evaluation report on the patent, he shall submit a request, indicating the patent number of the said patent. Each request shall be limited for one patent.

Where a request for an evaluation report on a patent does not comply with relevant provisions, the Patent Administration Department under the State Council shall inform the applicant to make corrections within prescribed time

limit; if the applicant does not submit any amendment or corrections after the expiration of the due date, his request shall be deemed not to have been submitted.

Rule 57 The Patent Administration Department under the State Council shall make the evaluation report on a patent within 2 months after a request for such report is received. If more than one request was made for such an evaluation report on the same patent for utility model or design, the Patent Administration Department under the State Council shall only issue one evaluation report on the patent. Any entity or individual is entitled to view or make copies of said evaluation report on a patent.

Rule 58 The Patent Administration Department under the State Council shall promptly correct the errors in the patent announcements or Patent Offprint once they are discovered, and the corrections shall be announced.

Chapter 4 Re-examination of Patent Applications and Invalidation of Patent Rights

Rule 59 The Patent Reexamination Board shall consist of technical and legal experts appointed by the Patent Administration Department under the State Council. The person responsible for the Patent Administration Department under the State Council shall be the Director of the Board.

Rule 60 Where the applicant requests the Patent Reexamination Board to make a reexamination in accordance with the provisions of Article 41 of the Patent Law, it or he shall file a request for reexamination, state the reasons and, when necessary, attach the relevant supporting documents.

Where the request for reexamination does not comply with the provisions of Article 19, paragraph one or of Article 41, paragraph one of the Patent Law, the Patent Reexamination Board shall refuse to accept the request, notify the applicant in writing with the reason for refusal.

Where the request for reexamination does not comply with the prescribed form, the person making the request shall rectify it within the time limit specified by the Patent Reexamination Board. If the requesting person fails to meet the time limit for making rectification, the request for reexamination shall be deemed not to have been filed.

Rule 61 The person making the request may amend its or his application at the time when it or he requests reexamination or makes responses to the notification of reexamination of the Patent Reexamination Board. However, the amendments shall be limited only to remove the defects identified in the decision of rejection of the application, or in the notification of reexamination.

The amendments to the application for patent shall be submitted in duplicate.

Rule 62 The Patent Reexamination Board shall forward the request for reexamination which the Board has received to the examination department of the Patent Administration Department under the State Council which has made the examination of the application concerned to make an examination. Where that examination department agrees to revoke its former decision upon the request of the person requesting reexamination, the Patent Reexamination Board shall make a decision accordingly and notify the requesting person.

Rule 63 Where, after reexamination, the Patent Reexamination Board finds that the request does not comply with the provisions of the Patent Law and these Implementing Regulations; it shall notify the person requesting reexamination require such person to submit his observations within a specified time limit. Where no response is made within that time limit, the request for reexamination shall be deemed to have been withdrawn. Where, after the requesting person has made its observations and amendments, the Patent Reexamination Board still finds that the request does not comply with the provisions of the Patent Law and these Implementing Regulations, it shall make a decision of reexamination to maintain the earlier decision that rejected the application.

Where, after reexamination, the Patent Reexamination Board finds that the decision rejecting the application does not comply with the provisions of the Patent Law and these Implementing Regulations, or that the amended application has removed the defects as identified by the decision rejecting the application, it shall make a decision to revoke the earlier decision that rejected the application, and ask the original examination department to continue the examination procedure.

Rule 64 At any time before the Patent Reexamination Board makes its decision on the request for reexamination, the requesting person may withdraw his request for reexamination.

Where the requesting person withdraws his request for reexamination before the Patent Reexamination Board renders its decision, the procedure of reexamination shall terminate.

Rule 65 Anyone requesting invalidation or partial invalidation of a patent right in accordance with the Article 45 of the Patent Law shall submit in duplicate a written request and necessary evidence. The request for invalidation shall state in detail the grounds for filing the request, making reference to all the evidence as submitted, and indicate the piece of evidence on which each ground is based.

“The grounds on which the request for invalidation is based”, referred to in the preceding paragraph, means that the patented invention-creation does not comply with Article 2, Article 20, paragraph one, Article 22, Article 23, or Article 26, paragraph three or four, Article 27, paragraph two or Article 33 of the Patent Law, or Rule 20, paragraph two, Rule 43, paragraph one of these Implementing Regulations; or the invention-creation falls under the provisions of Articles 5 or 25 of the Patent Law; or the applicant is not entitled to be granted the patent right in accordance with Article 9 of the Patent Law.

Rule 66 Where a request for invalidation does not comply with Article 19, paragraph one of the Patent Law, or Rule 65 of these Implementing Regulations, the Patent Reexamination Board shall not accept it.

Where another invalidation request is made on the same grounds and with the same evidence after the Patent Re-examination Board has rendered a decision on an invalidation request, the Patent Reexamination Board shall not accept it.

Where a request for invalidation of a design patent is based on the ground of not being in conformity with Article 23, paragraph 3 of the Patent Law, but no evidence for conflicts of rights is submitted, the Patent Reexamination Board shall not accept it.

Where the request for invalidation of the patent right does not comply with the prescribed form, the requesting party shall rectify it within the time limit specified by the Patent Reexamination Board. If the rectification fails to be made within the time limit, the request for invalidation shall be deemed having not been made.

Rule 67 After a request for invalidation is accepted by the Patent Reexamination Board, the person making the request may add reasons or supplement evidence within one month from the date when the request for invalidation is submitted. Additional reasons or supplementary evidence submitted after the specified time limit may be dismissed by the Patent Reexamination Board.

Rule 68 The Patent Reexamination Board shall send duplicates of the request for invalidation of a patent right and the relevant documents to the patentee and invite it or him to state its or his observations within a specified time limit.

The patentee and the person making request for invalidation shall, within the specified time limit, make responses to the notice concerning forwarding documents or the notice concerning the examination of an invalidation request issued by the Patent Reexamination Board. Failure to respond within

the time limit shall not affect the hearing by the Patent Re-examination Board.

Rule 69 In the course of the examination of the invalidation request, the patentee for the invention or utility model patent may amend its or his claims, but may not broaden the original scope of patent protection.

The patentee for an invention or utility model patent may not amend its or his description or drawings. The patentee for a design patent may not amend its or his drawings, photographs or the concise description of the design.

Rule 70 The Patent Reexamination Board may, at the request of the parties concerned or necessitated by the case, decide to conduct an oral hearing for an invalidation request.

Where the Patent Reexamination Board decides to conduct such an oral hearing for an invalidation request, it shall send notices to the parties concerned, indicating the date and venue of the oral hearing. The parties concerned shall respond to the notice within the specified time limit.

Where the person requesting invalidation fails to make response to the notice of the oral hearing sent by the Patent Reexamination Board within the specified time limit, and fails to attend the oral hearing, its invalidation request shall be deemed having been withdrawn. Where the patentee fails to attend the oral hearing, the Patent Reexamination Board may proceed by default.

Rule 71 In the course of the examination of a request for invalidation, the time limit specified by the Patent Reexamination Board shall not be extended.

Rule 72 The person requesting invalidation may withdraw his request before the Patent Reexamination Board renders its decision.

Where the person requesting invalidation withdraws his request or the request is deemed as having been withdrawn before the Patent Re-examination Board renders its decision, the examination of the invalidation request is terminated. However, where the Patent Reexamination Board holds that the existing examination suffices to warrant a decision of invalidation or partial invalidation of a patent right, the examination of invalidation shall not be terminated.

Chapter 5 Compulsory Licence for exploiting a patent

Rule 73 The circumstance of “having not sufficiently exploited his or its patent” as referred to in Article 48, subparagraph (1) of the Patent Law refers to the patentee or the licensee exploiting the patent in a manner or on a scale

that fails to meet the domestic demands for the patented product or process.

“Medicine subject to patent rights” as referred to in Article 50 of the Patent Law refers to any patented product or any product directly obtained through a patented process to resolve the public health issues in the medical field, including active ingredients for the manufacture of the product and the diagnostic apparatus required for using the product.

Rule 74 Any entity requesting a compulsory license shall submit to the Patent Administration Department under the State Council a request for compulsory license, state the reasons therein, and attach relevant certifying documents.

The Patent Administration Department under the State Council shall send a copy of the request for compulsory license to the patentee, who shall make his or its observations within the time limit specified by the Patent Administration Department under the State Council. Where no response is made within the time limit, the Patent Administration Department under the State Council will not be affected in making a decision concerning a compulsory license.

Before making a decision to reject the request for compulsory license or grant a compulsory license, the Patent Administration Department under the State Council shall notify the applicant and patentee about its to-be-issued decision and reasons.

The Patent Administration Department under the State Council shall make its decision of granting a compulsory license in accordance with the provisions of Article 50 of the Patent Law concerning compulsory license, which shall be in line with the provisions of granting compulsory license to resolve public health issues as stipulated by the international treaties China acceded to or joined, except for those where China had made reservations.

Rule 75 Where any entity or individual requests, in accordance with Article 57 of the Patent Law, the Patent Administration Department under the State Council to adjudicate on the fees for exploitation, it or he shall submit a request for adjudication and furnish documents proving that the parties concerned have not been able to conclude an agreement in respect of the amount of the exploitation fee. The Patent Administration Department under the State Council shall adjudicate within three months from the date of receipt of the request and notify the parties concerned accordingly.

Chapter 6 Reward and Remuneration to Inventors or Designers of Invention-creation

Rule 76 The entity to which a patent right is granted may agree with the

inventor or the designer on, or may specify in its legitimately enacted company rules, the way as to how reward and remuneration is to be paid and the amount thereof as prescribed in Article 16 of the Patent Law.

Enterprises or public institutions shall grant to the inventor or the designer reward and remuneration according to relevant finance and accounting provisions of the state.

Rule 77 Where the entity to which a patent right is granted fails to agree with the inventor or the designer on, or to specify in its legitimately enacted company rules the way as to how reward and remuneration is to be paid and the amount thereof as prescribed in Article 16 of the Patent Law, the entity shall reward to the inventor or designer within 3 months from the announcement of granting the patent. The minimum reward for one invention patent shall not be less than RMB 3,000; and the minimum reward for one utility model or design patent shall not be less than RMB 1,000.

Where an invention-creation is accomplished because an inventor's or designer's proposal was adopted by the entity to which he belongs, the entity to which a patent right is granted shall award to the inventor or designer a money prize on favorable terms.

Rule 78 Where the entity to which a patent right is granted fails to agree with the inventor or the designer on, or to specify in its legally enacted company rules the way as to how reward and remuneration is to be paid and the amount thereof as prescribed in Article 16 of the Patent Law, the entity shall, after exploiting the patent for invention-creation within the period of validity of the patent right, pay the inventor or designer remuneration at a percentage of not less than 2% each year from the operating profits generated from the exploitation of the invention or utility model patent, or at a percentage of not less than 0.2% from the operating profits generated from the exploitation of the design, or pay the inventor or designer a lump sum of remuneration by reference to the above percentages; where the entity to which a patent right is granted authorise other entity or individual to exploit its patent, it shall reward the inventor or designer at a percentage no less than 10% from the royalty fee collected.

Chapter 7 Patent Protection

Rule 79 The administrative authority for patent affairs referred to in the Patent Law and these Implementing Regulations means the patent administrative authorities set up by the people's government of provinces, autonomous regions, or municipalities directly under the Central Government, or by the people's government of municipalities consisting of districts with both a large amount of patent administration work to attend to and the actual capability to handle patent administration work.

Rule 80 The Patent Administration Department under the State Council shall provide professional guidance to the administrative authorities for patent affairs in handling patent infringement disputes, investigating and penalising patent counterfeit acts, as well as mediating patent disputes.

Rule 81 Petition filed by a party concern requesting disputes arising from patent infringements being dealt with or patent disputes being mediated, shall be subject to the jurisdiction of the administrative authority for patent affairs of the place where the requested party is located or where the act of infringement has taken place.

Where two or more administrative authorities for patent affairs all have jurisdiction over a patent dispute, request may be filed by a party concerned with either one of the authorities to handle or mediate the matter. Where requests are filed with two or more administrative authorities having jurisdiction over patent affairs, the administrative authority for patent affairs that first accepts the request shall have jurisdiction.

Where a dispute arises over jurisdiction between administrative authorities for patent affairs, the administrative authority for patent affairs of people's government superior to both disputing agencies shall designate an administrative authority for patent affairs to exercise the jurisdiction; if there is no administrative authority for patent affairs of people's government superior to both disputing agencies, the Patent Administration Department under the State Council shall designate the administrative authority for patent affairs to exercise the jurisdiction.

Rule 82 Where, in the course of handling a patent infringement dispute, the defendant requests invalidation of the patent right and his request is accepted by the Patent Reexamination Board, he may request the administrative authority for patent affairs concerned to suspend the handling of the matter.

If the administrative authority for patent affairs finds that the reasons set forth by the defendant for suspension are obviously untenable, it may not suspend the handling of the matter.

Rule 83 Where any patentee affixes a patent sign on the patented product or on the package of that product in accordance with the provisions of Article 17 of the Patent Law, he or it shall make the affixation in the manner as prescribed by the Patent Administration Department under the State Council.

Where the patent sign does not comply with the provision of the preceding paragraph, the patent administrative authority shall order to rectify.

Rule 84 Any of the following constitutes acts of passing-off patent referred to in Article 63 of the Patent Law:

- (1) indicating the patent sign on a non-patented product or the package thereof, continuing to indicate the patent sign on a product or package after the patent being declared invalid or upon the expiration of the patent right, or indicating the patent number of others, without authorisation, on a product or package thereof;
- (2) selling the products specified in the paragraph one of this Rule;
- (3) indicating in the product manual or other materials, a non-patented technology or design as a patented technology or design, indicating a patent application as a patent, or using others' patent number, without authorisation, so as to mislead the public into perceiving the relevant technology or design as the patented technology or patented design;
- (4) counterfeiting or tampering with any patent certificate, patent document or patent application document of another person;
- (5) other acts that may mislead the public into perceiving the non-patented technology or design patent as a patented technology or design.

Affixing a patent sign on a patented product or product obtained directly by the patented process or on the package thereof before the expiration of the patent right, and offering to sell or selling the product after the expiration of the patent right shall not be deemed as passing-off the patent.

If the party selling the product without knowledge of the counterfeit nature of the products can prove that such products are obtained from legitimate source, he or it should be ordered by the patent administrative authority to stop selling such product but exempted from penalties.

Rule 85 Apart from the circumstances stipulated in Articles 60 of the Patent Law, the administrative authority for patent affairs may mediate the following patent disputes upon the request of the parties:

- (1) disputes over patent application rights and ownership of patent rights;
- (2) disputes over the qualifications of inventors and designers;
- (3) disputes over the reward and remuneration of the inventors and designers of service inventions;

(4) disputes over failure to pay royalties for the use of an invention after the invention patent application has been published and before the patent has been granted;

(5) other patent disputes.

Requests to the patent administrative authorities for mediation of the disputes specified in item (4) of the preceding paragraph shall be submitted after the patent right has been granted.

Rule 86 Any party concerned to a dispute over the ownership of the right to apply for a patent or the ownership of a patent right, which is being mediated by the administrative authority for patent affairs or has been sued to the people's court, may request the Patent Administration Department under the State Council to suspend the relevant procedures.

Any party requesting the suspension of the relevant procedures in accordance with the preceding paragraph, shall submit a written request to the Patent Administration Department under the State Council, and attach a copy of the document certifying the acceptance of the relevant request from the administrative authority for patent affairs or the people's court in which the patent application number or patent number should be clearly indicated.

After the letter of mediation made by the administrative authority for patent affairs or the judgment rendered by the people's court enters into force, the parties concerned shall request the Patent Administration Department under the State Council to resume the suspended procedure. If, within one year from the date when the request for suspension is filed, no decision is made on the dispute relating to the ownership of the right to apply for a patent or the ownership of a patent right, and it is necessary to continue the suspension, the party who or that filed the suspension request shall, within the said time limit, request to extend the suspension. If, at the expiration of the said time limit, no such request for extension is filed, the Patent Administration Department under the State Council shall resume the procedure on its own initiative.

Rule 87 Where, in hearing civil cases, the people's court has ordered the preservation of the right to apply for a patent or a patent right, the Patent Administration Department under the State Council, for the purpose of assisting the execution of the order, shall suspend the relevant procedure concerning the preserved patent application right or patent right on the day of receiving the court order and notice of assistance for enforcement with patent application number or patent number clearly indicated. Upon the expiration of the time limit for preservation, if there is no order of the people's court to continue the preservation, the Patent Administration Department under the State Council shall resume the relevant procedure on its own initiative.

Rule 88 Procedures that the Patent Administration Department under the State Council's Patent Department shall suspend according to Rule 86 and Rule 87 of these Implementing Regulations are procedures concerning preliminary examination, substantive examination, re-examination, grant of patent rights, declaration of invalidation of patent rights; procedures concerning abandonment, change, or transfer of the patent right or the right to apply the patent right; procedures concerning pledge of patent rights, termination of patent rights within the period of validity of the patent, etc.

Chapter 8 Patent Registration and Patent Gazette

Rule 89 The Patent Administration Department under the State Council shall keep a Patent Register in which the registration of the following matters relating to patent application or patent right shall be made:

- (1) grant of the patent right;
- (2) any transfer of the right of patent application or the patent right;
- (3) any pledge and preservation of the patent right and their termination;
- (4) any patent license contract for exploitation submitted for the record;
- (5) any declaration of invalidation of the patent right;
- (6) any cessation of the patent right;
- (7) any restoration of the patent right;
- (8) any compulsory license for exploitation of the patent;
- (9) any change in the name, title, nationality and address of the patentee.

Rule 90 The Patent Administration Department under the State Council shall publish the Patent Gazette on a regular basis, publishing or announcing the following:

- (1) The bibliographic data contained in an invention patent applications and the Abstract of the patent specification thereof;
- (2) Any request for substantive examination of a patent application for an invention and any decision made by the Patent Administration Department under the State Council to proceed on its own initiative to examine the

substance of a patent application for an invention;

(3) Any rejection, withdrawal, deemed withdrawal, deemed abandonment, restoration, and transfer of a patent application for an invention after its publication;

(4) Any grant of the patent and the bibliographic data of the patent right;

(5) The abstract of the specification of an invention or utility model patent, and a drawing or photo of a design patent;

(6) Any decryption of National defense patent and confidential patent;

(7) Any declaration of invalidation of the patent right;

(8) Any cessation and restoration of the patent right;

(9) Any transfer of a patent right;

(10) Any patent license contract for exploitation submitted for the record;

(11) Any pledge and preservation of the patent right and the termination thereof;

(12) Any grant of compulsory license to exploit a patent;

(13) Any change in the name, title or address of the patentee;

(14) Any documents served by public announcement;

(15) Any correction made by the patent administration department under the State Council; and

(16) Any other related matters.

Rule 91 The Patent Administration Department under the State Council shall provide free access to the public to the Patent Gazette, the Offprint for an invention patent application, and the Offprint for granted invention patent, utility model patent and design patent.

Rule 92 The Patent Administration Department under the State Council is responsible for the exchange of patent documents with the patent

department or regional patent organisations in other countries or regions in accordance with the reciprocity principle.

Chapter 9 Fees

Rule 93 When any person files an application for a patent with, or has other procedures to go through at, the Patent Administration Department under the State Council, (s)he or it shall pay the following fees:

- (1) filing fee, additional fee for filing application, printing fee for publishing the application, and fees for claiming priority;
- (2) substantive examination fee for an application for patent for invention, and reexamination fee;
- (3) registration fees for the grant of patent right, printing fees for the announcement of grant of patent right, and annual fee;
- (4) fees for requesting restoration of rights, and fees for requesting extension of a time limit;
- (5) fees for a change in the bibliographic data, fees for requesting an evaluation report for a patent right, fee for requesting declaration of invalidation.

The amount of the fees referred to in the preceding paragraph shall be prescribed by the price administration department under the State Council, Ministry of Finance in conjunction with the Patent Administration Department under the State Council.

Rule 94 The fees provided for in the Patent Law and in these Implementing Regulations may be paid directly to the Patent Administration Department under the State Council or paid by bank or postal remittance, or by any other means as prescribed by the Patent Administration Department under the State Council.

Where any fee is paid by bank or postal remittance, the applicant or the patentee shall indicate on the money order submitted to the Patent Administration Department under the State Council, the correct filing number or the patent number and the description of the fee paid. Where a money order submitted is not in line with the requirements as prescribed in this paragraph, the payment of the fee shall be deemed not to have been made.

Where any fee is paid directly to the Patent Administration Department under

the State Council, the date on which the fee is paid shall be the date of payment; where any fee is paid by postal remittance, the date of remittance indicated by the postmark shall be the date of payment; where any fee is paid by bank transfer, the date on which the transfer of the fee is done shall be the date of payment.

For any patent fee paid in excess of the amount as prescribed, paid repeatedly or erroneously, where the party making the payment requests a refund from the Patent Administration Department under the State Council within three years from the date of payment, the Patent Administration Department under the State Council shall refund the fee.

Rule 95 The applicant shall, within 2 months after filing the application or within 15 days after receipt of the notification of acceptance of the application from the Patent Administration Department under the State Council, pay the filing fee, the printing fee for the publication of the application and the necessary additional fees for filing the application. If the fees are not paid or not paid in full within the time limit, the application shall be deemed being withdrawn.

Where the applicant claims priority, he or it shall pay the fee for claiming priority together with the filing fee. If the fee is not paid or not paid in full within the time limit, the claim for priority shall be deemed not having been made.

Rule 96 Where the party concerned makes a request for substantive examination or reexamination, the relevant fee shall be paid within the time limit as prescribed respectively for such requests by the Patent Law and these Implementing Regulations. If the fee is not paid or not paid in full within the time limit, the request is deemed not having been made.

Rule 97 When the applicant goes through the procedures of registration, it or he shall pay a patent registration fee, printing fee for the announcement and the annual fee of the year in which the patent right is granted. If such fees are not paid in full amount within the prescribed time limit, the registration of the grant of patent right shall be deemed not having been made.

Rule 98 The annual fee of the patent right, after the year in which the patent is granted, shall be paid in advance before the expiration of the preceding year. If the patentee has not paid or not fully paid the maintenance fees, the Patent Administration Department under the State Council shall notify the patentee to pay the fee or to make up the insufficiency within six months from the expiration of the time limit within which the annual fee is due to be paid, and at the same time pay a late fee. The amount of the late fee shall be charged at, for each month of late payment, 5% of the whole amount of the annual fee of the year within which the annual fee is due to be paid. Where the fee and the late fee are not paid within the time limit, the patent right shall

lapse from the expiration of the time limit within which the annual fee should have been paid.

Rule 99 The fee for requesting restoration of rights shall be paid within the time limit prescribed in these Implementing Regulations. If the fee is not paid or not paid in full within the time limit, the request will be deemed not having been made.

The fee for requesting extension of a time limit shall be paid within the time limit. If the fee is not paid or not paid in full within the time limit, the request shall be deemed not having been made.

The fee for alteration of the bibliographic data, for requesting an evaluation report for a patent right, and for requesting declaration of invalidation shall be paid within one month upon filing of the request. If the fee is not paid or not paid in full within the time limit, the request shall be deemed not having been made.

Rule 100 Where any applicant or patentee has difficulties in paying the various fees prescribed in these Implementing Regulations, he may, in accordance with the provisions, submit a request to the Patent Administration Department under the State Council for a reduction or postponement of the payment. Measures for the reduction and postponement of the payment shall be prescribed by the finance administration department, together with the Patent Administration Department under the State Council and the price administration department under the State Council.

Chapter 10 Special Provisions for International Applications

Rule 101 The Patent Administration Department under the State Council shall accept international patent applications filed under the Patent Cooperation Treaty according to Article 20 of the Patent Law.

Where any international application filed under the Patent Cooperation Treaty designating China (hereinafter referred to as the international application) starts to be processed by the Patent Administration Department under the State Council (hereinafter referred to as entering the Chinese national phase), the requirements and procedures prescribed in this Chapter shall apply. In the absence of such provisions in this Chapter, the relevant provisions in the Patent Law and in any other chapters of these Implementing Regulations shall apply.

Rule 102 Any international application designating China which has been accorded an international filing date in accordance with the Patent Cooperation Treaty shall be deemed as an application for patent filed with the

Patent Administration Department under the State Council, and the said filing date shall be deemed as the filing date referred to in Article 28 of the Patent Law.

Rule 103 Any applicant for an international application entering the Chinese national phase shall, within 30 months from the priority date as referred to in Article 2 of the Patent Cooperation Treaty (referred to as "the priority date" in this chapter), go through the procedures at the Patent Administration Department under the State Council; if the applicant fails to go through the relevant procedures within said time limit, he or it may, after paying a fee for a grace period, go through the procedures for entering the Chinese National Phase within 32 months from the Priority Date.

Rule 104 Where the applicant goes through the procedures for entering the Chinese National Phase in accordance with Rule 103 of these Implementing Regulations, the following requirements shall be met:

(1) submitting a written statement in Chinese, concerning entry into the Chinese National Phase, and indicating the international application number and the kind of patent right sought;

(2) paying the filing fee and printing fee for publishing as prescribed in Article 93, paragraph one of these Implementing Regulations, and, if necessary, paying the fee for a grace period prescribed in Article 103 of these Implementing Regulations;

(3) where the international application is filed in a foreign language, submitting the Chinese translation of the description and the claims of the original international application;

(4) indicating the title of the invention-creation, the name or title of the applicant, the address of the applicant and the name of the inventor in the written statement concerning entry into Chinese National Phase. Such indications shall be consistent with those recorded by the International Bureau of the World Intellectual Property Organisation (hereinafter referred to as the International Bureau); where the inventor is not indicated in the international application, the name of the inventor shall be indicated in this statement concerning entry into the Chinese national phase;

(5) where an international application is filed in a language other than Chinese, the Chinese translation of the abstract shall be furnished; where there are drawings or figure for the abstract, copies shall be furnished; where there is notes in the drawings, such notes shall be substituted with equivalent Chinese; where an international application is filed in Chinese, a copy of the abstract and the duplicate for the figure in the abstract published in the

international publication shall be furnished;

(6) where the applicant has gone through the procedures for the change of the applicant before the International Bureau in the international phase, the document certifying the right of the new applicant to the international application shall be furnished;

(7) when necessary, paying the additional fee for filing application as prescribed in Rule 93, paragraph one of these Implementing Regulations.

Where the application meets the requirements of Subparagraph 1 to 3 as prescribed in the preceding paragraphs of this Rule, the Patent Administration Department under the State Council shall grant an application number, ascertain the date when the international application enters the Chinese National Phase (hereinafter referred to as the "entry date"), and notify the applicant.

Where an international application enters the Chinese National Phase but fails to fulfill the requirements of Subparagraph 4 to 7 in the preceding paragraphs of this Rule, the Patent Administration Department under the State Council shall notify the applicant to make corrections within the specified time limit; if, within the time limit, no correction is made, his or its application shall be deemed being withdrawn.

Rule 105 Where an international application has any of the following circumstances, the validity of this international application shall terminate in China:

(1) in the international phase, an international application is withdrawn or deemed withdrawn, or its designation of China is withdrawn.

(2) the applicant fails to go through the procedures for entering the Chinese national phase within 32 months from "the priority date" prescribed in Rule 103 of these Implementing Regulations;

(3) when going through the procedures for entry into the National Phase in China, the applicant fails to meet the requirements at the expiration of the 32 months from "the priority date" as prescribed in Subparagraph 1 to 3 of Rule 104 of these Implementing Regulations.

According to the preceding paragraph subparagraph (1), Rule 6 of these Implementing Regulations shall not apply to the international application of which the validity has been terminated in China; according to the preceding paragraph subparagraph (2) and (3), Rule 6 paragraph 2 of these Implementing Regulations shall not apply to the international application of

which the validity has been terminated in China.

Rule 106 Where an international application was amended in the international phase and the applicant requests that the examination be based on the application documents which have been amended, the Chinese translation of the amended portions shall be submitted within two months from the entry date. Where the Chinese translation is not furnished within said time limit, the amendments made in the international phase shall not be taken into consideration by the Patent Administration Department under the State Council.

Rule 107 Where any invention-creation to which the international application relates falls under one of the circumstances referred to in Article 24, subparagraph (1) or (2) of the Patent Law and where statements have been made in this respect when the international application was filed, the applicant shall indicate it in the written statement concerning entry into the Chinese national phase, and furnish the relevant certificates prescribed in Rule 30, paragraph three of these Implementing Regulations within two months from the entry date; where no indication is made or no certificates are furnished within the said time limit, Article 24 of the Patent Law shall not apply to the international application.

Rule 108 Where the applicant has provided a description concerning the deposit of biological materials in accordance with the provisions of the Patent Cooperation Treaty, the requirements provided for in Rule 24, subparagraph (3) of these Implementing Regulations shall be deemed having been satisfied. In the statement of entry into the Chinese national phase, the applicant shall indicate the documents recording the particulars of the deposit of the biological materials, and the exact location of such record in the documents.

Where particulars concerning the deposit of the biological materials are indicated in the description of the international application initially filed, but there is no such indication in the statement of the entry into the Chinese national phase, the applicant shall make correction within four months from the entry date. If the correction is not made within the time limit, said biological materials shall be deemed not having been deposited.

Where the applicant submits the certificates of the deposit and the viability proof of the biological materials to the Patent Administration Department under the State Council within four months from the entry date, the deposit of biological materials shall be deemed having been made within the time limit as provided for in Rule 24, subparagraph (1) of these Implementing Regulations.

Rule 109 Where the completion of the creation-invention to which an international application relates depends on genetic resources, the applicant

shall make an indication in the written statement concerning entry of the international application into the Chinese National Phase, fill in the table as prescribed by the Patent Administration Department under the State Council.

Rule 110 Where the applicant claims one or multiple priorities in the international phase and such claims remain valid at the time when the application enters the Chinese national phase, the priority shall be deemed having been made in compliance with the provisions of Article 30 of the Patent Law.

The applicant shall pay the fee for claiming the priority within two months from the entry date; if the fee is not paid or not paid in full within the time limit, the claim for priority shall be deemed not having been made.

Where the applicant has submitted a copy of the earlier application in the international phase in accordance with the provisions of the Patent Cooperation Treaty, he or it shall be exempted from submitting a copy of the earlier application to the Patent Administration Department under the State Council at the time of going through the formalities for entering the Chinese national phase. Where the applicant has not submitted a copy of the earlier application in the international phase, the Patent Administration Department under the State Council, when it deems necessary, may notify the applicant to submit a copy of the earlier application within the specified time limit. If no copy is submitted at the expiration of the time limit, his or its claim for priority shall be deemed not having been made.

Rule 111 Where, before the expiration of 30 months from "the priority date", the applicant files a request with the Patent Administration Department under the State Council for early processing and examination of his or its international application, he or it shall, in addition to going through the formalities for entering the Chinese national phase, submit a request in accordance with the provisions in Article 23, paragraph two of the Patent Cooperation Treaty. Where the international application has not been transmitted by the International Bureau to the Patent Administration Department under the State Council, the applicant shall submit a confirmed copy of the international application.

Rule 112 With regard to an international application for a utility model patent, the applicant may make amendments to the application documents on its or his own initiative within two months from the entry date.

With regard to an international application for a patent for invention, Rule 51, paragraph one of these Implementing Regulations shall apply.

Rule 113 Where the applicant finds that there are mistakes in the Chinese

translation of the description, the claims or the text matter of the drawings as filed, he or it may correct the translation in accordance with the international application as filed within the following time limits:

(1) before the completion of technical preparations for the publication of the application for patent for invention or the announcement of patent right of the utility model by the Patent Administration Department under the State Council ;

(2) within three months from the date of receipt of the notification sent by the Patent Administration Department under the State Council, stating that the application for a patent for invention has entered into the substantive examination phase.

Where the applicant intends to correct the mistakes in the translation, he or it shall file a written request, and pay the prescribed fee for the correction of the translation.

Where the applicant makes correction of the translation in accordance with the notification of the Patent Administration Department under the State Council, he or it shall, within the specified time limit, go through the formalities prescribed in paragraph two of this Rule. Failure to go through the prescribed formalities at the expiration of the time limit, the international application shall be deemed withdrawn.

Rule 114 With regard to any international application for an invention patent, if the Patent Administration Department under the State Council, after preliminary examination, finds it in compliance with the provisions of the Patent Law and these Implementing Regulations, it shall publish it in the Patent Gazette; where the international application is filed in a language other than Chinese, the Chinese translation of the international application shall be published.

Where the international publication of an international application for a patent for invention by the International Bureau is made in Chinese, Article 13 of the Patent Law shall apply from the date of the international publication. If the international publication by the International Bureau is made in a language other than Chinese, Article 13 of the Patent Law shall apply from the date of the publication by the Patent Administration Department under the State Council.

With regard to an international application, the publication referred to in Articles 21 and 22 of the Patent Law means the publication referred to in paragraph one of this Rule.

Rule 115 Where two or more inventions or utility models are contained in an international application, the applicant may, from the entry date, submit a divisional application in accordance with the provisions in Rule 42, paragraph one of these Implementing Regulations.

If at the international phase, the International Searching Authority or the International Preliminary Examining Authority is of the opinion that an International Application does not conform with the requirement of unity of the Patent Cooperation Treaty and the applicant failed to pay the surcharge in accordance with regulations, so that a certain part of the International Application not being subjected to preliminary examination by the International Searching Authority or the International Preliminary Examining Authority, and the applicant then requests that the afore-mentioned part be made the basis for examination after the application enters the national phase in China and the Patent Administration Department under the State Council is of the opinion that the judgment of the International Searching Authority or the International Preliminary Examining Authority on the unity of the invention was correct, it shall notify the applicant to pay a unity restoration fee within a prescribed time limit. If the applicant fails to pay or pay in full such fee within the prescribed time limit, that part of the International Application that was not subjected to a search or a preliminary international examination shall be deemed having been withdrawn.

Rule 116 Where an international application in the international phase has been refused to be accorded an international filing date or has been declared to be deemed withdrawn by an international authority concerned, the applicant may, within two months from the date on which he or it receives the notification, request the International Bureau to send the copy of any document in the file of the international application to the Patent Administration Department under the State Council, and shall go through the procedures prescribed in Rule 103 of these Implementing Regulations within the said time limit at the Patent Administration Department under the State Council. After receiving the documents sent by the International Bureau, the Patent Administration Department under the State Council shall review whether the decision made by the international authority concerned is correct.

Rule 117 With regard to a patent right granted on the basis of an international application, if the scope of protection determined in accordance with the provisions of Article 59 of the Patent Law exceeds the scope of the international application in its original language due to erroneous translation, the scope of protection granted on the international application shall be confined to the original language of the application; if the scope of protection granted on the international application is narrower than the scope of the application in its original language, the scope of protection shall be determined according to the patent in the language when it is granted.

Chapter 11 Supplementary Provisions

Rule 118 Any person may, with the consent of the Patent Administration Department under the State Council, examine or copy the files of the published or gazetted patent applications and the Patent Register, and may request the Patent Administration Department under the State Council to issue duplicates of the Patent Register.

Files of the patent applications which have been withdrawn or deemed withdrawn or which have been rejected, shall be preserved for two years after the expiration date on which the applications cease to be valid.

Where the patent right has been abandoned, wholly invalidated or terminated, the files shall be preserved for three years after the expiration date on which the patent right ceases to be valid.

Rule 119 Any patent application which is filed with, or any formality which is gone through at, the Patent Administration Department under the State Council shall be signed or sealed by the applicant, the patentee, any other interested person or his or its representative. Where any patent agency is appointed, it shall be sealed by such agency.

Where a change in the name of the inventor, or in the name, title, nationality and address of the applicant or the patentee, or in the name and address of the patent agency and the name of patent agent is requested, a request for a change in the bibliographic data shall be made to the Patent Administration Department under the State Council, together with the relevant certifying documents.

Rule 120 The document concerning patent applications or patent rights mailed to the Patent Administration Department under the State Council shall be sent as registered letters, not as parcels.

Except for any patent application filed for the first time, when any document is submitted to and any procedure is going through at the Patent Administration Department under the State Council, the filing number or the patent number, the title of the invention-creation and the name or title of the applicant or the patentee shall be indicated.

A letter shall contain only documents relating to the same application.

Rule 121 Various kinds of application documents shall be typed or printed neatly and clearly in black ink, and may not contain alterations. The drawings shall be made with drafting instruments in black ink, with clear lines of uniform thickness, and shall not contain alterations.

Requests, descriptions, claims, drawings and abstracts shall be numbered sequentially with Arabic numerals.

The textual portion of application documents shall be written horizontally. Entries shall be made on one side of the paper only.

Rule 122 The Patent Administration Department under the State Council shall formulate Guidelines for Examination pursuant to the Patent Law and these Implementing Regulations.

Rule 123 These Implementing Regulations shall enter into force as of July 1, 2001. The amended Implementing Regulations of the Patent Law of the PRC approved by the State Council on December 12, 1992 and promulgated by the Patent Office of the PRC on December 21, 1992 shall be repealed simultaneously.

B3: Interpretation I of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Disputes over Infringement of Patent Rights (2010)

Fa Shi (2009) No. 21

(Adopted at the 1480th meeting of the Judicial Committee of the Supreme People's Court on 21 December 2009 and effective as of 1 January 2010)

For the purpose of adjudicating appropriately disputes over the infringement of patent rights, this Interpretation is formulated in accordance with the Patent Law of the People's Republic of China, Civil Procedure Law of the People's Republic of China and other relevant legal provisions, in combination with trial practices.

Article 1 The people's courts shall, pursuant to Article 59.1 of the Patent Law, determine the scope of protection of the patent right in accordance with the claims asserted by the patentee. Changes introduced by the patentee to the claims asserted prior to the close of the arguments before a court of the first instance shall be allowed by the people's courts.

Where the patentee asserts that the scope of protection of the patent right is to be determined on the basis of the dependent claims, the people's courts shall determine the scope of protection of the patent right on the basis of both the additional technical features of such dependent claims and the technical features of the claims being referred to.

Article 2 The people's courts shall determine the content of a claim as prescribed in Article 59.1 of the Patent Law on the basis of the recitations of the claim in combination with the understanding by a person of ordinary skill in the art after reading the description and the appended drawings.

Article 3 The people's courts may interpret a claim using the description and the appended drawings, relevant claims, and patent examination dossier. Where the description has specifically defined an expression in the claim, such specific definition shall prevail.

In case the application of the above-mentioned method still fails to clarify the meaning of the claim, interpretation may be made in combination with such published literature as reference books, textbooks, and common understanding of the meaning by a person of ordinary skill in the art.

Article 4 For a technical feature in a claim represented by function or effect, the people's courts shall determine the content of such technical feature by

reference to the specific embodiment and its equivalent embodiment(s) of the function or effect as depicted in the description and the appended drawings.

Article 5 For a technical solution which is only depicted in the description or the appended drawings but not recited in the claims, the incorporation of such technical solution by the patentee in a patent infringement lawsuit into the scope of protection of the patent right shall not be supported by the people's courts.

Article 6 In the procedure leading to a grant or an invalidation of a patent right, where the patent applicant or the patentee waives a technical solution by amendments to the claims or the description or via the observations, the incorporation of the waived technical solution into the scope of protection of the patent right by the patentee in a patent infringement lawsuit shall not be supported by the people's courts.

Article 7 The people's courts, in determining whether the technical solution accused for infringement falls within the scope of protection of the patent right, shall examine all the technical features recited in the claim asserted by the patentee.

Where a technical solution accused for infringement comprises technical features identical with or equivalent to all the technical features recited in the claims, the people's courts shall determine that such technical solution falls within the scope of protection of the patent right; where by comparison with all the technical features recited in the claims, the technical solution accused for infringement lacks more than one technical features, or more than one technical features of the claim are neither identical with nor equivalent to those of the accused technical solution, the people's courts shall determine that the technical solution accused for infringement does not fall within the scope of protection of the patent right.

Article 8 Where a product of the same or similar classification with the product incorporating the design uses a design identical with or similar to the patented design, the people's courts shall determine that the design accused for infringement falls within the scope of protection of patent right for the design as prescribed in Article 59.2 of the Patent Law.

Article 9 The people's courts may determine whether products are of the same or similar classification based on the use of the products incorporating the design. In determining the use of the products, reference may be made to the brief description of the designs, International Classification for Design, functions, as well as sales and practical usages of the products.

Article 10 The people's courts, in judging whether designs are identical or

similar, shall base on the knowledge level and understanding of the general consumers of the products incorporating the designs.

Article 11 The people's courts, in judging whether designs are identical or similar, shall consider in a comprehensive manner according to the overall visual effect of the designs on the basis of the design features of the patented design and the design accused for infringement, and shall not take into consideration the design features determined mainly by the technical functions and those features such as materials and internal structures of a product which have no bearing on the overall visual effect.

The overall visual effect of a design is generally more susceptible to influence in cases of the following circumstances:

- (1) the portion of a product which is easily exposed to direct observation during normal use of the product, relative to other portions of the product;
- (2) the design features of the patented design as distinguished from the prior design, relative to other design features of the patented design.

Where there is no difference in overall visual effect between the design accused for infringement and the patented design, the people's courts shall determine that the two designs are identical; where there is no substantial difference in overall visual effect, the two designs shall be determined as similar.

Article 12 Where a product infringing upon the patent right for an invention or a utility model is used as a component for the production of another product, the people's courts shall determine this as an act of "use" prescribed in Article 11 of the Patent Law; where such another product is sold, the people's courts shall determine this as an act of "sell" prescribed in Article 11 of the Patent Law.

Where a product infringing upon the patent right for a design is used as a component for the production and sale of another product, the people's courts shall determine this as an act of "sell" prescribed in Article 11 of the Patent Law, with the exception of the circumstance where the product infringing upon the patent right for a design performs merely a technical function in such another product.

Regarding the circumstances prescribed in the preceding two paragraphs, where the accused infringers collaborate by division of labor, the people's courts shall determine this as a contributory patent infringement.

Article 13 Where an original product is obtained by a patented process, the

people's courts shall determine this as "the product directly obtained by the patented process" as prescribed in Article 11 of the Patent Law.

Where a follow-on product is obtained by further processing or disposing of the original product, the people's courts shall determine the act as "using the product directly obtained by the patented process" as prescribed in Article 11 of the Patent Law.

Article 14 Where all the technical features alleged to fall within the scope of protection of the patent right are identical with or of no substantial difference from the corresponding technical features of a single existing technical solution, the people's courts shall determine the technical solution implemented by the accused infringer as a prior art as prescribed in Article 62 of the Patent Law.

Where a design accused for infringement is identical with or of no substantial difference from a prior design, the people's courts shall determine the design exploited by the accused infringer as a prior design prescribed in Article 62 of the Patent Law.

Article 15 Where an accused infringer asserts prior user rights for an illegally acquired technical solution or design, the assertion shall not be granted by the people's courts.

Under either of the following circumstances, the people's courts shall determine the circumstance as "already made necessary preparations for its making or using" as prescribed in Article 69(2) of the Patent Law:

- (1) the main technical drawings or technique documents for exploiting an invention-creation have been finished;
- (2) the main equipment or raw materials for exploiting an invention-creation have been made or purchased.

The "original scope" prescribed in Article 69(2) of the Patent Law includes the existing scale of production as of the date of filing an application for the patent, and the scale of production achievable from making use of existing production facilities or based on existing production preparation.

Where the owner of the prior user right, after the date of filing an application for the patent, transfers or licenses others to exploit the technology or design which has been exploited or for which necessary preparation for exploitation has been made, the assertion by the accused infringer that the act of exploitation belongs to a continuous exploitation within the original scope shall not be supported by the people's courts, except that such technical solution or design is transferred or inherited along with the original company.

Article 16 The people's courts, in determining pursuant to Article 65.1 of the Patent Law the proceeds acquired by the infringer from the infringement, shall restrict the proceeds to those acquired by the infringer from the infringement upon the patent right itself, and those proceeds generated from other rights shall be reasonably deducted.

Where the product infringing upon the patent right for an invention or a utility model is a component of another product, the people's courts shall reasonably determine the amount of damages according to such factors as the value of the component itself and its role in achieving the profits of the finished product.

Where the product infringing upon the patent right for a design is a package, the people's courts shall reasonably determine the amount of damages according to such factors as the value of the package itself and its role in achieving the profits of the packaged product.

Article 17 Where a product or the technical solution for producing a product is unknown to the public in the country or abroad as of the date of filing an application for the patent, the people's courts shall determine that such product is a "new product" prescribed in Article 61.1 of the Patent Law.

Article 18 Where a patentee sends a warning to others for infringing a patent right and where the patentee neither withdraws the warning nor files a lawsuit within one month upon receiving a written reminder in which the person warned or the interested party urges the patentee to exercise the right of action, or within two months upon issuing the written reminder, the people's courts shall accept the case if the person warned or the interested party files a request for a declaratory judgment action for non-infringement.

Article 19 Where the act accused for infringement upon a patent right occurs before 1 October 2009, the people's courts shall apply the old Patent Law; where such act occurs after October 1, 2009, the people's courts shall apply the revised Patent Law.

Where the act alleged for infringement upon a patent right occurs before 1 October 2009 and continues after 1 October 2009, the people's courts in determining the amount of damages shall apply the revised Patent Law, provided that the infringer shall assume responsibility for damages in accordance with the old and the revised Patent Law.

Article 20 Where there is discrepancy between relevant Interpretations promulgated by the Supreme People's Court and this Interpretation, this Interpretation shall prevail.

B4: Several Provisions of the Supreme People's Court on Issues concerning the Application of Law in the Trial of Patent Dispute Cases (2015)

Fa Shi [2015] No.4

(Adopted at the 1180th meeting of the Judicial Committee of the Supreme People's Court on June 19, 2001; amended for the first time in accordance with the Decision of the Supreme People's Court on Revising the Several Provisions of the Supreme People's Court on Issues concerning the Application of Law in the Trial of Patent Dispute Cases, which was adopted at the 1570th meeting of the Judicial Committee of the Supreme People's Court on February 25, 2013, and then for the second time in accordance with the Decision of the Supreme People's Court on Revising the Several Provisions of the Supreme People's Court on Issues concerning the Application of Law in the Trial of Patent Dispute Cases, which was adopted at the 1641st meeting of the Judicial Committee of the Supreme People's Court on January 19, 2015, and this amendment shall take effect as of February 1, 2015.)

With a view to correctly adjudicating patent dispute cases, the following provisions are promulgated in accordance with the provisions of the General Principles of Civil Law of the People's Republic of China (hereinafter referred to as the "General Principles of Civil Law"), the Patent Law of the People's Republic of China (hereinafter referred to as the "Patent Law"), the Civil Procedure Law of the People's Republic of China, the Administrative Procedure Law of the People's Republic of China and other laws:

Article 1 The people's courts shall accept the following types of patent dispute cases:

1. cases concerning disputes over the right to apply for a patent;
2. cases concerning disputes over the ownership of patent rights;
3. cases concerning disputes over any contract for the assignment of a patent right or of the right to apply for a patent;
4. cases concerning disputes over the infringement of patent rights;
5. cases concerning disputes over the counterfeiting of any patent owned by another person;
6. cases concerning disputes over royalties due after the publication of a patent application for an invention and prior to the granting of a patent right;
7. cases concerning disputes over the reward or remuneration payable to the inventor or designer of a service invention-creation;
8. cases involving applications for pre-suit cessation of an infringement or preservation of property;
9. cases concerning disputes over the standing of an inventor or designer;

10. cases seeking to overturn a review decision of the Patent Reexamination Board upholding the rejection of an application;
11. cases seeking to overturn a decision of the Patent Reexamination Board for a request to declare a patent right invalid;
12. cases seeking to overturn a decision of the patent administrative department under the State Council for compulsory licensing;
13. cases seeking to overturn a ruling of the patent administrative department under the State Council for compulsory licensing royalty;
14. cases seeking to overturn an administrative reconsideration decision of the patent administrative department under the State Council;
15. cases seeking to overturn an administrative decision of a department responsible for the administration of patents; and
16. other patent dispute cases.

Article 2 Any first instance cases concerning patent disputes are under the jurisdiction of the intermediate people's courts at places where the people's governments of the various provinces, autonomous regions and municipalities directly under the Central Government are located, and of the intermediate people's courts designated by the Supreme People's Court.

The Supreme People's Court may, depending on actual circumstances, designate a basic level people's court to adjudicate first instance cases concerning patent disputes.

Article 3 The people's court shall not accept any lawsuit filed by a party seeking to overturn a review decision made by the Patent Reexamination Board after July 1, 2001 concerning a request for the cancellation of a utility model or design patent right.

Article 4 The people's court shall accept any lawsuit filed by a party seeking to overturn a review decision made by the Patent Reexamination Board after July 1, 2001 upholding the rejection of an application for a utility model or design patent, or a decision concerning a request to declare a utility model or design patent right invalid.

Article 5 Any lawsuit filed concerning a patent infringement shall be under the jurisdiction of the people's court either at the place where the infringement was committed or at the domicile where the defendant resides.

The place where an infringement is committed shall include the place where any of the following acts occurs: the acts of manufacturing, using, offering for sale, selling or importing any product which is alleged to have infringed a patent right for an invention or utility model; the act of using a patented process, and the acts of using, offering for sale, selling or importing any product obtained as a direct result of using that process; the acts of manufacturing, offering for sale, selling, or importing any product

incorporating a patented design; and the act of counterfeiting the patent of another person. The place where the result of any of the aforesaid infringing acts occurs shall also be considered to be a place where an infringement is committed.

Article 6 Where a plaintiff files a lawsuit only against the manufacturer of the infringing products and not against the seller, and the place where the infringing products are manufactured is not the same as the place where they are sold, the people's court at the place where the products are manufactured shall have jurisdiction over the lawsuit; where the manufacturer and the seller are sued as joint defendants, the people's court at the place where the products are sold shall have jurisdiction over the lawsuit.

Where the seller is a branch of the manufacturer and the plaintiff files a lawsuit at the place where the infringing products are sold suing the manufacturer for both manufacturing and selling the infringing products, the people's court at the place where the products are sold shall have jurisdiction over the lawsuit.

Article 7 For any infringement lawsuit filed by a plaintiff on account of a patent whose application was submitted prior to January 1, 1993 and whose patent right for process invention was granted based on that application, jurisdiction shall be determined by reference to the provisions of Articles 5 and 6 of these Provisions.

In the substantive trial of any aforesaid cases, the people's court shall legally apply the provisions stating that the patent right for process invention does not extend to the products.

Article 8 As for a lawsuit for the infringement of a utility model patent filed before October 1, 2009 (exclusive), the plaintiff may provide the search report issued by the patent administrative department under the State Council; as for a lawsuit for the infringement of a utility model or design patent filed after October 1, 2009, the plaintiff may provide the patent evaluation report issued by the patent administrative department under the State Council. The people's court may require the plaintiff to submit the search report or the patent evaluation report according to the requirements of the trial of a case. If the plaintiff refuses to provide the above report without any just cause, the people's court may rule to discontinue the lawsuit or order the plaintiff to bear the potential adverse consequences.

Any defendant in a case concerning a dispute over the infringement of a utility model or design patent right who makes a request for discontinuance of the lawsuit shall, during the period for the presentation of its defense, request that the plaintiff's patent right shall be declared invalid.

Article 9 With regard to any case accepted by the people's court concerning a dispute over the infringement of a utility model or design patent right, where the defendant, during the period for the presentation of its defense, requests that the patent right shall be declared invalid, the people's court shall discontinue the lawsuit. However, the people's court may continue with the lawsuit under any of the following circumstances:

1. where no reason that leads to an invalidity of a utility model or design patent right has been identified in the search report or the patent evaluation report produced by the plaintiff;
2. where the evidence provided by the defendant is sufficient to prove that the technology it used is already in the public domain;
3. where the evidence provided or the grounds relied on by the defendant to support the request for declaring the patent right invalid are obviously insufficient; or
4. any other circumstances in which the people's court deems that the lawsuit shall not be discontinued.

Article 10 With regard to any case accepted by the people's court concerning a dispute over the infringement of a utility model or design patent right, where the defendant requests that the patent right shall be declared invalid after the expiration of the period for the presentation of its defense, the people's court shall not discontinue the lawsuit, except where it is deemed necessary, upon examination, to discontinue the lawsuit.

Article 11 In any case accepted by the people's court concerning a dispute over the infringement of the patent right for an invention or a dispute over the infringement of a utility model or design patent right in which the patent right has been upheld following an examination carried out by the Patent Reexamination Board, where the defendant, during the period for the presentation of its defense, requests that the patent right shall be declared invalid, the people's court may nevertheless continue hearing the case.

Article 12 Where the people's court decides to discontinue a lawsuit, and the patentee or any interested party requests that the defendant shall be ordered to cease the relevant conduct or to other measures shall be taken to prevent the loss caused by the infringement from increasing, and provides a guarantee, which, upon examination, conforms to the relevant legal provisions, the people's court may make the relevant rulings while deciding to discontinue the lawsuit.

Article 13 Where the people's court takes property preservation measure for a patent right, it shall issue to the patent administrative department under the State Council a notice of assistance for enforcement stating the matters requiring assistance for execution and the period of time for preservation of the patent right, with a written ruling of the people's court attached.

The period of time for preservation of a patent right, commencing from the date on which the patent administrative department under the State Council receives the notice of assistance for enforcement, shall not exceed six months. In the event that it is still necessary to continue taking preservation measures for the patent right after the time period expires, the people's court shall, prior to the expiration of the preservation period, serve an additional notice of assistance for enforcement on the continuous preservation on the patent administrative department under the State Council. Where no additional notice is served prior to the expiration of the preservation period, it shall be deemed as automatic termination of the property preservation for the patent right.

The people's court may take property preservation measures in relation to a pledged patent right, and the pledgee's priority of claim shall not be affected by any such preservation measures; an exclusive licensing contract which has been concluded by the patentee and the licensee does not affect the property preservation measure for the patent right taken by the people's court.

The people's court shall not take additional property preservation measures in relation to any patent right which has already been subject to such measures.

Article 14 For any invention-creation completed prior to July 1, 2001 by utilizing the material and technical resources of an entity, if any contract entered into by the entity and the inventor or designer agrees on the right to apply for a patent and the ownership of the patent, such agreement shall apply.

Article 15 Where any dispute over the infringement of a patent right accepted by the people's court involves the conflict of rights, the legitimate rights and interests of the party who enjoys the prior right shall be accorded protection according to law.

Article 16 The term "legitimate prior right" as referred to in Article 23 of the Patent Law shall include: trademark rights, copyrights, enterprise name rights, rights to portrait, and rights to use the peculiar packaging or trade dress of famous commodities.

Article 17 The "scope of protection for an invention or utility model patent right is subject to the content of its claims, and the descriptions and appended drawings can be used to interpret such claims" as referred to in Paragraph 1 of Article 59 of the Patent Law shall mean that the scope of protection for a patent right shall be subject to the scope as determined based on all the technical features recorded in the claims, and shall also include the scope as determined based on the features equivalent to such

technical features.

The term "equivalent features" shall refer to the features that, use substantially the same means, perform substantially the same function and produce substantially the same effect, like the technical features recorded in the claims, so much so that when the infringement act for which a lawsuit is filed occurs, it may be contemplated by a person of ordinary skills in the art without inventive effort.

Article 18 Where any patent infringement act occurs prior to July 1, 2001, civil liability shall be determined in accordance with the old Patent Law; where the infringement act occurs after July 1, 2001, civil liability shall be determined in accordance with the revised Patent Law.

Article 19 The people's court may, in accordance with the provisions of Article 63 of the Patent Law, determine the civil liability for the counterfeiting of a patent of another person. Where the department responsible for the administration of patents has not imposed any administrative penalty on the relevant party, the people's court may impose civil sanctions on such party in accordance with Paragraph 3 of Article 134 of the General Principles of Civil Law, and the amount of civil fine may be determined by reference to the provisions of Article 63 of the Patent Law.

Article 20 The actual loss suffered by a patentee as a result of the infringement as specified in Article 65 of the Patent Law may be calculated by using the total number of the patentee's patented products of which the sales volume is reduced due to the infringement multiplied by a reasonable amount of profit for each patented product. Where it is difficult to determine the total number of the patentee's patented products of which the sales volume is reduced, the total number of the infringing products sold on the market multiplied by a reasonable amount of profit for each patented product may be deemed as the actual loss suffered by the patentee as a result of the infringement.

The proceeds obtained by the infringer as a result of the infringement as specified in Article 65 of the Patent Law may be calculated by using the total number of infringing products sold on the market multiplied by a reasonable amount of proceeds for each infringing product. In general, the proceeds obtained by the infringer as a result of the infringement shall be calculated based on the operating profits of the infringer, or for any infringer that is fully engaged in patent infringements, may be calculated based on the sales profit.

Article 21 Where it is difficult to determine the loss suffered by a patentee or the proceeds obtained by an infringer, and the royalties can be used as a reference, the people's court may determine the amount of compensation at

the reasonably multiplied amount of the royalties by taking into account the type of the patent right concerned, the nature and circumstances of the infringing act, the nature, scope, and period of validity of the patent license, and other factors; where no royalties could be used as a reference, or the royalties is manifestly unreasonable, the people's court may determine, in accordance with provisions in Paragraph 2 of Article 65 of the Patent Law, the amount of compensation, taking into account the type of the patent right concerned, the nature and circumstances of the infringing act and other factors.

Article 22 Where the patentee claims the reimbursement of reasonable expenses incurred thereby in stopping the infringement, the people's court may separately calculate the amount in addition to the amount of compensation as determined based on Article 65 of the Patent Law.

Article 23 The limitation of action for patent infringement is two years, commencing from the date on which the patentee or any other interested party became or should have become aware of the infringement. Where a patentee files a lawsuit after the two-year period has elapsed, and the infringement is still ongoing at the time the case is filed, the people's court shall order that the defendant cease infringing the patent right during the period of its validity, and the amount of compensation for loss suffered as a result of the infringement shall be calculated over a period of two years, counting backwards from the date on which the patentee filed the case with the people's court.

Article 24 The term "offer for sale" or "offers for sale" as referred to in Articles 11 and 69 of the Patent Law shall refer to the manifestation of an intention to sell the commodities concerned by advertising, displaying in a shop window, exhibiting at an exhibition fair, or otherwise.

Article 25 Where the department responsible for the administration of patents has made a determination on whether or not any case concerning a dispute over a patent right amounts to an infringement, the people's court accepting such case shall nevertheless carry out an overall examination on the claims of the party concerned.

Article 26 In the event of any discrepancy between any relevant judicial interpretation issued earlier and these Provisions, these Provisions shall prevail.

B5: Interpretation II of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Disputes over Infringement of Patent Rights (2016)

Fa Shi (2016) No.1

(Adopted at the 1676th meeting of the Judicial Committee of the Supreme People's Court on January 25, 2016 and effective as of April 1, 2016)

For the purpose of adjudicating appropriately disputes over the infringement of patent rights, this Interpretation is formulated in accordance with the Patent Law of the People's Republic of China, the Tort Liability Law of the People's Republic of China, the Civil Procedure Law of the People's Republic of China and other relevant legal provisions, in combination with trial practices.

Article 1 Where the litigious patent has two or more claims, the right holder shall state in the Complaint the claims based on which he or it accuses the infringer for infringing upon its patent right. Where there is no statement in the Compliant or the statement is not clear in the Compliant, the people's court shall require the right holder to make a clarification. If the right holder refuses to do so after being notified, the people's court may rule to dismiss the lawsuit.

Article 2 Where the claim of the litigious patent on the basis of which the right holder asserted patent infringement in a lawsuit is declared invalid by the Patent Reexamination Board, the people's court adjudicating patent infringement disputes may rule to dismiss the lawsuit brought by the right holder based on the invalidated claim.

Where there is evidence proving that the decision to declare the above claim invalid is revoked by a binding administrative judgment, the right holder may file a lawsuit separately.

Where the patentee files a lawsuit separately, the time limit of action shall be counted from the date of service of the administrative judgment stated in Paragraph 2 of this Article.

Article 3 Where the patent right is requested to be declared invalid due to its obvious violation against Paragraph 3 or Paragraph 4 of Article 26 of the Patent Law so that it is impossible to use the Description to interpret the claims, which does not fall under the circumstances prescribed by Article 4 of this Interpretation, the people's court adjudicating patent infringement lawsuit shall, in general, rule to suspend the lawsuit; where no request for declaring the patent right invalid is filed within a reasonable period, the people's court may determine the scope of protection of the patent right based on the claims.

Article 4 Where grammar, text, punctuation, graphic, symbol, etc. of the Claims, Description and appended Drawings are ambiguous, but those of ordinary skill in the art may derive a sole understanding by reading the Claims, Description, and appended drawings, the people's court shall make determination according to the sole understanding.

Article 5 When the people's people's court determines the scope of protection of the patent right, technical features recorded in the preamble portion and characterizing portion of an independent claim and those in the reference portion and characterizing portion of dependent claims all have limiting function.

Article 6 The people's court may construe the claims of the litigious patent by referring to another patent, which has a divisional application relation with the litigious patent, and the patent examination dossier thereof, and any binding official documents in relation to its allowability or validity.

The patent examination dossier comprises the written materials filed by the patent applicant or patentee; and office actions, meeting minutes, oral hearing records, and binding decisions of reexamination and declaration for invalidation issued by the Patent Administrative Department under the State Council and the Patent Reexamination Board in the patent examination, reexamination and invalidation proceeding.

Article 7 Where an accused infringing technical solution contains technical features in addition to all the technical features of a close-ended claim for a composition, the people's court shall determine the accused technical solution as not falling within the protection scope of the patent right, except that the additional technical features are of unavoidable impurities in normal quantity.

The close-ended claim for a composition as mentioned in the preceding paragraph generally does not include the claim of a traditional Chinese medicine composition.

Article 8 A functional feature refers to a technical feature in which the structures, compositions, steps, conditions or the relations therebetween are defined by their functions or the effects achieved in the invention-creation, except that a specific embodiment for achieving the above functions or effects can be directly and specifically determined by those ordinary in the art only by reading the claims.

Where comparing with the technical feature that is necessary to achieve the functions or the effects mentioned in the preceding paragraph as recorded in the Description and appended Drawings, the corresponding technical feature

of the accused infringing technical solution can adopt substantially the same means to perform the same functions and achieve the same effects, and can be contemplated by those ordinary in the art without creative efforts upon occurrence of the accused infringing act, the people's court shall find that said corresponding technical feature identical or equivalent to the functional feature.

Article 9 Where an accused infringing technical solution can not be adapted for the use environment defined by the use environment features in a claim, the people's court shall find that the accused infringing technical solution does not fall within the scope of protection of the patent right.

Article 10 Where the manufacturing process of the accused product is neither identical with nor equivalent to the manufacturing process recited in a claim where the technical features of a product is defined by such manufacturing process, the people's court shall find that the accused infringing technical solution does not fall within the scope of protection of the patent right.

Article 11 Where the sequence of the technical steps is not explicitly recorded in a process claim, but those of ordinary skill in the art directly and definitely opine that these technical steps shall be exploited in accordance with a particular sequence after reading the Claims, Description and appended Drawings, the people's court shall find that such sequence of steps is a limitation to the scope of protection of the patent right.

Article 12 Where a claim uses phrases like "at least", "not more than" to define a numerical feature, and those of ordinary skill in the art opine that the patented technical solution places special emphasis on the roles of such phrases to limit the respective technical features after reading the Claims, Description and appended Drawings, if the right holder alleges that a numerical feature not identical with it is of an equivalent feature, the people's court shall not support such allegation.

Article 13 Where the right holder proves that any restrictive amendments or statements to the Claims, Description and appended Drawings made by the patent applicant or the patentee are definitely denied in the patent granting and patent right affirmation proceedings, the people's court shall find that such amendments or statements do not lead to waiver of a technical solution.

Article 14 When determining the level of knowledge and cognitive ability of the common consumer toward a design, the people's court shall, in general, take into consideration the design space of the products in the identical or similar category as patented designs incorporating products upon occurrence of the accused infringing act. Where there is a relatively large design space, the people's court may find that it is usually unlikely for the ordinary consumer

to notice relatively minor differences between the compared designs; where there is a relatively small design space, the people's court may find that it is usually more likely for the ordinary consumer to notice a relatively minor difference between the compared designs.

Article 15 Regarding the patent of designs incorporating a set of products, where the accused infringing design is identical with or similar to one of the designs, the people's court shall find that the accused infringing design falls within the scope of protection of the patent right.

Article 16 Regarding a design patent of a component product with a unique assembly relation among the individual components, where the accused infringing design is identical with or similar to the design of the component product in its assembled state, the people's court shall find that the accused infringing design falls within the protection scope of the patent right.

Regarding a design patent of a component product with no assembly relation or with no unique assembly relation among the individual components, where the accused infringing design is identical with or similar to the designs of all the individual components of the component product, the people's court shall find that the accused infringing design falls within the protection scope of the patent right; where the accused infringing design lacks the design of one of the individual components, or is neither identical with nor similar to the design of one individual component, the people's court shall find that the accused infringing design does not fall within the protection scope of the patent right.

Article 17 Regarding a design patent of a product having variable states, where the accused infringing design is identical with or similar to the designs in every usage state as shown in the views of variable states, the people's court shall find that the accused infringing design falls within the protection scope of the patent right; where the accused infringing design lacks the design in one of the usage states, or is neither identical with nor similar to the design in one of its usage states, the people's court shall find that the accused infringing design does not fall within the protection scope of the patent right.

Article 18 Where a right holder files a lawsuit to request an entity or individual to pay appropriate fees for exploiting its, his or her invention during the period from the date of publication of the invention patent application to the date of announcement of grant of the invention patent in accordance with Article 13 of the Patent Law, the people's court may determine the fees reasonably by referring to relevant royalties of the patent.

Where the protection scope claimed by the applicant at the time of the publication of an invention patent application is inconsistent with the protection scope of the patent right at the time of the announcement of grant

of the invention patent, if the accused technical solution falls within both of aforesaid protection scopes, the people's court shall find that the defendant has exploited the invention during the period stated in the preceding paragraph; if the accused technical solution only falls within one of said foregoing protection scopes, the people's court shall find that the defendant has not exploited the invention during the period stated in the preceding paragraph.

Where a party, without the authorization of the patentee and for production and business purposes, uses, offers for sale or sells products that were manufactured, sold or imported by another party during the period mentioned in Paragraph 1 of this Article after the announcement of grant of the invention patent, and such another party has already paid or promised in writing to pay appropriate fees as provided in Article 13 of the Patent Law, the people's court shall not uphold the claim of the right holder that the aforesaid using, offering for sale and selling acts infringe upon the patent right.

Article 19 Where a sales contract of products is concluded according to law, the people's court shall find that it constitutes the sales prescribed in Article 11 of the Patent Law.

Article 20 Where a follow-on product, obtained from further processing or treatment of a product that is directly obtained from the patented process, is re-processed or re-treated, the people's court shall find that the re-processing or re-treatment act does not belong to "using a product that is directly derived from the patented process" as prescribed in Article 11 of the Patent Law.

Article 21 Where a party, knowing that certain products are the materials, equipment, parts or components or intermediates specifically used for the exploitation of a patent, provides, without the authorization of the patentee and for production and business purposes, such products to another party who commits an act of patent infringement, if the right holder claims that the party's provision of such products is an act of contributory infringement as prescribed in Article 9 of the Tort Liability Law, the people's court shall uphold such claim.

Where a party, knowing that a product or a process has been granted a patent right, actively induces, without the authorization of the patentee and for production and business purposes, another party to commit an act of patent infringement, if the right holder claims that the inducer's act is abetting another party to commit infringement as prescribed in Article 9 of the Tort Liability Law, the people's court shall uphold such claim.

Article 22 Regarding the prior art defense or prior design defense asserted by the accused infringer, the people's court shall define the prior art or prior design based on the Patent Law that was in effect at the time of the

application date of the patent.

Article 23 Where the accused infringing technical solution or design falls within the protection scope of a prior patent right, and the accused infringer makes a non-infringement defense of the patent right on the ground that his or its technical solution or design is granted a patent right, the people's court shall not uphold such defense.

Article 24 Where recommended national, industrial or local standards explicitly disclose information on an essential patent that is relevant to such standards, if the accused infringer makes a non-infringement defense of the patent right on the ground that no license from the patentee is required for the exploitation of such standards, the people's court shall, in general, not uphold such defense.

Where recommended national, industrial or local standards explicitly disclose information on an essential patent that is relevant to such standards, and the patentee is intentionally in breach of its obligations for licensing on "fair, reasonable and non-discriminatory" terms as promised in the process of formulating the standards in consultation with the accused infringer on the conditions for the exploitation and licensing of such patent, thereby resulting in failure to conclude a patent licensing contract, the people's court shall, in general, not uphold the right holder's claim for stopping the exploitation of the standards, provided that the alleged infringer has no obvious faults in the negotiations.

The conditions for the exploitation and licensing of a patent as stated in Paragraph 2 of this Article shall be determined through negotiation between the patentee and the accused infringer. Where no agreement is reached after full consultation, the parties may request the people's court to determine such conditions, in which case the people's court shall, on fair, reasonable and non-discriminatory terms, take into comprehensive consideration the degree of innovation of the patent and the role of patent in standards, the technical field to which the standards belong, the nature of the standards, the application scope of the standards and relevant licensing conditions, among other factors.

If the exploitation of a patent involved in a standard is otherwise prescribed by laws and administrative regulations, such provisions shall prevail.

Article 25 Where a party, for production and business purposes, uses, offers for sale or sells a patent-infringing product without the knowledge that such product is produced and sold without authorization of the patentee, and may adduce evidence to prove the legitimate source of the product, the people's court shall uphold the right holder's claim in the cessation of the aforesaid using, offering for sale or selling the patent-infringing product, unless the user

of the accused infringing product adduces evidence to prove that it has paid reasonable quid pro quo for such products.

For the purpose of Paragraph 1 of this Article, "without the knowledge" refers to the circumstance where a party has no actual knowledge of and ought not to have such knowledge of the situation.

For the purpose of Paragraph 1 of this Article, "legitimate source" means the product is obtained through a normal commercial manner such as legitimate sales channel and an ordinary sales contract. Regarding the legitimate source, the person who uses, offers for sale or sells the product shall adduce relevant evidence proving that his or its act complies with the trading customs.

Article 26 Where the defendant constitutes infringement on the patent right, the right holder's request for stopping the infringing act shall be upheld by the people's court. However, in consideration of the national or public interests, the people's court may not order the defendant to stop the alleged acts, but order the defendant to pay reasonable fees.

Article 27 Where it is difficult to determine the actual losses suffered by the right holder from infringement, the people's court shall require the right holder to adduce evidence to prove the proceeds gained by the infringer from infringement according to Paragraph 1 of Article 65 of the Patent Law; if the right holder has adduced *prima facie* evidence to prove the proceeds gained by the infringer, but the account books or materials relating to patent infringing acts are mainly controlled by the infringer, the people's court may order the infringer to submit such account books and materials; if the infringer refuses to provide the account books and materials without justifiable reasons, or provides false ones, the people's court may determine the proceeds gained by the infringer from infringement based on the claims of and evidence provided by the right holder.

Article 28 Where the right holder and the infringer agree, according to law, on the amount of damages or the calculation method of the damages of patent infringement, and claim, during a patent infringement lawsuit, that the amount of damages shall be determined in accordance with such agreement, the people's court shall uphold such claim.

Article 29 Where a party legally applies for retrial based on a decision declaring the patent invalid, requesting the revocation of the judgment or mediation statement on patent infringement that is rendered by the people's court before the patent is declared invalid but has not been executed, the people's court may render a ruling to stay the retrial examination and suspend the execution of the original judgment or mediation agreement.

Where the patentee provides sufficient and effective guarantee to the people's court requesting continuous execution of the judgment or the mediation agreement in the preceding paragraph, the people's court shall continue the execution; where the infringer provides sufficient and effective counter guarantee to the people's court requesting for suspension of the execution, the people's court shall approve the request of the infringer. Where a binding judgment of the people's court does not revoke the decision of declaring the patent invalid, the patentee shall compensate for the loss caused by the continued execution to the infringer; where the decision of declaring the patent right invalid is revoked by a binding judgment of the people's court and the patent right is still valid, the people's court may directly execute the counter guarantee property in accordance with the judgment or the mediation agreement in the preceding paragraph.

Article 30 Where no action is brought before the people's court with respect to the decision of declaring a patent invalid within the statutory time limit or the decision is not revoked by a binding judgment rendered after filing of a lawsuit, if a party applies, based on the invalidation decision and according to law, for a retrial, and requests the revocation of the patent infringement judgment or the mediation agreement which has been rendered by the people's court before the declaration of invalidation of the patent right but has not been executed, the people's court shall conduct retrial. If a party applies, based on the invalidation decision and according to law, for terminating the execution of the patent infringement judgment or the mediation agreement which has been rendered by the people's court before the declaration of invalidation of the patent right but has not yet been executed, the people's court shall rule to terminate the execution.

Article 31 This Interpretation shall enter into force as of April 1, 2016. Where there is any discrepancy between relevant Interpretations promulgated previously by the Supreme People's Court and this Interpretation, this Interpretation shall prevail.

COPYRIGHT

C1: Copyright Law of the People's Republic of China (2010)

(Adopted at the 15th Session of the Standing Committee of the Seventh National People's Congress on September 7, 1990; amended for the first time according to the Decision on Amending the Copyright Law of the People's Republic of China at the 24th Session of the Standing Committee of the Ninth National People's Congress on October 27, 2001; and amended for the second time according to the Decision on Amending the Copyright Law of the People's Republic of China at the 13th Session of the Standing Committee of the Eleventh National People's Congress on February 26, 2010)

Chapter I General Provisions

Article 1 This Law is enacted, in accordance with the Constitution, for the purpose of protecting the copyright of authors in their literary, artistic and scientific works and the rights and interests related to copyright, encouraging the creation and dissemination of works conducive to the building of a socialist society with advanced spiritual and material civilization, and promoting the progress and flourishing of socialist culture and sciences.

Article 2 Chinese citizens, legal entities or other organizations shall, in accordance with this Law, enjoy the copyright in their works, whether published or not.

The copyright enjoyed by foreigners or stateless persons in any of their works under an agreement concluded between China and the country to which they belong or in which they have their habitual residences, or under an international treaty to which both countries accede, shall be protected by this Law.

Foreigners and stateless persons whose works are first published in the territory of China shall enjoy the copyright in accordance with this Law.

Any work of an author of a country that has not concluded any agreement with China or that is not a party to any international treaty to which China accedes to and any work of a stateless person, which is first published in a member country of an international treaty to which China accedes, or simultaneously published in a member country of the treaty and in a

non-member country of such treaty, shall be protected by this Law.

Article 3 For purposes of this Law, the term “works” includes, among other things, works of literature, art, natural sciences, social sciences, engineering and technology, which are created in any of the following forms:

- (1) written works;
- (2) dictation works;
- (3) musical, theatrical, *quyi*, choreographic and acrobatic works;
- (4) works of the fine arts and architecture;
- (5) photographic works;
- (6) cinematographic works and works created by a process analogous to cinematography;
- (7) graphic works such as drawings of engineering designs and product designs, maps and schematic drawings, and model works;
- (8) computer software; and
- (9) other works as provided for in laws and administrative regulations.

Article 4 Copyright owners shall not violate the Constitution or laws or jeopardize public interests when exercising their copyright. The State shall supervise and administrate the publication and dissemination of works in accordance with the law.

Article 5 This Law shall not be applicable to:

- (1) laws and regulations, resolutions, decisions and orders of State organs, other documents of a legislative, administrative or judicial nature and their official translations;
- (2) news on current affairs; and
- (3) calendars, numerical tables and forms of general use, and formulas.

Article 6 Measures for the protection of copyright in works of folk literature and art shall be prescribed separately by the State Council.

Article 7 The administrative department for copyright under the State Council shall be responsible for the administration of copyright nationwide. The administrative departments for copyright under the people's governments of provinces, autonomous regions and municipalities directly under the Central Government shall be responsible for the administration of copyright in their respective administrative regions.

Article 8 Copyright owners or owners of the rights related to the copyright may authorize collective copyright administration organizations to exercise their copyright or rights related to the copyright. Upon authorization, a

collective copyright administration organization may exercise the copyright or the rights related to the copyright, in its own name for the copyright owner or the owner of the rights related to the copyright, and may participate as a party in legal or arbitration proceedings concerning the copyright or the rights related to the copyright.

Collective copyright administration organizations are non-profit organizations, and regulations concerning the way of their establishment, their rights and obligations, their collection and allocation of copyright licensing fees, and their supervision and administration shall be prescribed separately by the State Council.

Chapter II Copyright

Section 1 Copyright Owners and Their Rights

Article 9 Copyright owners include:

- (1) authors; and
- (2) other citizens, legal entities and other organizations enjoying the copyright in accordance with this Law.

Article 10 Copyright includes the following personal rights and property rights:

- (1) the right of publication, that is, the right to decide whether to make a work available to the public;
- (2) the right of authorship, that is, the right to claim authorship in respect of, and to have the author's name indicated in connection with, a work;
- (3) the right of alteration, that is, the right to revise or authorize others to revise a work;
- (4) the right of integrity, that is, the right to protect a work against distortion and falsification;
- (5) the right of reproduction, that is, the right to produce one or more copies of a work by printing, photocopying, rubbing, making of a sound recording or video recording, duplicating a recording, or duplicating a photographic work, or by other means;
- (6) the right of distribution, that is, the right to provide the original copy or reproductions of a work to the public by selling or donating;
- (7) the right of rental, that is, the right to authorize others' temporary paid use of a cinematographic work or a work created by a process analogous to cinematography, or computer software, except where the software itself is not the essential object of the rental;
- (8) the right of exhibition, that is, the right to publicly exhibit the original

copy or reproductions of a work of the fine arts or of a photographic work;

(9) the right of performance, that is, the right to publicly perform a work, and to publicly broadcast the performance of a work by any means or process;

(10) the right of showing, that is, the right to publicly reappear a work of the fine arts, a photographic work, a cinematographic work, a work created by a process analogous to cinematography, or other works, by projector, slide projector or any other technology or instrument;

(11) the right of broadcasting, that is, the right to broadcast a work or disseminate it to the public by any wireless means, to disseminate a work to the public by wire or by rebroadcasting, and to publicly disseminate a work by loudspeaker or any other analogous instrument transmitting signs, sounds or images;

(12) the right of communication through information network, that is, the right to make a work available to the public by wire or by wireless means, so that people may have access to the work from a venue and at a time individually chosen by them;

(13) the right of making cinematographic works, that is, the right to fix an adaptation of a work in a medium by cinematography or a process analogous to cinematography;

(14) the right of adaptation, that is, the right to change a work into a new one with originality;

(15) the right of translation, that is, the right to change the language in which the work is written into another language;

(16) the right of compilation, that is, the right to compile by selection or arrangement preexisting works or passages therefrom into a new work; and

(17) other rights to be enjoyed by copyright owners.

Copyright owners may authorize others' exercising of the rights provided for in Subparagraph (5) through Subparagraph (17) of the preceding paragraph and receive remuneration in accordance with the terms as agreed or the relevant provisions in this Law.

Copyright owners may transfer, wholly or partially, the rights provided for in Subparagraph (5) through Subparagraph (17) of the first paragraph in this Article and receive remuneration in accordance with the terms as agreed or the relevant provisions in this Law.

Section 2 Ownership of Copyright

Article 11 Except where otherwise provided for in this Law, the copyright in a work shall belong to its author.

The author of a work is the citizen who creates the work.

Where a work is created under the auspices of and according to the intention of a legal entity or other organization, which bears responsibility for the work, the said legal entity or organization shall be deemed to be the author of the work.

The citizen, legal entity or other organization whose name is indicated in connection with a work shall, in the absence of proof to the contrary, be deemed to be the author of the work.

Article 12 Where a work is created by adaptation, translation, annotation or arrangement of a preexisting work, the copyright in the work thus created shall be enjoyed by the adapter, translator, annotator or arranger, provided that the exercise of such copyright does not prejudice the copyright in the preexisting work.

Article 13 Where a work is created jointly by two or more authors, the copyright in the work shall be enjoyed jointly by the co-authors. No co-authorship may be claimed by anyone who has not participated in the creation of the work.

Where a work of joint authorship may be separated into parts and exploited separately, each co-author may be entitled to independent copyright in the part that he creates, provided that the exercise of such copyright does not prejudice the copyright in the joint work as a whole.

Article 14 A collection of preexisting works or passages therefrom, or of data or other material which does not constitute a work, if manifesting the originality of a work by reason of the selection or arrangement of its contents, is a compilation. The copyright in such compilation shall be enjoyed by the compiler, provided that the exercise of such copyright does not prejudice the copyright in the preexisting works.

Article 15 The copyright in a cinematographic work or in a work created by a process analogous to cinematography shall be enjoyed by the producer of the work, while its scriptwriter, director, cameraman, lyricist, composer and other authors shall enjoy the right of authorship therein and shall be entitled to receive remuneration in accordance with the terms of the contracts concluded between them and the producer.

The authors of the script, the musical works and the other works which are included in a cinematographic work or in a work created by a process analogous to cinematography and which may be exploited separately shall be entitled to exercise their copyright independently.

Article 16 A work created by a citizen in the fulfillment of tasks assigned to

him by a legal entity or other organization is a work for hire. Subject to the provisions of the second paragraph of this Article, the copyright in such work shall be enjoyed by the author; however, the legal entity or other organization shall have priority to exploit the work within the scope of its professional activities. Within two years after the completion of the work, the author may not, without the consent of the legal entity or other organization, authorize the exploitation of the work by a third party in the same manner as the legal entity or other organization exploits the work.

In any of the following circumstances, the author of a work for hire shall enjoy the right of authorship, while the legal entity or other organization shall enjoy the other rights included in the copyright and may reward the author:

- (1) drawings of engineering designs and product designs, maps, computer software and other works for hire mainly created with the material and technical resources of the legal entity or other organization and for which the legal entity or other organization bears responsibility;
- (2) works for hire the copyright in which is, in accordance with laws, administrative regulations or contracts, enjoyed by the legal entity or other organization.

Article 17 The ownership of the copyright in a commissioned work shall be agreed upon in a contract between the commissioning and the commissioned parties. In the absence of such a contract or of an explicit agreement in such a contract, the copyright in the work shall belong to the commissioned party.

Article 18 The transfer of ownership of the original copy of a work of the fine arts or other works shall not be deemed to include the transfer of the copyright in such work or works; however, the right to exhibit the original copy of the work of the fine arts shall be enjoyed by the owner of the original copy.

Article 19 Where the copyright in a work belongs to a citizen, the rights as provided for in Subparagraph (5) through Subparagraph (17) of the first paragraph in Article 10 of this Law in respect of the work shall, after his death and during the term of protection provided for in this Law, be transferred in accordance with the provisions of the Law of Succession.

Where the copyright in a work belongs to a legal entity or other organization, the rights provided for in Subparagraph (5) through Subparagraph (17) of the first paragraph in Article 10 of this Law shall, after the change or the termination of the status of the legal entity or other organization and during the term of protection provided for in this Law, be

enjoyed by the succeeding legal entity or other organization which takes over the former's rights and obligations, or, in the absence of such succeeding entity or organization, by the State.

Section 3 Term of Protection for the Rights

Article 20 No time limit shall be set on the term of protection for an author's rights of authorship and alteration and his right to protect the integrity of his work.

Article 21 In respect of a work of a citizen, the term of protection for the right of publication and the rights as provided for in Subparagraph (5) through Subparagraph (17) of the first paragraph in Article 10 of this Law shall be the lifetime of the author and fifty years after his death, expiring on December 31 of the fiftieth year after his death. In the case of a work of joint authorship, the term shall expire on December 31 of the fiftieth year after the death of the last surviving author.

In respect of a work of a legal entity or other organization or a work for hire the copyright (except the right of authorship) in which is enjoyed by a legal entity or other organization, the term of protection for the right of publication and the rights as provided for in Subparagraph (5) through Subparagraph (17) of the first paragraph in Article 10 of this Law shall be fifty years, expiring on December 31 of the fiftieth year after the first publication of such work; however, such work shall no longer be protected under this Law if it is not published within fifty years after the completion of its creation.

In respect of a cinematographic work, a work created by a process analogous to cinematography or a photographic work, the term of protection for the right of publication and the rights as provided for in Subparagraph (5) through Subparagraph (17) of the first paragraph in Article 10 of this Law shall be fifty years, expiring on December 31 of the fiftieth year after the first publication of such work; however, such work shall no longer be protected under this Law if it is not published within fifty years after the completion of its creation.

Section 4 Limitations on Rights

Article 22 In the following circumstances, a work may be used without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work are indicated and the other rights enjoyed by the copyright owner in accordance with this Law are not prejudiced:

- (1) use of another person's published work for purposes of the user's

own personal study, research or appreciation;

(2) appropriate quotation from another person's published work in one's own work for the purpose of introducing or commenting a certain work, or explaining a certain point;

(3) unavoidable inclusion or quotation of a published work in the media, such as in a newspaper, periodical and radio and television program, for the purpose of reporting current events;

(4) publishing or rebroadcasting by the media, such as a newspaper, periodical, radio station and television station, of an article published by another newspaper or periodical, or broadcast by another radio station or television station, etc. on current political, economic or religious topics, except where the author declares that such publishing or rebroadcasting is not permitted;

(5) publishing or broadcasting by the media, such as a newspaper, periodical, radio station and television station of a speech delivered at a public gathering, except where the author declares that such publishing or broadcasting is not permitted;

(6) translation, or reproduction in a small quantity of copies of a published work by the teaching staff or scientific researchers for use in classroom teaching or scientific research, provided that the translation or the reproductions are not published for distribution;

(7) use of a published work by a State organ to a justifiable extent for the purpose of fulfilling its official duties;

(8) reproduction of a work in its collections by a library, archive, memorial hall, museum, art gallery, etc. for the purpose of display, or preservation of a copy, of the work;

(9) gratuitous performance of a published work, for which no fees are charged to the public, nor payments are made to the performers;

(10) copying, drawing, photographing or video-recording of a work of art put up or displayed in an outdoor public place;

(11) translation of a published work of a Chinese citizen, legal entity or other organization from Han language into minority languages for publication and distribution in the country; and

(12) transliteration of a published work into braille for publication.

The provisions of the preceding paragraph shall be applicable also to the rights of publishers, performers, producers of sound recordings and video recordings, radio stations and television stations.

Article 23 Except where the author declares in advance that use of his work is not permitted, passages from a work, a short written work, musical work, a single work of the fine arts or photographic work which has been published may, without permission from the copyright owner, be included in textbooks for the purpose of compiling and publishing textbooks for the nine-year compulsory education and for national education planning, provided that remuneration is paid, the name of the author and the title of the work are indicated, and the other rights enjoyed by the copyright owner

in accordance with this Law are not prejudiced.

The provisions of the preceding paragraph shall be applicable also to the rights of publishers, performers, producers of sound recordings and video recordings, radio stations and television stations.

Chapter III Copyright Licensing and Transfer Contracts

Article 24 Anyone who exploits another person's work shall conclude a copyright licensing contract with the copyright owner, except where no permission needs to be obtained under this Law.

A licensing contract shall include the following:

- (1) the category of the right to exploit the work covered by the license;
- (2) the exclusive or non-exclusive nature of the right to exploit the work covered by the license;
- (3) the territory and the term covered by the license;
- (4) the rates of remuneration and the means of payment;
- (5) the liabilities in the case of breach of the contract; and
- (6) other matters which the parties consider it necessary to agree upon.

Article 25 Anyone who transfers any of the rights provided for in Subparagraph (5) through Subparagraph (17) of the first paragraph in Article 10 of this Law shall conclude a written contract.

A copyright transfer contract shall include the following:

- (1) the title of the work;
- (2) the category of the right to be transferred and the territory covered by the transfer;
- (3) the rates of the transfer fee;
- (4) the date and the means of payment of the transfer fee;
- (5) the liabilities in the case of breach of the contract; and
- (6) other matters that the parties consider it necessary to agree upon.

Article 26 Where a copyright is pledged, both the pledger and pledgee shall undergo the formalities for registration with the copyright administration department under the State Council.

Article 27 The other party may not, without permission from the copyright owner, exercise any right that is not explicitly licensed or transferred by the copyright owner in the contract.

Article 28 The rates of remuneration for the exploitation of a work may be agreed upon by the parties and may also be paid in accordance with the rates fixed by the administrative department for copyright under the State Council in conjunction with the other departments concerned. In the absence of an explicit agreement in the contract, the remuneration shall be paid in accordance with the rates fixed by the said department under the State Council in conjunction with the other departments concerned.

Article 29 No publishers, performers, producers of sound recordings and video recordings, radio stations, television stations, etc. that exploit another person's work in accordance with the relevant provisions of this Law may infringe upon the authors' rights of authorship, alteration or protection of the integrity of the works, or their right to remuneration.

Chapter IV Publication, Performance, Sound Recording, Video Recording and Broadcasting

Section 1 Publication of Books, Newspapers and Periodicals

Article 30 A book publisher who intends to publish a book shall conclude a publishing contract with, and pay remuneration to, the copyright owner.

Article 31 The exclusive right enjoyed by the book publisher in accordance with the agreement in the contract to publish a work that the copyright owner delivered to him for publishing shall be protected by law, and the work may not be published by others.

Article 32 The copyright owner shall deliver the work within the term specified in the contract. The book publisher shall publish the work in compliance with the quality requirements and within the term as specified in the contract.

The book publisher who fails to publish the work within the term specified in the contract shall bear civil liabilities provided for in Article 53 of this Law.

Where the book publisher reprints or republishes the work, it shall apprise and remunerate the copyright owner. If the publisher refuses to reprint or republish the work when the book is out of stock, the copyright owner shall have the right to terminate the contract.

Article 33 Where a copyright owner has contributed to a newspaper or periodical publisher and has not received, within 15 days from the newspaper or within 30 days from the periodical publisher, counted from the date of submission of the manuscript of his work, any notification of the said newspaper's or publisher's decision to publish the work, the copyright

owner may submit the manuscript of the same work to another newspaper or periodical publisher for publishing, unless the parties have agreed otherwise.

Except where the copyright owner declares that no reprinting or excerpting of his work is permitted, a newspaper or periodical publisher may, after the work is published by another newspaper or periodical publisher, reprint the work or publish an abstract of it or publish it as reference material, provided that remuneration is paid to the copyright owner in accordance with relevant regulations.

Article 34 A book publisher may, with the permission of the author, revise or abridge the work.

A newspaper or periodical publisher may make editorial modifications and abridgments in the language of a work. Any alteration in the contents of the work shall be subject to permission by the author.

Article 35 When publishing a work created by adaptation, translation, annotation, arrangement or compilation of a preexisting work, the publisher shall obtain permission from, and pay remuneration to, both the owner of the copyright in the work created by adaptation, translation, annotation, arrangement or compilation and the owner of the copyright in the preexisting work.

Article 36 A publisher shall be allowed to permit another person to exploit, or prohibit such person from exploiting, the typographical design of the book or the periodical which he publishes.

The term of protection for the right specified in the preceding paragraph shall be ten years, expiring on December 31 of the tenth year after the first publication of the book or the periodical in which the typographical design is used.

Section 2 Performance

Article 37 A performer (an individual performer or an organisation of performing artists) who exploits, for a performance, a work created by another person shall obtain permission from, and pay remuneration to, the copyright owner. Where a performance is organized by a person, the organizer shall obtain permission from, and pay remuneration to, the copyright owner.

Anyone who exploits, for a performance, a work created by adaptation, translation, annotation or arrangement of a preexisting work shall obtain

permission from, and pay remuneration to, both the owner of the copyright in the work created by adaptation, translation, annotation or arrangement and the owner of the copyright in the preexisting work.

Article 38 A performer shall, in respect of his performance, enjoy the following rights:

- (1) to claim performership;
- (2) to protect the image inherent in his performance from distortion;
- (3) to authorize others' live broadcasting or disseminating to the public of his performance, and receive remuneration therefrom;
- (4) to authorize others' making of sound recordings and video recordings of his performance, and receive remuneration therefrom;
- (5) to authorize others' reproduction and distribution of the sound recordings and video recordings of his performance, and receive remuneration therefrom; and
- (6) to authorize others' making of his performance available to the public through information network, and receive remuneration therefrom.

A person who is authorized exploitation of a work in the manner provided for in Subparagraph (3) through Subparagraph (6) of the preceding paragraph shall, in addition, obtain permission from, and pay remuneration to, the copyright owner.

Article 39 No time limit shall be set on the term of protection for the rights provided for in Subparagraphs (1) and (2) of the first paragraph in Article 38 of this Law.

The term of protection for the rights provided for in Subparagraph (3) through Subparagraph (6) of the first paragraph in Article 38 of this Law shall be fifty years, expiring on December 31 of the fiftieth year after the performance takes place.

Section 3 Sound Recording and Video Recording

Article 40 A producer of sound recordings or video recordings who exploits, for making a sound recording or video recording, a work created by another person shall obtain permission from, and pay remuneration to, the copyright owner.

A producer of sound recordings or video recordings who exploits a work created by adaptation, translation, annotation or arrangement of a preexisting work shall obtain permission from, and pay remuneration to, both the owner of the copyright in the work created by adaptation, translation, annotation or arrangement and the owner of the copyright in

the preexisting work.

A producer of sound recordings may be allowed to exploit, for making a sound recording, a musical work of which a lawful sound recording has been made, without permission from the copyright owner, but shall, in accordance with regulations, pay remuneration to the copyright owner; no such work may be exploited where the copyright owner declares that exploitation is not permitted.

Article 41 When making a sound recording or video recording of a performance, the producer shall conclude a contract with, and pay remuneration to, the performer.

Article 42 The producer of a sound recording or video recording shall enjoy the right to authorize others' reproducing, distributing or renting the sound recording or video recording or making it available to the public through information network and to receive remuneration therefrom. The term of protection for such right shall be fifty years, expiring on December 31 of the fiftieth year after the first completion of the recording.

Anyone who is authorized reproducing or distributing a sound recording or video recording or making it available to the public through information network shall, in addition, obtain permission from, and pay remuneration to, both the copyright owner and the performer.

Section 4 Broadcasting by a Radio Station or Television Station

Article 43 A radio station or television station that broadcasts an unpublished work created by another person shall obtain permission from, and pay remuneration to, the copyright owner.

A radio station or television station may be allowed to broadcast a published work created by another person without permission from, but shall pay remuneration to, the copyright owner.

Article 44 A radio station or television station may be allowed to broadcast a published sound recording without permission from, but shall pay remuneration to, the copyright owner, unless the parties have agreed otherwise. Specific measures in this regard shall be formulated by the State Council.

Article 45 A radio station or television station shall have the right to prohibit the following acts performed without its permission:

- (1) broadcasting its aired radio or television programs; and
- (2) making a sound recording or video recording of its aired radio or television programs and reproducing such recording.

The term of protection for the right specified in the preceding paragraph shall be fifty years, expiring on December 31 of the fiftieth year after the first broadcasting of such radio or television program.

Article 46 A television station that intends to broadcast a cinematographic work or a work created by a process analogous to cinematography, or a video recording produced by another person, shall obtain permission from, and pay remuneration to, the producer; in the case of a video recording, the television station shall, in addition, obtain permission from, and pay remuneration to, the copyright owner.

Chapter V Legal Liabilities and Enforcement Measures

Article 47 Anyone who commits any of the following acts of infringement shall, depending on the circumstances, bear civil liabilities such as ceasing the infringement, eliminating the adverse effects of the act, making an apology or indemnifying damages:

- (1) publishing a work without permission of the copyright owner;
- (2) publishing a work of joint authorship as a work created solely by oneself, without permission of the other co-authors;
- (3) having one's name indicated in another person's work in the creation of which one has taken no part, in order to seek personal fame and gain;
- (4) falsifying or distorting a work created by another person;
- (5) plagiarizing a work created by another person;
- (6) exploiting a work for exhibition or film-making or in a manner analogous to film-making, or for adaptation, translation, annotation, or for other purposes, without permission of the copyright owner, except where otherwise provided for in this Law;
- (7) exploiting a work created by another person without paying remuneration as one should;
- (8) renting a cinematographic work or a work created by a process analogous to cinematography, computer software, or products of sound recording or video recording, without permission of the copyright owner or the owner of the rights related to the copyright, except where otherwise provided for in this Law;
- (9) exploiting the typographical design of a published book or periodical, without permission of the publisher;
- (10) live broadcasting, disseminating to the public, or recording a performance, without permission of the performer; or
- (11) committing other acts infringing upon the copyright and the rights

related to the copyright.

Article 48 Anyone who commits any of the following acts of infringement shall, depending on the circumstances, bear civil liabilities such as ceasing the infringement, eliminating the adverse effects of the act, making an apology or indemnifying damages; where public rights and interests are impaired, the administrative department for copyright may order the person to discontinue the infringement, confiscate his unlawful gains, confiscate or destroy the copies produced through infringement, and may also impose a fine; where the circumstances are serious, the said department may, in addition, confiscate the material, tools and equipment mainly used to produce copies through infringement; and where a crime is constituted, criminal liabilities shall be investigated and pursued in accordance with law:

- (1) reproducing, distributing, performing, showing, broadcasting, compiling a work or making it available to the public through information network, without permission of the copyright owner, except where otherwise provided for in this Law;
- (2) publishing a book the exclusive right of publication in which is enjoyed by another person;
- (3) reproducing or distributing a sound recording or video recording of a performance, or making a performance available to the public through information network, without permission of the performer, except where otherwise provided for in this Law;
- (4) reproducing or distributing a product of sound recording or video recording or making it available to the public through information network, without permission of the producer, except where otherwise provided for in this Law;
- (5) rebroadcasting a radio or television program or reproducing such a program without permission, except where otherwise provided for in this Law;
- (6) intentionally circumventing or sabotaging the technological measures adopted by a copyright owner or an owner of the rights related to the copyright to protect the copyright or the rights related to the copyright in the work or the products of sound recording or video recording, without permission of the owner, except where otherwise provided for in laws or administrative regulations;
- (7) intentionally removing or altering any electronic rights management information attached to a copy of a work, a product of sound recording or video recording, etc. without permission of the copyright owner or the owner of the rights related to the copyright, except where otherwise provided for in this Law; or
- (8) producing or selling a work the authorship of which is counterfeited.

Article 49 Anyone who infringes upon the copyright or a right related to the copyright shall indemnify the actual losses suffered by the right owner, or where the actual losses are difficult to calculate, indemnify the right owner

at the amount of the unlawful gains of the infringer. The indemnification shall include the reasonable expenses that the right owner has paid for stopping the infringement.

Where the actual losses of the right owner or the unlawful gains of the infringer cannot be determined, the People's Court shall, in light of the circumstances of the infringement, decide on indemnification amounting to not more than RMB 500,000.

Article 50 Where a copyright owner or an owner of a right related to the copyright who can present evidence to prove that another person is committing, or is about to commit, an infringement upon his right, which, unless prevented promptly, is likely to cause irreparable harm to his legitimate rights and interests, he may, before instituting legal proceedings, apply to a People's Court for measures to order cessation of the infringement and to preserve property.

When dealing with the application specified in the preceding paragraph, the People's Court shall apply the provisions in Article 93 through Article 96 and Article 99 of the Civil Procedure Law of the People's Republic of China.

Article 51 In order to stop infringement, a copyright owner or an owner of a right related to the copyright may, before instituting legal proceedings, apply to a People's Court for preserving evidence, where the evidence is likely to be destroyed or is difficult to obtain later.

After accepting the application, the People's Court shall make a ruling within 48 hours. Where it rules to adopt preservation measures, it shall have the measures enforced immediately.

The People's Court may order the applicant to provide a guarantee, and shall reject the application where the applicant fails to do so.

Where the applicant fails to institute legal proceedings within 15 days from the date the People's Court adopts the preservation measure, the People's Court shall lift the measure.

Article 52 When hearing a case where the copyright or a right related to it is infringed upon, the People's Court may rule to confiscate the unlawful gains, the products of infringement and the property being used for illegal activities.

Article 53 A publisher or a producer of reproductions who fails to prove that he is legally authorized to publish or produce the reproductions, or a distributor of reproductions or a renter of reproductions of a

cinematographic work or a work created by a process analogous to cinematography, computer software, sound recording or video recording who fails to prove the legitimate source of the reproductions that he distributes or rents, shall bear legal liabilities.

Article 54 Any party who fails to perform his contractual obligations, or performs them at variance with the agreed conditions in the contract, shall bear civil liabilities in accordance with the relevant provisions of the General Principles of the Civil Law of the People's Republic of China, the Contract Law of the People's Republic of China and other related laws.

Article 55 Any dispute over copyright may be settled through mediation, it may also be submitted to an arbitration body for arbitration under a written arbitration agreement concluded between the parties or under the arbitration clause in the copyright contract.

Any party may institute legal proceedings directly in a People's Court where there is neither a written arbitration agreement between the parties nor an arbitration clause in the copyright contract.

Article 56 Any party that is not satisfied with an administrative penalty may institute legal proceedings in a People's Court within three months from the date he receives the written decision on the penalty. Where the party neither institutes legal proceedings nor executes the decision at the expiration of the time limit, the administrative department for copyright may apply to the People's Court for enforcement.

Chapter VI Supplementary Provisions

Article 57 The term *zhuzuoquan* (*copyright*) as used in this Law means *banquan* commonly used in the country.

Article 58 The term *publish* as used in Article 2 of this Law means reproducing and distributing of a work.

Article 59 Measures for the protection of computer software and of the right of communication through information network shall be prescribed separately by the State Council.

Article 60 The rights of copyright owners, publishers, performers, producers of sound recordings and video recordings, radio stations and television stations, as provided for in this Law, shall, if the term of their protection specified in this Law has not yet expired on the entry-into-force date of this Law, be protected in accordance with this Law.

Any act of tort or breach of contract committed prior to the entry-into-force date of this Law shall be dealt with in accordance with the relevant regulations or policies in force at the time when such act was committed.

Article 61 This Law shall go into effect as of June 1, 1991.

C2: Regulations for the Implementation of the Copyright Law of the People's Republic of China (2013)

(Promulgated by Decree No. 359 of the State Council of the People's Republic of China on August 2, 2002, revised for the first time in accordance with the Decision of the State Council on Annulling and Amending Certain Administrative Regulations on January 8, 2011, and revised for the second time in accordance with the Decision of the State Council on Amending the Regulations for the Implementation of the Copyright Law of the People's Republic of China on January 30, 2013)

Article 1 These Regulations are formulated in accordance with the Copyright Law of the People's Republic of China (hereinafter referred to as "the Copyright Law").

Article 2 The term "works" as referred to in the Copyright Law means intellectual creations with originality in the literary, artistic or scientific domain, insofar as they can be reproduced in a tangible form.

Article 3 The term "creation" as referred to in the Copyright Law means intellectual activities in which literary, artistic or scientific works are directly created.

Any organizational activity, providing consultation, material support or offering other assistance to another person's creation shall not be deemed as creation.

Article 4 For the purposes of the Copyright Law and these Regulations, the following expressions concerning works shall be interpreted as follows:

- (1) "written works" means novels, poems, prose, treatises and other works that are expressed in written form;
- (2) "oral works" means impromptu speeches, lectures, court debates and other works that are expressed in form of spoken language;
- (3) "musical works" means songs, symphonies, and other works, with or without lyrics, that can be sung or played;
- (4) "dramatic works" means dramas, operas, local operas and other works that are created for stage performance;
- (5) "qu yi works" means such works as "xiang sheng" (cross talk), "kuai shu" (clapper talk), "da gu" (ballad singing with drum accompaniment) and "ping shu" (story telling based on novels), which are mainly performed by recitation or singing, or by both;
- (6) "choreographic works" means works in which thoughts and feelings are or can be expressed through successive movements, gestures, facial expressions, etc.;

(7) "acrobatic works" means acrobatics, magic, circus and other works that are expressed through bodily movements and techniques;

(8) "works of fine arts" means paintings, works of calligraphy and sculptures and other two- or three-dimensional works of the plastic arts formed by lines, colours and/or other media which impart aesthetic effect;

(9) "works of architecture" means works with aesthetic effect which are expressed in form of buildings or structures;

(10) "photographic works" means artistic works created by recording images of objects on light-sensitive or other medias with the aid of devices;

(11) "cinematographic works and works created by a process analogous to cinematography" means works which are filmed on a certain medium, consisting of a series of images, with or without accompanying sound, and which can be projected with the aid of suitable devices or disseminated by other means;

(12) "graphic works" means such works as drawings of engineering designs and product designs for the purpose of actual construction and manufacturing, and as maps and schematic drawings showing geographical phenomena and demonstrating the fundamentals or the structure of a thing or an object;

(13) "model works" means three-dimensional works made on the basis of the shape and the structure of an object to a certain scale, for the purpose of display, test or observation, etc.

Article 5 For the purposes of the Copyright Law and these Regulations, the following expressions shall be interpreted as follows:

(1) "news on current affairs" means the mere facts or happenings reported via newspapers, periodicals and radio and television programmes, or other media;

(2) "sound recordings" means a recording of the sounds of a performance or of other sounds;

(3) "video recordings" means recording of successive and related images or pictures, with or without accompanying sounds, other than cinematographic works and works created by a process analogous to cinematography;

(4) "producer of sound recordings" means the original producer of a sound recording;

(5) "producer of video recordings" means the original producer of a video recording;

(6) "performer" means an actor or actress, or an organisation of performing artists or any other person who performs a literary or artistic work.

Article 6 Copyright exists from the date when the creation of a work is completed.

Article 7 Works of foreigners or stateless persons first published in the

territory of China, as provided in the third paragraph of Article 2 of the Copyright Law, shall be protected from the date of the first publication of the works.

Article 8 Where a work of a foreigner or a stateless person first published outside the territory of China is published in the territory of China within 30 days thereafter, the work shall be deemed as having been simultaneously published in the territory of China.

Article 9 Where a work of joint authorship cannot be divided and exploited separately, the copyright therein shall be enjoyed by the co-authors and exercised by consensus; where no consensus thereupon can be reached through consultation, any party may not, without justified reasons, prevent the other party or parties from exercising the copyright, other than the transfer right; however, the gains thus obtained shall be distributed reasonably among all the co-authors.

Article 10 Where a copyright owner authorizes another person to make, based on his works, cinematographic works or works created by a process analogous to cinematography, it is deemed that the copyright owner has agreed to the necessary alteration of his works, insofar as such alteration does not falsify or distort the original works.

Article 11 The term “tasks” as referred to in the first paragraph of Article 16 of the Copyright Law regarding a work for hire means the duties a citizen shall fulfill as a member of that legal person or organization.

The term “material and technical resources” as referred to in the second paragraph of Article 16 of the Copyright Law regarding a work for hire means the funds, equipment or materials provided to the citizen by that legal person or organization solely for the purpose of the citizen’s completion of his or her creation.

Article 12 Where, within two years after the completion of a work for hire, the author, with consent of the employer, authorizes a third party to exploit his work in the same manner as the employer may have, remuneration received thereby shall be shared between the author and the employer according to the agreed proportions.

The two-year period following the completion of a work shall be calculated from the date of the author’s delivery of that work to the employer.

Article 13 With respect to a work of which the author’s identity is unknown, the copyright, other than the right of authorship, shall be exercised by the owner of the original copy of the work. Upon ascertaining the author’s

identity, copyright shall be exercised by the author or his successor.

Article 14 Where any of the co-authors of a jointly created work dies, and no one is to inherit, or receive as a bequest, the rights in the work to which the deceased author is entitled, as stipulated in subparagraphs (5) through (17) of the first paragraph of Article 10 of the Copyright Law, the rights shall be enjoyed by the other co-authors.

Article 15 The right of authorship, alteration, and integrity of his or her copyright shall, after the death of the author, be protected by the author's heir or legatee.

In the absence of an heir to inherit a copyright or legatee to receive a copyright as a bequest, the right of authorship, alteration and integrity thereof shall be protected by the administrative departments for copyright.

Article 16 Where the copyright in a work is vested in the State, the exploitation of that work shall be administered by the administrative department for copyright of the State Council.

Article 17 With respect to a deceased author's unpublished work, if the author did not clearly indicate that the work should not be published, the right of publication for that work may be exercised by the author's heir or legatee within a period of 50 years after the death of the author; or otherwise by the owner of the original copy of the work, in the absence of an heir or legatee.

Article 18 With respect to a work of which the author's identity is unknown, the term of protection for the rights in that work as provided in subparagraphs (5) through (17) of the first paragraph of Article 10 of the Copyright Law shall expire on December 31 of the 50th year after the first publication of the work. The provisions of Article 21 of the Copyright Law shall apply after ascertaining of the author's identify.

Article 19 Anyone who exploits another person's work shall clearly indicate the name of the author and the title of the work, except where the parties agree otherwise or such information cannot be indicated due to the manner in which the work is exploited.

Article 20 For the purposes of the Copyright Law, a "published work" shall mean a work which has been made available to the public by the copyright owner of his or her own accord or by another party with the copyright owner's authorisation.

Article 21 The exploitation of a published work which may be exploited

without the authorisation from the copyright owner in accordance with the relevant provisions of the Copyright Law, shall neither impair the normal exploitation of the work concerned, nor unreasonably prejudice the legitimate interests of the copyright owner.

Article 22 The rates of remuneration for the exploitation of works in accordance with the provisions of Article 23, the second paragraph of Article 33 and the third paragraph of Article 40 of the Copyright Law shall be formulated and promulgated by the administrative department for copyright of the State Council jointly with the competent department for pricing of the State Council.

Article 23 Anyone who exploits another person's work shall conclude a licensing contract with the copyright owner, and the contract shall be made in written form insofar as the right licensed for exploiting the work is exclusive, except where the work is to be published in a newspaper or a periodical.

Article 24 The contents of an exclusive right of exploitation provided in Article 24 of the Copyright Law shall be agreed upon by the contract. In the absence of such an agreement or of inexplicit agreement thereupon in the contract, it shall be deemed that the licensee has the right to prevent any other person, including the copyright owner per se, from exploiting the work in the same manner; unless otherwise agreed in the contract, the sublicensing of the same right to a third party by the licensee shall be subject to the permission from the copyright owner.

Article 25 An exclusive licensing contract and a copyright transfer contract concluded with the copyright owner may be filed with the administrative departments for copyright for record.

Article 26 For the purposes of the Copyright Law and these Provisions, "rights and interests related to copyright" shall mean the rights enjoyed by publishers in the typographical designs of their books or periodicals, the rights enjoyed by performers in their performances, the rights enjoyed by producers of sound and video recordings in their sound and video recordings, and the rights enjoyed by radio and television stations in their broadcasting programmes.

Article 27 Publishers, performers, producers of sound and video recordings, and radio and television stations, in the course of exercising their rights, shall not prejudice the rights of the copyright owners in the works being exploited and in the original works.

Article 28 Where it is agreed in a book publishing contract that the book

publisher enjoys an exclusive publishing right, of which the particular contents are not specified, it shall be deemed that the book publisher has the exclusive right to publish the original or revised edition of a book in the same language, during the term of validity of the contract and within the territory agreed upon therein.

Article 29 If two separate subscription forms mailed by the copyright owner to the book publisher are still not able to be fulfilled within six months, it shall be deemed that the book is out of stock as referred to in Article 32 of the Copyright Law.

Article 30 Where a copyright owner declares in accordance with the second paragraph of Article 33 of the Copyright Law that no reprinting or excerpting/compiling of his work is allowed, he shall append such a declaration to the work when it is published in a newspaper or a periodical.

Article 31 Where a copyright owner declares in accordance with the third paragraph of Article 40 of the Copyright Law that no production of a sound recording of his work is allowed, he shall make such a declaration when his work is legally recorded.

Article 32 Where another person's work is exploited in accordance with the provisions of Article 23, the second paragraph of Article 33 and the third paragraph of Article 40 of the Copyright Law, remuneration shall be paid to the copyright owner within two months from the date of exploitation of the said work.

Article 33 Performances presented by foreigners or stateless persons in the territory of China shall be protected by the Copyright Law.

The rights enjoyed by foreigners or stateless persons in their performances under the international treaties to which China has already acceded shall be protected by the Copyright Law.

Article 34 Sound recordings produced and/or distributed by foreigners or stateless persons in the territory of China shall be protected by the Copyright Law.

Where a foreigner or stateless person is entitled, under an international treaty to which China has acceded, to a right in a sound recording that he or she has produced and/or distributed, the right shall be protected by the Copyright Law.

Article 35 The rights enjoyed by foreign radio and television stations in their broadcasting programmes under the international treaties to which

China has acceded shall be protected by the Copyright Law.

Article 36 Where any act of infringement is committed as enumerated in Article 48 of the Copyright Law, which also prejudices the social or public interests, and the illegal turnover is not less than RMB 50,000 yuan, the administrative department for copyright may impose a fine of not less than one time but not more than five times the illegal turnover; if there is no illegal turnover or the illegal turnover is not more than RMB 50,000 yuan, the administrative department for copyright may impose a fine of not more than RMB 250,000 yuan in light of the seriousness of the circumstances.

Article 37 Where any act of infringement is committed as enumerated in Article 48 of the Copyright Law, which also prejudices the social or public interests, the administrative department for copyright of the local people's government shall be responsible for the investigation of and punishment against such an act.

The administrative department for copyright of the State Council may investigate into and impose punishment against any act of infringement that is of significant national impact.

Article 38 These Regulations shall be effective as of September 15, 2002. The Regulations for the Implementation of the Copyright Law of the People's Republic of China, which were approved by the State Council on May 24, 1991 and promulgated by the National Copyright Administration on May 30, 1991, shall be abolished at the same time.

C3: Interpretation of the Supreme People's Court Concerning Several Issues on Application of Law in Hearing Civil Dispute Cases Involving Copyright (2002)

Fa Shi [2002] No. 31

(Adopted on 12 October 2002 at the 1246th Meeting of the Judicial Committee of the Supreme People's Court and effective as of October 15, 2002)

With a view to correctly adjudicating civil dispute cases involving copyright, the following interpretations are made regarding several issues relating to the application of the law in accordance with the provisions of laws such as the General Principles of the Civil Law of the People's Republic of China, the Contract Law of the People's Republic of China, the Copyright Law of the People's Republic of China and the Civil Procedural Law of the People's Republic of China:

Article 1 The People's Court accepts the following copyright civil dispute cases:

- (a) copyright dispute cases and the ownership, infringement, and contractual disputes that are pertinent to copyright-related rights;
- (b) cases where preliminary injunction is sought to stop the acts of infringement of copyright or copyright-related rights and those where preliminary asset or evidence preservation is sought; and
- (c) other cases concerning the disputes over copyright or copyright-related rights.

Article 2 The copyright civil dispute cases shall be under the jurisdiction at level not lower than the Intermediate People's Court.

Various High People's Courts may, according to the actual circumstances of their prefecture, appoint several basic-level People's Court to adjudicate first instance copyright civil dispute cases.

Article 3 Where an action is initiated by a party concerned before the People's Court, seeking to hold accountable an offender whose acts of copyright infringement are investigated and penalized by the administrative department of copyrights, the People's Court shall accept.

The People's Court, when adjudicating those copyright civil dispute cases

that have been handled by the administrative department of copyrights, shall conduct complete review on the case fact.

Article 4 The civil proceedings initiated on the ground of copyright infringement shall be governed by the People's Courts of the place where the infringing acts are committed, or where the infringing reproductions are stored or confiscated as stipulated by Articles 46 and 47 of the Copyright Law of the People's Republic of China or where the defendant is domiciled.

The places where the infringing reproductions are stored as mentioned in the preceding paragraph refer to the places where large quantities of infringing reproductions are stored or hidden, or the place where infringing reproductions are frequently stored or hidden. The places where the infringing reproductions are sealed or detained refer to the places where the Customs, the copyright administration, the administration for industry and commerce or other administrative agency has sealed or detained the infringing reproductions.

Article 5 Where a jointly suit is brought against multiple defendants whose acts of infringement are committed in different places, the plaintiff may choose the People's Court of the place where one of the defendants has carried out his infringing acts as the competent court. Where a suit is brought against one of the defendants only, the People's court where that defendant carried out his infringing act shall have jurisdiction.

Article 6 Where a collective copyright management organisation lawfully established is authorised by the copyright owner in writing to initiate an action in its own name, the People's Court shall accept the case.

Article 7 The manuscripts, originals, legitimate publications, registration certificate of copyright, certificates issued by the organisation of accreditation and the contracts vouchering acquisition of right provided by the parties in connection with copyright, may be admissible in evidence.

The natural persons, legal persons or other organizations whose names are indicated on the works or products shall be deemed as the proprietors of the copyrights or copyright-related rights, until proven otherwise.

Article 8 Where the party concerned acquires, on his own accord, or commissions others to acquire the infringing reproduction and invoice by ordering or on-site transaction, such infringing reproduction and invoice may be admissible in evidence.

Where the notary, without disclosing their identities to a party concerned who are suspect of infringing copyrights, faithfully produces notarial deed in

respect of the evidence obtained by the other party by using the approach as provided in the preceding paragraph or the process of acquiring such evidence, such notarial deed shall be taken as evidence, until proven otherwise.

Article 9 "To make a work available to the public" as specified in Article 10 (1) of the Copyright Law refers to make the works available to unspecified people by the copyright owners or with their permission. However, a work is not necessarily to be known by the public in order to be found available to the public.

Article 10 For the works specified in Article 15 (2) of the Copyright Law, as regards terms of protection, , Article 21 (1) of the Copyright Law shall apply if the copyright owners are natural persons, while Article 21 (2) of the Copyright Law shall apply if the copyright owners are legal persons or other organizations.

Article 11 In case of disputes arising over the order of sequence as to how the authors' names appear in the byline of the works, the People's Court shall refer to the following principle: where the authors have agreed on the order of sequence as to how their names will appear in the byline, their agreement shall prevail ; otherwise, the People's Court shall ascertain the order of sequence by taking into account their input in the creation of works, arrangement of works, the strokes of the family name of the authors, etc.

Article 12 In case the ownership of copyright in a commissioned work belongs to the commissioned party as specified by Article 17 of the Copyright Law, the commissioning party may be entitled to use the works within the use scope as covenanted; where the commissioning party and the commissioned party have not covenanted the use scope of the works, the commissioning party may use the works free of charge within the specific scope, which the commissioned creation is purported for.

Article 13 Except for the circumstances as provided by Article 11 (3) of the Copyright Law, the copyrights of the reports, speeches and other works drafted by others but reviewed, finalized and published in the name of another person, the copyright belong to the report maker or the speech maker. The copyright owner may pay the drafters proper remunerations.

Article 14 The copyrights of the autobiographical works completed based on the theme of the experiences of specific persons as agreed by the parties concerned shall follow the covenant, if any has been covenanted by the parties; otherwise, the copyrights belong to such specific persons whose experiences are depicted, provided that the copyright owners may properly remunerate the drafter or the person who have labored in arranging for the completion of the works.

Article 15 For the works created on the same theme by different authors, where the expressions of which are creative and completed independently, the authors shall enjoy independent copyrights of their corresponding works.

Article 16 The purely factual news disseminated by mass media shall fall under the current affairs as specified by Article 5 (2) of the Copyright Law. Current affairs stories compiled by others shall be disseminated or reported with proper attribution.

Article 17 The reprints as specified by Article 32 (2) of the Copyright Law refer to the act of publishing by newspapers or magazines of the works already published on other newspapers or magazines. In case the reprinting has no attribution to the author of the reprinted works or the newspapers or magazines in which such works were firstly published, the offender shall bear the civil liabilities, such as eliminating the adverse influence or offering apologies, etc.

Article 18 The artistic work in an outdoor public place as specified by Article 22 (10) of the Copyright Law refers to sculptures, paintings, calligraphies and other artistic works that are placed or displayed in an outdoor public place.

The person that copies, paints, photographs or videotapes the artistic works as provided in the preceding paragraph may again use such copy, painting, photograph or videotape in reasonable ways and within reasonable scope, which does not constitute infringement.

Article 19 The publishers and producers shall bear the burden of proof for legitimate authorization that warrants their publications and productions, and the distributors and leasers shall bear the burden of proof for legitimate sources that warrants the distribution or lease of their reproduced products. Otherwise, they shall undertake the corresponding legal liability as provided in Article 46 and 47 of the Copyright Law.

Article 20 In case the publications infringe upon the copyrights of others, the publishers shall bear the civil compensatory liabilities in consideration of their faults, degree of infringement, and the consequential damages.

In case the publishers have not fulfilled the duties of reasonable care for the authorization of their publishing acts, the sources and signature of the manuscripts and the content of publications under edition, they shall undertake the compensatory liabilities according to the provisions of Article 48 of the Copyright Law.

In case the publishers have taken the duties of reasonable care and the copyright owners have not evidence to show that the publishers should have

known the infringement involved in their publications, the publishers shall undertake the civil responsibilities for stopping the infringement and returning the profits obtained through infringement according to the provision of Article 117 of the General Principles of Civil Law.

The publishers shall take the burden of proof for indicating that they have taken the duties of reasonable cares.

Article 21 In case the users of computer software make commercial use of the computer software without permission or beyond the scope of permission, civil responsibilities should be undertaken according to the provisions of Article 47 (1) of the Copyright Law and Article 24 (1) of the Regulation on Protection of Computer Software.

Article 22 In case the contract on transfer of copyrights does not adopt a written form, the People's Court shall examine and check to see whether the contract is established according to the provisions of Articles 36 and 37 of the Contract Law.

Article 23 In case the publishers has lost or destroyed the works delivered by the copyright owners for publishing, enabling failure of the performance of the publishing contract, the publishers should be accorded with civil responsibilities according to the provisions of Article 53 of the Copyright Law, Article 117 of the General Principles of Civil Law and Article 122 of the Contract Law.

Article 24 The actual losses of the copyright owners may be calculated as the multiplication of the decreased distribution volume of the reproduced products due to the infringement or the sale volume of the infringing reproduced products by the unit profits of the reproduced products of the copyright owners. In case the decreased distribution volume is hard to determine, it may be determined according to the market sale volume of infringing reproduced products.

Article 25 In case the actual losses of the copyright owners or the illegitimate revenues of the infringing party cannot be determined, the People's Court shall determine the amount of compensations as per the request of the parties concerned or according to the provisions of Article 48 (2) of the Copyright Law at their discretion within their powers.

When determining the amount of compensations, the People's Court shall comprehensively consider the work type, reasonable usage fee, nature of infringing acts, results, and other relevant circumstances.

It shall be allowed for the party concerned to reach an agreement on the

amount of compensations according to clause 1 of this Article.

Article 26 The reasonable expenses paid for stopping the infringing acts as specified by Article 48 (1) of the Copyright Law include reasonable fees occurred from investigating on the infringing acts and obtaining evidences.

The People's Court may calculate in the compensations the attorney's fees according to the provisions of the relevant state departments in consideration of the proceeding claims and specific circumstance of cases of the parties concerned.

Article 27 In terms of the cases under pleading for the infringing acts of copyrights occurred prior to the implementation of the decision on the revised copyright law for which the People's Court provides findings after the implementation of the decision on the revised copyright law, references may be taken in applying the provision of Article 48 of the Copyright Law.

Article 28 The time limit for actions of copyright infringement is two years, starting from the date when the copyright owners have known or should have known the infringing acts. If the copyright owners bring the action beyond two years and if the infringing act still remains when the action is brought, the People's Court shall within the term for protection of the copyrights offer findings against the defendant for stopping the infringing acts; and the amount of compensations for infringement shall be calculated for two years taken backward from the date when the copyright owners brought the action with the People's Court.

Article 29 In case of the infringing acts specified by Article 47 of the Copyright Law, the People's Court may in addition to prosecuting infringing party with civil responsibilities as per the request by the parties concerned accord civil punishment according to the provision of Article 134 of the General Principles of Civil Law, with the amount of fine to be determined by reference with the relevant provisions of the Regulations on the Implementation of the Copyright Law of the People's Republic of China.

In case the administrative department of copyrights has accorded the same infringing acts with administrative punishment, the People's Court shall not accord civil punishment.

Article 30 For the infringing acts of copyrights occurred prior to October 27, 2001, the provisions of Articles 49 and 50 of the Copyright Law shall be applicable when the parties concerned have after October 27, 2001 applied with the People's Court for adopting the order to stop the infringing acts or take measures for conservation of evidence.

In case of taking the pre-trial measures, the People's Court shall proceed by reference with the provisions of the Interpretations of the Supreme People's Court on the Applicable Laws Concerning the Pre-suit Cessation of the Acts Infringing the Rights for Exclusive Use of Registered Trademarks and the Conservation of Evidences.

Article 31 Unless otherwise provided by the Interpretation, the cases of civil dispute concerning copyrights accepted by the People's Court after October 27, 2001, if involving the civil acts occurred prior to October 27, 2001, shall adopt the provisions of the Copyright Law before the revision; if involving the civil acts occurred after October 27, 2001, shall adopt the provisions of the revised Copyright Law; and if involving the civil acts occurred prior to October 27, 2001 but lasting after such date, shall adopt the provisions of the revised Copyright Law.

Article 32 In case of any discrepancy between previous provisions and the Interpretation, the Interpretation shall prevail.

C4: Provisions of the Supreme People's Court on Several Issues Concerning Application of Law in Adjudication of Civil Dispute Cases Related to Infringement of the Right of Communication via Information Networks (2012)

Fa Shi (2012) No. 20

(Adopted at the 1561st meeting of the Judicial Committee of the Supreme People's Court on November 26, 2012 and effective as of January 1, 2013)

In order to properly adjudicate civil disputes relating to infringements of the right of communication via information networks (RCIN), legally protect the right of communication via information networks, promote the healthy development of the information network industry, and safeguard the public interest, the Supreme People's Court promulgates these provisions in accordance with the "General Principles of the Civil Code", the "Tort Liability Law", the "Copyright Law", the "Civil Procedure Code" and other relevant laws and regulations of the People's Republic of China, taking into consideration of the trial practice.

Article 1 When adjudicating civil disputes related to the infringement of RCINs and exercising their discretion, the People's Courts shall strive to balance the interests of right owners, network service providers (NSPs) and the public.

Article 2 For the purposes of these Provisions, "information networks" include computer internets, radio and television broadcasting networks, landline telecommunication networks, mobile communications networks as well as other information networks using electronic devices, such as computers, television sets, landline telephones and mobile phones, etc., as terminals, as well as publicly accessible local area networks (LAN).

Article 3 Where a network user or NSP provides to the public via information networks, without permission, a work, performance, audio and video work in which right holders enjoy RCINs, unless otherwise stipulated by laws and administrative regulations, the People's Courts shall find that such network user and NSP has committed an infringement of RCINs.

Where a work, performance, audio and video recording is placed on a publicly accessible information network through uploading to network servers, configuration as shared files or the use of file-sharing software such that they become available to the public via downloading, browsing or other means at a time and location that can be decided by individuals, the People's Courts shall determine that such acts of the network users and NSPs constitute an "act of providing" as provided in the preceding paragraph.

Article 4 Where there is evidence to prove that a NSP have provided, a work, performance, audio and video work, by himself or via division of labor and cooperation with another party, and where the requirements for joint infringement are met, the People's Courts shall order the NSP to undertake joint and several liability. Where the NSP can prove that it merely provided network services such as automatic access, automatic transmission, information storage space, searching, linking, or file-sharing technology, etc., and the NSP argues that it did not commit a joint infringement, the People's Court shall support such claims.

Article 5 Where a NSP has effectively displaced other NSPs in making works available to the public by providing cached images or thumbnail images, the People's Courts shall find the act of such NSP to have constituted an "act of providing".

Where the "act of providing" in the preceding paragraph neither affect the normal use of relevant works nor unfairly violate the legitimate interests of the right owner over such works, and where the NSP argues that it has not infringed the RICN, the People's Courts shall support such claims.

Article 6 Where a plaintiff has preliminary evidence to prove that a NSP has provided relevant works, performances, audio and video recording, but the NSP can prove that it only provided network services and bears no fault, the People's Courts shall not determine that the NSP committed an infringement.

Article 7 Where a NSP aids and abets or assists a network user to commit an infringement of RCINs in the course of providing network services, the People's Court shall order the NSP to undertake liability for infringement.

Where a NSP induces or encourages a network user to commit an act of RCINs infringement by means such as words, promotion of technical support, rewarding points, etc., the People's Court shall determine that such NSP has committed aiding and abetting infringement.

Where the NSP clearly knows or ought to know that its network user is using its network services to infringe RCINs, and the NSP has not taken necessary measures, such as deleting, shielding, disconnecting, etc., and the NSP continues to provides assistance (to the user), such as technical support, etc., the People's Court shall determine that the NSP has committed contributory infringement.

Article 8 The People's Court shall determine whether the NSP shall undertake liability for aiding and abetting or contributory infringement based on the fault of the NSP. The fault of the NSP shall be determined by whether the NSP clearly knew or ought to have known the network user's

infringement of RCINs.

Where the NSP fails to proactively scrutinize a network user for its infringement act of RCINs, the People's Court shall not regard such failure as a basis for determining that the NSP has fault.

Where the NSP can prove that it has taken reasonable and effective technical measures but it is still difficult to detect the network user's infringements of RCINs, the People's Court shall determine that the NSP does not have fault.

Article 9 The People's Court shall, based on whether the network user's infringements of RCINs are evident, take into consideration of a combination of the following factors for determining that a NSP ought to know an infringement:

- (1) the ability of the NSP to manage information, given the nature and ways the NSP provides services and the possibilities of causing infringements thereof;
- (2) the types and reputation of the works, performances, audio and video recordings being disseminated and the degree to which information on the infringement is evident;
- (3) whether the NSP has proactively taken action, such as selecting, editing, modifying, recommending, etc., works, performances and audio and video recordings;
- (4) whether the NSP has actively taken reasonable steps to prevent infringements;
- (5) whether the NSP has established speedy procedures to receive notices of infringements and is timely providing reasonable responses thereto;
- (6) whether the NSP has taken reasonable corresponding measures to address repeated infringements by the same network user; and
- (7) other relevant factors.

Article 10 Where, at the time of providing network services, a NSP promotes works such as hit film and television programs, etc., through methods such as setting ranking lists, catalogs, indices, descriptive paragraphs and brief introductions, etc., and the public can directly download, browse or obtain such programs by other means from the webpage of the NSP, the People's Court may determine that the NSP ought to know the network users has infringed RCINs.

Article 11 In cases where a NSP directly derives economic benefits from works, performance, audio and video recordings that are provided by network users, the People's Court shall determine that the NSP bears a higher duty of care with respect to the acts of infringement of RCINs by network users.

The proceeds derived by a NSP from advertising of specific works, performances, audio and video recordings, or other economic benefits generated that are specifically related to disseminated works, performance, audio and video recordings, shall be deemed as "directly derived economic benefits" as provided in the preceding paragraph. Advertising fees of a general nature, service fees, etc., charged by NSPs for providing network service do not fall under the circumstances set out in this provision.

Article 12 The People's Court shall find that NSPs that provide information storage services ought to know about a network user's infringement of RCINs based on specific circumstances of cases, and provided that one of the following circumstances is met:

- (1) placing hit film and television programs and the like on the homepage or other primary web page, etc., which is obviously detectible by the NSP;
- (2) based on the theme or content of hit film and television programs and the like, proactively selecting, editing, organizing, promoting or setting specific ranking lists;
- (3) other situations where the NSP can obviously detect that the relevant works, performances, or audio and video recordings are being made available without permission, and still fails to take reasonable measures.

Article 13 Where the NSP receives a notice submitted by a right holder by letter, facsimile or email and fails to take necessary measures, such as deleting, shielding or disconnecting the links, etc., the People's Court shall determine that the NSP clearly knew of the corresponding act of infringement of the RCIN.

Article 14 Where the People's Court determines as to whether the NSP's taking of necessary measures, such as deleting, shielding or disconnecting the links, etc., has been made in a timely manner, the People's Court shall consider a combination of factors, such as the form of notice submitted by the right holders, the degree of accuracy of the notice, the degree of difficulty in taking measures, the nature of the network services and the type, reputation, quantity, etc., of the work, performance, or audio and video recording.

Article 15 The People's Court has jurisdiction over civil disputes concerning infringement of RCINs in the places where the infringing acts are committed or where the defendant has his domicile. The places where the infringing acts are committed include the places where network servers, computer terminals and other equipment used for carrying out infringement acts are located. Where it is difficult to determine the place where neither the infringing acts are committed nor the defendant has his domicile or where such places are overseas, the place where the computer terminal or other equipment with the plaintiff-detected infringing content is located may be deemed the place where the infringing acts are committed.

Article 16 The *“Interpretation of the Supreme People’s Court on Certain Issues Related to the Application of Law in the Trial of Cases Involving Computer Network Copyright Disputes”* (Fa Shi (2006) No. 11) shall be abrogated as of the date these Provisions entering into effect.

The Provisions shall be applicable to civil disputes involving the infringement of RCINs that are yet to be concluded with a final judgment after the entry-into-effect of these Provisions. These Provisions shall not be applied, provided that those civil disputes have been concluded with a final judgment before the entry-into-effect of these Provisions, yet retrial applications have been filed by the parties concerned or retrial proceeding is initiated pursuant to the adjudication supervision procedure.

ANTI-UNFAIR COMPETITION

D1: Anti-Unfair Competition Law of the People's Republic of China (2019)

(Adopted at the 3rd Session of the Standing Committee of the Eighth National People's Congress on September 2, 1993; amended by the 30th Session of the Standing Committee of the Twelfth National People's Congress on November 4, 2017; and amended for the second time in accordance with the Decision on Revising the Trademark Law of the People's Republic of China adopted at the 10th session of the Thirteenth Standing Committee of the National People's Congress on April 23, 2019.)

Chapter I General Provisions

Article 1 The Law is formulated for the purposes of promoting 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.

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 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.

Article 5 The State encourages, supports and protects all organizations and individuals in their exercise of social supervision over Unfair Competition Acts.

Neither State organ nor its functionary shall support or harbour Unfair Competition Acts.

Industry association shall promote self-regulation and fair competition through guidance and regulation of its members so as to maintain the market competition order.

Chapter II Acts of Unfair Competition

Article 6 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:

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.

Article 7 A Business Operator shall not offer money or valuable things or take any other means to bribe the organisations or individuals listed below in order to seek transaction opportunity or competitive edge.

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.

Article 8 A Business Operator shall not make false or misleading commercial publicity on the performance, function, quality, sales, user ratings, awards, 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 or other means.

Article 9 A Business Operator shall not conduct any of the following acts to infringe upon trade secrets:

1. To acquire a right holder's trade secrets by theft, bribery, fraud, coercion, electronic intrusion or any other improper means;
2. To disclose, explore or permit others to explore the trade secrets acquired from the right holder by means mentioned in the preceding paragraph; or
3. To disclose, explore or permit others to explore the trade secrets at its disposal by breaching obligations of confidentiality or violating requirement of the right holder on keeping the confidentiality of the trade secret;
4. To acquire, disclose, explore or permit others to explore the trade secrets of the right owner by instigating, inducing or assisting in others' violation of obligation of confidentiality or in others' breach of the requirement of the right

holder on keeping the confidentiality of the trade secret.

Where other natural persons, legal persons or unincorporated organisations, other than the Business Operators, commit any of the illegal acts as prescribed in the preceding paragraph, such act shall be deemed as infringement upon trade secrets.

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 first paragraph of this article, 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 technical or operational information, **or** other business information which is unknown to the public, has commercial value and for which the right holder has taken corresponding measures to ensure confidentiality.

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;
3. To maliciously make the network product or service legally offered by other Business Operators incompatible; or
4. Other acts that interfere or sabotage the normal running of network product or service legally offered by others.

Chapter III Investigation on Suspected Unfair Competition Acts

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
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.

Article 14 The Business operator, the interested parties and other relevant entities or individuals that are under investigation shall truthfully provide relevant materials or particulars when the supervision and inspection departments investigate suspected Unfair Competition Acts.

Article 15 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.

Article 16 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.

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.

Chapter IV Legal Liability

Article 17 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 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 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 proceeds that the infringer has earned through the infringement. In the case of serious circumstances, the amount of compensation shall be calculated at an amount of not less than one time but not more than five times of the actual losses suffered by the Business Operator, or the proceeds earned by the infringer. 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 proceeds obtained from the infringing act, the people's court shall make a decision on the amount of compensation not higher than RMB 5 million yuan, by taking into account the seriousness of the infringement.

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. In the case of serious circumstances, 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 original enterprise registration authority shall replace such name with a Uniform Social Credit Code before name change.

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. In the case of serious circumstances, the supervision and inspection department may revoke the business license of the Business Operator.

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. In the case of serious circumstances, 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.

Article 21 Where a Business Operator, other natural persons, legal persons or unincorporated organisations infringes upon trade secrets of others thus

violates the provisions of Article 9 of the law, the supervision and inspection department shall order cessation of the illegal act, confiscate the illegal proceeds and impose a fine of more than RMB 100,000 Yuan but not higher than RMB 1,000,000 Yuan. In the case of serious circumstances, the supervision and inspection department shall impose a fine of more than RMB 500,000 Yuan but not higher than RMB 5,000,000 Yuan.

Article 22 Where a Business Operator carries out premium sale in violation of the provisions of Article 10 of the law, the supervision and inspection department shall order it to stop the illegal act and impose a fine of more than RMB50,000 Yuan but not higher than RMB500,000 Yuan.

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. In the case of serious circumstances, 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.

Article 24 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. In the case of serious circumstances, 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.

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.

Article 26 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.

Article 27 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 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 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 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.

Article 31 Anyone who violates the provisions of the law and whose act constitutes crime shall be subject to criminal prosecution.

Article 32 Where a trade secret owner adduces, during civil proceeding involving infringement upon trade secrets, preliminary evidence to prove that confidentiality measures have been employed to protect its trade secret for which protection has been sought and based on which it reasonably indicates that such trade secret has been infringed upon, the suspected infringer shall prove the trade secret for which protection has been sought by the plaintiff does not fall under the trade secret as prescribed by the law.

The suspected infringer shall prove that it has not been engaged in the infringement upon trade secrets, provided that trade secret owner has adduced preliminary evidence which reasonably indicates that such trade secret has been infringed upon, and has submitted any of the following evidence:

1. Evidence indicates that the suspected infringer has access to or opportunity to acquire the trade secret and the information being explored by the suspected infringer is substantively identical with such trade secret;

2. Evidence indicates that the trade secret has been disclosed or explored by the suspected infringer or the trade secret is at risk of disclosure or exploration; or
3. Other evidence indicates that the trade secret has been infringed upon by the suspected infringer.

Chapter V Supplementary Provision

Article 33 The Law shall take effect as of January 1, 2018.

**Comparative table of the 2017 and 2019 Anti-Unfair Competition Law
(Articles revised)**

AUCL 2017 Version	AUCL 2019 Version
<p>Article 9</p> <p>A Business Operator shall not conduct any of the following acts to infringe upon trade secrets:</p> <ol style="list-style-type: none"> 1. To acquire a right holder's trade secrets by theft, bribery, fraud, coercion or any other improper means; 2. To disclose, explore or permit others to explore the trade secrets acquired from the right holder by means mentioned in the preceding paragraph; or 3. To disclose, explore or permit others to explore the trade secrets at its disposal by breaching agreement or violating requirement of the right holder on keeping the confidentiality of the trade secret. 	<p>Article 9</p> <p>A Business Operator shall not conduct any of the following acts to infringe upon trade secrets:</p> <ol style="list-style-type: none"> 1. To acquire a right holder's trade secrets by theft, bribery, fraud, coercion, electronic intrusion or any other improper means; 2. To disclose, explore or permit others to explore the trade secrets acquired from the right holder by means mentioned in the preceding paragraph; or 3. To disclose, explore or permit others to explore the trade secrets at its disposal by breaching obligations of confidentiality or violating requirement of the right holder on keeping the confidentiality of the trade secret; 4. To acquire, disclose, explore or permit others to explore the trade secrets of the right owner by instigating, inducing or assisting in others' violation of obligation of confidentiality or in others' breach of the requirement of the right holder

<p>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.</p> <p>For purposes of the law, “trade secrets” refer to technical or operational information which is unknown to the public, has commercial value and for which the right holder has taken corresponding measures to ensure confidentiality.</p>	<p>on keeping the confidentiality of the trade secret.</p> <p>Where other natural persons, legal persons or unincorporated organisations, other than the Business Operators, commit any of the illegal acts as prescribed in the preceding paragraph, such act shall be deemed as infringement upon trade secrets.</p> <p>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 first paragraph of this article, yet still acquires, discloses, explores or permits others to explore the trade secret, such act shall be deemed as infringement upon trade secrets.</p> <p>For purposes of the law, “trade secrets” refer to technical or operational information, or other 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>
<p>Article 17</p> <p>A Business Operator, which violates the provisions of the law and thus causes damage to others, shall bear civil liability according to the laws.</p> <p>A Business Operator whose lawful rights and interests are damaged by Unfair Competition Acts may</p>	<p>Article 17</p> <p>A Business Operator, which violates the provisions of the law and thus causes damage to others, shall bear civil liability according to the laws.</p> <p>A Business Operator whose lawful rights and interests are damaged by Unfair Competition Acts may</p>

<p>bring a lawsuit before a people's court.</p> <p>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 proceeds 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.</p> <p>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 proceeds 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.</p>	<p>bring a lawsuit before a people's court.</p> <p>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 proceeds that the infringer has earned through the infringement. In the case of serious circumstances, the amount of compensation shall be calculated at an amount of not less than one time but not more than five times of the actual losses suffered by the Business Operator, or the proceeds earned by the infringer. The amount of compensation shall cover the rational expenses paid by the Business Operator for stopping the infringing act.</p> <p>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 proceeds obtained from the infringing act, the people's court shall make a decision on the amount of compensation not higher than RMB 5 million yuan, by taking into account the seriousness of the infringement.</p>
<p>Article 21</p> <p>Where a Business Operator infringes upon trade secrets of</p>	<p>Article 21</p> <p>Where a Business Operator, other natural persons, legal persons</p>

<p>others thus violates the provisions of Article 9 of the law, the supervision and inspection department shall order cessation of the illegal act and impose a fine of more than RMB 100,000 Yuan but not higher than RMB 500,000 Yuan. In the case of serious circumstances, the supervision and inspection department shall impose a fine of more than RMB 500,000 Yuan but not higher than RMB 3,000,000 Yuan.</p>	<p>or unincorporated organisations infringes upon trade secrets of others thus violates the provisions of Article 9 of the law, the supervision and inspection department shall order cessation of the illegal act, confiscate the illegal proceeds and impose a fine of more than RMB 100,000 Yuan but not higher than RMB 1,000,000 Yuan. In the case of serious circumstances, the supervision and inspection department shall impose a fine of more than RMB 500,000 Yuan but not higher than RMB 5,000,000 Yuan.</p>
	<p>Introducing a new article as Article 32:</p> <p>Where a trade secret owner adduces, during civil proceeding involving infringement upon trade secrets, preliminary evidence to prove that confidentiality measures have been employed to protect its trade secret for which protection has been sought and based on which it reasonably indicates that such trade secret has been infringed upon, the suspected infringer shall prove the trade secret for which protection has been sought by the plaintiff does not fall under the trade secret as prescribed by the law.</p> <p>The suspected infringer shall prove that it has not been engaged in the infringement upon trade secrets, provided that trade secret owner has adduced preliminary evidence which reasonably indicates that such trade secret has been infringed upon, and has submitted any of the following evidence:</p>

	<ol style="list-style-type: none">1. Evidence indicates that the suspected infringer has access to or opportunity to acquire the trade secret and the information being explored by the suspected infringer is substantively identical with such trade secret;2. Evidence indicates that the trade secret has been disclosed or explored by the suspected infringer or the trade secret is at risk of disclosure or exploration; or3. Other evidence indicates that the trade secret has been infringed upon by the suspected infringer.
--	--

D2: Interpretation of the Supreme People's Court on the Application of Laws in the Trial of Civil Disputes over Domain Names of Computer Network (2001)

Fa Shi [2001] No. 24

(Adopted at the 1182nd Meeting of the Judicial Committee of the Supreme People's Court on June 26, 2001 and effective as of July 24, 2001)

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.

D3: Interpretation of the Supreme People's Court on Some Matters Concerning the Application of Law in the Trial of Civil Cases Involving Unfair Competition (2007)

Fa Shi [2007] No. 2

(Adopted at the 1412th meeting of the Judicial Committee of the Supreme People's Court on December 30, 2006 and effective as of February 1, 2007)

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 oblige, 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 oblige, 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.

ANTI-MONOPOLY

E1: Anti-monopoly Law of the People's Republic of China (2008)

(Adopted at the 29th session of the Standing Committee of the 10th National People's Congress of the People's Republic of China on August 30, 2007 and effective as of August 1, 2008)

Chapter I General Provisions

Article 1 This Law is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, promoting the healthy development of the socialist market economy.

Article 2 This Law shall be applicable to monopolistic conducts in economic activities within the People's Republic of China. This Law shall apply to the conducts outside the territory of the People's Republic of China if they eliminate or have restrictive effect on competition in the domestic market of the PRC.

Article 3 For the purposes of this Law, "monopolistic conducts" are defined as the following:

- (1) conclusion of monopolistic agreements among business operators;
- (2) abuse of dominant market positions by business operators; and
- (3) concentration of business operators that eliminates or restricts competition or might be eliminating or restricting competition.

Article 4 The State sets and implements competition rules that align with the socialist market economy, improves macro-control, and advances a unified, open, competitive and orderly market system.

Article 5 Business operators may, through fair competition and voluntary alliance, implement concentration according to law, expand the scope of business operations, and enhance competitiveness.

Article 6 Any business with a dominant market position may not abuse that

dominant position to eliminate, or restrict competition.

Article 7 With respect to the industries that are controlled by the State-owned economy and are in the vital position to the national economy and national security or the industries implementing exclusive operation and sales according to law, the state protects the lawful business operations conducted by the business operators therein. The state also lawfully oversees, regulates and controls their business operations and the prices of their commodities and services so as to safeguard the interests of consumers and promote technical progresses.

Subject to public supervision, the business operators as mentioned in the preceding paragraph shall operate with honesty, integrity and self-discipline, and shall not prejudice the interests of consumers by taking advantage of their dominant or exclusive positions.

Article 8 Administrative agency or institution empowered by laws or regulations to administer public affairs shall not abuse its administrative powers to eliminate or restrict competition.

Article 9 Set up by the State Council, the Anti-monopoly Commission, which organises, coordinates and guides anti-monopoly work, performs the following functions:

- (1) studying and drafting competition related policies;
- (2) organizing the investigation and assessment of overall market competition situations, and releasing assessment reports;
- (3) promulgating and issuing anti-monopoly guidelines;
- (4) coordinating anti-monopoly administrative law enforcement; and
- (5) other functions as assigned by the State Council.

The State Council appoints the staff and formulates the working rules of the Anti-monopoly Commission.

Article 10 The authority designated by the State Council to undertake the anti-monopoly enforcement work (hereinafter referred to as Anti-monopoly Enforcement Authority under the State Council) shall be in charge of anti-monopoly law enforcement in accordance with this Law.

The Anti-monopoly Enforcement Authority under the State Council may, if

necessary, authorize the corresponding agencies in the people's governments of the provinces, autonomous regions and municipalities directly under the Central Government to take charge of anti-monopoly law enforcement in accordance with this Law.

Article 11 A guild shall promote self-regulation and fair competition through guidance of the operators so as to maintain market competition order.

Article 12 For the purposes of this Law, "business operator" refers to a natural person, legal person, or any other organization that is in the engagement of commodities production or operation or service provision.

"Relevant market" refers to the commodity or geographical range within which the business operators compete against each other over specific commodities or services (hereinafter referred to as "commodities") during a certain period of time.

Chapter II Monopoly Agreement

Article 13 Any of the following monopoly agreements reached among the competing business operators shall be prohibited:

- (1) fixing or changing prices of commodities;
- (2) limiting the output or sales of commodities;
- (3) dividing the sales market or the raw material procurement market;
- (4) restricting the purchase of new technology or new facilities or the development of new technology or new products;
- (5) making boycott transactions; or
- (6) other monopoly agreements ascertained by the Anti-monopoly Authority under the State Council.

For the purposes of this Law, "monopoly agreements" refer to agreements, decisions or other concerted actions that eliminate or restrict competition.

Article 14 Any of the following agreements concluded between business operators and their trading parties are prohibited:

- (1) fixing the price of commodities for resale to a third party;

- (2) restricting the minimum price of commodities for resale to a third party; or
- (3) other monopoly agreements ascertained by the Anti-monopoly Authority under the State Council.

Article 15 Articles 13 and 14 of this Law shall not apply if operators may prove that an agreement concluded among them falls under any of the following circumstances:

- (1) for the purpose of improving technologies, researching and developing new products;
- (2) for the purpose of upgrading product quality, reducing cost, improving efficiency, unifying product specifications or standards, or carrying out professional labor division;
- (3) for the purpose of enhancing operational efficiency and reinforcing the competitiveness of small and medium-sized business operators;
- (4) for the purpose of achieving public interests such as conserving energy, protecting the environment and rescuing and relieving operations for a disaster and so on;
- (5) for the purpose of mitigating serious decrease in sales volume or obviously excessive production during economic recessions;
- (6) for the purpose of ensuring the legitimate interests in the foreign trade or foreign economic cooperation; or
- (7) other circumstances as stipulated by laws and the State Council.

Where a monopoly agreement is concluded in any of the circumstances that fall under those circumstances as provided by any of the first five clauses of the preceding paragraph so that Articles 13 and 14 of this Law do not apply, the business operators shall also prove that the agreement will enable consumers to share the interests derived from the agreement, and will not severely restrict the competition in relevant market.

Article 16 Any guild shall not organize the business operators of the industry to implement monopolistic conduct as prohibited in this Chapter.

Chapter III Abuse of Market Dominance

Article 17 A business operator with a dominant market position shall be prohibited from the engagement of abusing its dominant market position as follows:

- (1) selling commodities at unfairly high prices or buying commodities at unfairly low prices;
- (2) selling products at prices below cost without any just cause;
- (3) refusing to trade with a trading party without any just cause;
- (4) requiring a trading party to trade exclusively with itself or trade exclusively with a designated business operator(s) without any just cause;
- (5) making tie-in sale or attaching other unreasonable trading conditions at the time of transaction without any just cause;
- (6) applying discriminatory treatments on trading prices or other trading terms to trading parties with equal standing without just cause;
- (7) other conducts ascertained as abuse of a dominant market position by the Anti-monopoly Authority under the State Council.

For the purposes of this Law, "dominant market position" refers to a market position held by a business operator that enables it to control the price, quantity or other trading conditions of commodities in relevant market, or to impede or affect any other business operator to enter the relevant market.

Article 18 The dominant market status shall be determined by considering the following factors:

- (1) the market share of a business operator in relevant market, and the competition status of the relevant market;
- (2) the capacity of a business operator to control the sales market or the raw material procurement market;
- (3) the financial resources and technical conditions of the business operator;
- (4) the degree of dependence of other business operators upon the business operator in transactions;

(5) the degree of difficulty for other business operators to enter the relevant market; and

(6) other factors that are pertinent to determine a dominant market position of the said business operator.

Article 19 Where a business operator falls under any of the following circumstances, it may be assumed to have a dominant market position:

(1) the market share of a business operator accounts for 1/2 or above in the relevant market;

(2) the joint market share of two business operators accounts for 2/3 or above; or

(3) the joint market share of three business operators accounts for 3/4 or above.

A business operator with a market share of less than 1/10 shall not be presumed as having a dominant market position even if it falls under the circumstances as provided by clause 2 or 3 of the preceding paragraph.

Where a business operator who has been presumed to have a dominant market position can prove otherwise, it shall not be determined as having a dominant market position.

Chapter IV Concentration of Business Operators

Article 20 A concentration of business operators refers to the following circumstances:

(1) the merger of business operators;

(2) acquiring control over other business operators by virtue of acquiring their equities or assets; or

(3) acquiring control over other business operators or being capable of exercising decisive influence on other business operators by virtue of contract or any other means.

Article 21 Where a concentration of business operators reaches the threshold of declaration stipulated by the State Council, a declaration shall be lodged in advance with the Anti-monopoly Authority under the State Council.

Otherwise the concentration shall not be implemented.

Article 22 Where a concentration of business operators falls under any of the following circumstances, it may not be declared to the Anti-monopoly Authority under the State Council:

- (1) one business operator that is a party to the concentration has more than 50% of the voting shares or assets of every other business operator; or
- (2) one business operator who is not a party to the concentration has more than 50% of the voting shares or assets of every business operator concerned.

Article 23 A business operator shall, when making a concentration declaration with the Anti-monopoly Authority under the State Council, submit the following documents and materials:

- (1) a declaration form;
- (2) explanations on the effect of the concentration on the relevant market competition;
- (3) the agreement of concentration;
- (4) the financial statements for the previous fiscal year of the business operators involved in the concentration, as audited by an accounting firm; and
- (5) other documents and materials as stipulated by the Anti-monopoly Authority under the State Council.

Such items shall be specified in the declaration form as the name, domicile and business scopes of the business operators involved in the concentration as well as the date of the scheduled concentration and other items as stipulated by the Anti-monopoly Authority under the State Council.

Article 24 Where the documents or materials submitted by a business operator are incomplete, it shall supplement the documents and materials within the time limit stipulated by the Anti-monopoly Authority under the State Council. Otherwise, the declaration shall be deemed as not filed.

Article 25 The Anti-monopoly Authority under the State Council shall conduct a preliminary review of the declared concentration of business operators, make a decision whether to conduct further review and notify the business

operators in written form within 30 days upon receipt of the documents and materials submitted by the business operators pursuant to Article 23 of this Law. Until a decision is made by the Anti-monopoly Authority under the State Council, the concentration may be not implemented.

Where the Anti-monopoly Authority under the State Council decides not to conduct further review or fails to make a decision upon expiry of the statutory period, the concentration may be implemented.

Article 26 Where the Anti-monopoly Authority under the State Council decides to conduct further review, they shall, within 90 days from the date of decision, complete the review, make a decision on whether to prohibit the concentration, and notify the business operators concerned of the decision in written form. A decision of prohibition shall be attached with reasons therefor. During the review period, the concentration shall not be implemented.

Under any of the following circumstances, the Anti-monopoly Authority under the State Council may notify the business operators in written form that the time limit as stipulated in the preceding paragraph may be extended to no more than 60 days:

- (1) the business operators concerned agree to extend the time limit;
- (2) the documents or materials submitted by the business operators are inaccurate and need further verification;
- (3) circumstances have significantly changed after declaration.

If the Anti-monopoly Authority under the State Council fails to make a decision upon expiry of the statutory period, the concentration may be implemented.

Article 27 When examining the concentration of business operators, the following factors shall be taken into account:

- (1) the market share of the business operators involved in the relevant market and their control over that market;
- (2) the degree of market concentration in the relevant market;
- (3) the influence of the concentration of business operators on market access and technological progress;
- (4) the influence of the concentration of business operators on the consumers

and other business operators;

(5) the influence of the concentration of business operators on the national economic development, and

(6) other factors that the Anti-monopoly Authority under the State Council deems may have an effect on the market competition.

Article 28 Where a concentration has or may have effect of eliminating or restricting competition, the Anti-monopoly Authority under the State Council shall make a decision to prohibit the concentration. However, if the business operators concerned can prove that the concentration will bring more positive impact than negative impact on competition, or the concentration aligns with public interests, the Anti-monopoly Authority under the State Council may decide not to prohibit the concentration.

Article 29 Where the concentration is not prohibited, the Anti-monopoly Authority under the State Council may decide to attach restrictive conditions for reducing the negative impact of such concentration on competition.

Article 30 Where the Anti-monopoly Authority under the State Council decides to prohibit a concentration or attaches restrictive conditions on concentration, it shall publicize such decisions to the general public in a timely manner.

Article 31 Where a foreign investor merges and acquires a domestic enterprise or participate in concentration of business operators by other means, if national security is involved, besides the examination on the concentration in accordance with this Law, the examination on national security shall also be conducted in accordance with the relevant State provisions.

Chapter V Abuse of Executive Power to Eliminate or Restrict Competition

Article 32 Any administrative agency or institution empowered by laws or regulations to administer public affairs may not abuse its executive power in engaging in restriction or disguised restriction that entities and individuals operate, purchase or use the commodities provided by its designated business operators.

Article 33 Any administrative agency or institution empowered by laws or regulations to administer public affairs shall not abuse its executive power to perform any of the following acts so as to impede free interregional circulation:

- (1) imposing discriminative charges, discriminative fee standards or discriminative prices upon non-local commodities;
- (2) imposing discriminatory technical requirements and inspection standards upon non-local commodities so that are such commodities are not treated equally as those similar local commodities, or taking such discriminative technical measures as repeated inspections or repeated authentications to non-local commodities so as to restrict such to enter local market;
- (3) exerting administrative licensing specifically targeting non-local commodities so as to restrict such to enter local market;
- (4) setting barriers or taking other measures so as to impede non-local commodities from entering the local market or local commodities from shipping out of the local region, or
- (5) other conducts impeding free interregional circulation of commodities.

Article 34 Any administrative agency or institution empowered by laws or regulations to administer public affairs shall not abuse its executive power to reject or restrict non-local business operators from participating in local tendering and bidding activities by such means as imposing discriminative eligibility requirements or assessment standards or failing to release information in a lawful manner.

Article 35 Any administrative agency or institution empowered by laws or regulations to administer public affairs shall not abuse its executive power to reject or restrict non-local business operators from investing or setting up branches in the locality by imposing discriminatory measures so that such business operators are not treated equally as local business operators.

Article 36 Any administrative agency or institution empowered by laws or regulations to administer public affairs shall not abuse its executive power to force business operators to engage in the monopolistic conducts as prescribed in this Law.

Article 37 Any administrative agency shall not abuse its executive power to formulate provisions so as to eliminate or restrict competition.

Chapter VI Investigation into the Suspected Monopolistic Conducts

Article 38 The anti-monopoly enforcement authority shall make investigations into suspected monopolistic conducts in accordance with law.

Any entity or individual may report suspected monopolistic conducts to the anti-monopoly enforcement authority. The anti-monopoly enforcement authority shall keep the informer's identity confidential.

Where an informer makes the reporting in written form and provides relevant facts and evidences, the anti-monopoly enforcement authority shall make necessary investigation.

Article 39 The anti-monopoly enforcement authority may take the following measures in investigating suspected monopolistic conducts:

- (1) to enter and conduct inspection at the business premises of business operators under investigation or at any other relevant venues;
- (2) to inquire the business operators, interested parties, or other relevant entities or individuals under investigation, and require them to explain the relevant conditions;
- (3) to access and duplicate the relevant documentations, agreements, account books, business correspondences and electronic data, etc. of the business operators under investigation, interested parties and other relevant entities or individuals;
- (4) to seize or detain relevant evidence, and
- (5) to check the business operators' bank accounts.

Execution of the measures as provided in the preceding paragraph requires a written report filed to and an approval from the head of the anti-monopoly enforcement authority.

Article 40 When investigating suspected monopolistic conducts, the anti-monopoly enforcement authority shall send at least two law enforcement officers, who shall produce their badges.

When making inquiries and conducting investigation on suspected monopolistic conducts, law enforcement officers shall make written records thereon bearing the signatures of the persons under inquiry or investigation.

Article 41 The anti-monopoly enforcement authority and functionaries thereof shall be obliged to keep the confidentiality of the trade secrets that come to their knowledge during the course of the law enforcement.

Article 42 Business operators, interested parties and other relevant entities

and individuals under investigation shall cooperate with the anti-monopoly enforcement authority in performing its functions, and shall not reject or impede the investigation launched by the anti-monopoly enforcement authority.

Article 43 Business operators and interested parties under investigation are entitled to voice their opinions. The anti-monopoly enforcement authority shall verify the facts, grounds and evidences provided by such business operators and interested parties.

Article 44 Where the anti-monopoly enforcement authority, after investigating and verifying a suspected monopolistic conduct, deems that such conduct constitutes monopolistic conduct, it shall make a punishment decision and publicize it.

Article 45 Concerning a suspected monopolistic conduct that is under the investigation of the anti-monopoly enforcement authority, if the business operators under investigation promise to eliminate the consequence of the conduct by taking specific measures within the time limit that the anti-monopoly enforcement authority agrees upon, the anti-monopoly enforcement authority may decide to suspend the investigation. The decision on suspending the investigation shall specify the specific measures as promised by the business operators under investigation.

Where the anti-monopoly enforcement authority decides to suspend the investigation, it shall oversee the fulfillment of the promise by the relevant business operators. Where the business operators keep their promise, the anti-monopoly enforcement authority may decide to terminate the investigation.

However, the anti-monopoly enforcement authority shall resume the investigation in any of the following circumstances:

- (1) where the business operators fail to fulfill the promise;
- (2) where the facts based on which the decision on suspending the investigation was made have changed drastically; or
- (3) where the decision on suspending the investigation was based on incomplete or inaccurate information provided by the business operators.

Chapter VII Legal Liabilities

Article 46 Where business operators reach and execute a monopoly

agreement in violation of this Law, the anti-monopoly enforcement authority shall order the cessation of the offence, confiscate the illegal gains and impose a fine of more than 1% but not higher than 10% of the sales revenue in the previous year. Where the monopoly agreement reached has not been executed, a fine of up to RMB 500,000 yuan shall be imposed.

Where any business operator voluntarily reports on the conclusion of the monopoly agreement and provides important evidences to the anti-monopoly enforcement authority, the anti-monopolistic enforcement authority may exercise discretion to impose a mitigated punishment or grant exemption from punishment as the case may be.

Where a guild facilitates the conclusion of a monopoly agreement among business operators of the industry in violation of this Law, a fine of up to RMB 500,000 yuan shall be imposed thereupon by the anti-monopoly enforcement authority; in case of serious circumstances, the authority governing the registration of non-governmental organisations may deregister the guild.

Article 47 Where any business operator abuses its dominant market status in violation of this Law, the anti-monopolistic enforcement authority may order the cessation of the offence, confiscate its illegal gains and impose thereupon a fine of more than 1% but not higher than 10% of the sales revenue in the previous year.

Article 48 Where any business operator implements concentration in violation of this Law, the anti-monopoly enforcement authority shall order the cessation of concentration, dispose of shares or assets or transfer the business within a definite time limit, or take other necessary measures to restore the market situation before the concentration, and may impose a fine of up to RMB 500,000 yuan.

Article 49 When calculating the specific amount of fines in accordance with the provisions of Articles 46, Article 47 and Article 48, the anti-monopolistic enforcement authority shall take into consideration such factors as the nature, extent and duration of the violations.

Article 50 Where any damage was caused by a business operator's monopolistic conducts to other entities and individuals, the business operator shall bear the civil liabilities.

Article 51 Where any administrative agency or institution empowered by laws or regulations to administer public affairs abuses its executive power to eliminate or restrict competition, the superior authority thereof shall order it to make rectification and impose punishments on the person(s) directly in charge and other persons directly responsible. The anti-monopoly

enforcement authority may advise on the punishment according to law to the relevant superior authority.

Where it is otherwise provided by laws or regulations on the abuse of executive power of an administrative agency or institution empowered by laws or regulations to administer public affairs in eliminating or restricting competition, such provisions shall prevail.

Article 52 If during the review and investigation of the anti-monopoly enforcement authority, business operators refuse to provide related materials and information, or provide fraudulent materials or information, or conceal, destroy or remove evidence, or refuse or obstruct investigation in other ways, the anti-monopoly enforcement authority shall order them to make rectification, impose a fine of up to RMB 20,000 yuan on individuals, and a fine of up to RMB 200,000 yuan on entities; and in case of serious circumstances, the anti-monopoly enforcement authority may impose a fine of more than RMB 20,000 yuan but not higher than RMB 100,000 yuan on individuals, and a fine of more than RMB 200,000 yuan but not higher than RMB one million yuan on entities; where a crime is constituted, the relevant business operators shall bear criminal liabilities.

Article 53 Where any party concerned objects to the decision made by the anti-monopoly enforcement authority in accordance with Articles 28 and 29 of this Law, it may first apply for an administrative reconsideration; if it objects to the reconsideration decision, it may lodge an administrative lawsuit in accordance with law.

Where any party concerned is dissatisfied with any decision made by the anti-monopoly enforcement authority other than the decisions prescribed in the preceding paragraph, it may lodge an application for administrative reconsideration or initiate an administrative lawsuit in accordance with law.

Article 54 Where any functionary of the anti-monopoly enforcement authority 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 enforcement, the offender shall be subject to criminal prosecution if such act constitutes a crime; or else the offender shall be imposed upon a disciplinary sanction if such act does not constitute crime.

Chapter VIII Supplementary Provisions

Article 55 This Law does not govern the conduct of business operators exercising their intellectual property rights in accordance with laws and relevant administrative regulations on intellectual property rights; however, business operators' conduct of eliminating or restricting market competition

by abusing their intellectual property rights shall be governed by this Law.

Article 56 This Law does not govern the ally or concerted actions of agricultural producers and rural economic organizations in the economic activities such as production, processing, sales, transportation and storage of agricultural products.

Article 57 This Law shall enter into force as of August 1, 2008.

E2: Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct (2012)

Fa Shi [2012] No. 5

(Adopted at the 1539th Meeting of the Judicial Committee of the Supreme People's Court on January 30, 2012, promulgated on May 3, 2012, effective as of June 1, 2012)

For the purpose of properly hearing civil dispute cases arising from monopolistic conduct, interdicting monopolistic conduct, protecting and promoting fair market competition, and safeguarding the interests of consumers and the public, these Provisions are formulated in accordance with the relevant provisions of the Anti-Monopoly Law of the People's Republic of China, the Tort Law of the People's Republic of China, the Contract Law of the People's Republic of China, the Civil Procedure Law of the People's Republic of China, and other laws.

Article 1 For the purposes of these Provisions, "civil dispute cases arising from monopolistic conduct" (hereinafter referred to as "civil monopoly dispute cases") refer to civil lawsuits filed with the people's courts by natural persons, legal persons, or other organizations for disputes over losses caused by monopolistic conduct or breach of the Anti-Monopoly Law by contractual provisions, bylaws of industry associations, and so on.

Article 2 Where a plaintiff directly files a civil lawsuit with the people's court or files a civil lawsuit with the people's court after the entry-into-force of a decision made by the anti-monopoly law enforcement authority affirming the monopolistic conduct, the people's court shall accept the lawsuit, provided that other conditions for acceptance as provided by laws are met.

Article 3 The intermediate people's court of a city where the people's government of a province, autonomous region, or municipality directly under the Central Government is located or a city with independent planning status, or the intermediate people's court designated by the Supreme People's Court shall have jurisdiction over civil monopoly dispute cases at first instance.

With the approval of the Supreme People's Court, a grassroots people's court may have jurisdiction over civil monopoly dispute cases at first instance.

Article 4 The territorial jurisdiction over civil monopoly dispute cases shall align with the jurisdiction provisions regarding torts and contractual dispute as provided by the Civil Procedure Law and relevant judicial interpretations, taking into consideration the actual circumstances of a case.

Article 5 Where a civil dispute case is based on a cause of action other than monopoly when such case is docketed, provided that the defendant has evidence to support its monopoly defence or counter claim against the plaintiff or that the case needs to be adjudicated in accordance with the Anti-Monopoly Law, but the people's court accepting the lawsuit has no jurisdiction over civil monopoly dispute cases, such case shall be transferred to the people's court having jurisdiction.

Article 6 Where lawsuits have been respectively filed by two or more plaintiffs against the same monopolistic conduct before the same court with jurisdiction, the lawsuits may be combined in hearing.

Where lawsuits have been respectively filed by two or more plaintiffs against the same monopolistic conduct before different courts with jurisdiction, the court that docketed the case later shall, after learning another court's prior docketing of the case, orders the case to be transferred to that court within seven days. The court that accepts the transferred case may combine the cases in hearing. The defendant shall, when submitting its defense, provide on its own accord to the people's court accepting the lawsuit with relevant information about its involvement in lawsuits arising from the same conduct before other courts.

Article 7 Where the alleged monopolistic conduct falls under the monopolistic agreement as described in Article 13.1.1 through Article 13.1.5 of the Anti-Monopoly Law, the defendant shall bear the burden of proof in respect of the competition eliminating or restricting effect of the agreement.

Article 8 Where the alleged monopolistic conduct is an abuse of a dominant market position as provided by Article 17.1 of the Anti-Monopoly Law, the plaintiff shall bear the burden of proof in respect of the defendant's dominant position in the relevant market and its abuse of such dominant position.

The defendant arguing the justification of its act shall bear the burden of proof.

Article 9 Where the alleged monopolistic conduct is an abuse of a dominant market position by a public utility or any other business operator that, pursuant to law, has a dominant position, the people's court may, in light of the market structure and the specific circumstances of competition, ascertain that the defendant has a dominant position in the relevant market, unless there is contrary evidence to prove otherwise.

Article 10 A plaintiff may use publicly released information of a defendant as evidence to prove its dominant market position. Where the publicly released information of the defendant suffices to prove that the defendant has a

dominant market position in the relevant market, the people's court may base its finding on such fact, unless there is contrary evidence to prove otherwise.

Article 11 Where evidence involves any national secret, trade secret, individual privacy, or other information that should be kept confidential pursuant to law, the people's court may, adopt *ex officio* or as per the requests of a party concerned, protective measures, such as conducting closed-door hearing, restricting or prohibiting duplication of evidence, disclosure of evidence only to the parties' attorneys, and ordering the signing of a confidentiality agreement.

Article 12 A party may apply to the people's court to call one or two persons with relevant expertise to expound on the technicality of certain issues of the case in court.

Article 13 A party may apply to the people's court to entrust a professional institution or professionals to produce market investigation or economic analysis reports on the technicality of certain issues of a case. With the permission of the people's court, both parties may, by consultation, determine the professional institution or professionals; and if such consultation fails, the people's court shall designate the professional institution or professionals.

The people's court may examine and assess the market investigation or economic analysis reports as provided in the preceding paragraph by referring to the provisions of the Civil Procedure Law and relevant judicial interpretations regarding authentication conclusions.

Article 14 Where a defendant's monopolistic conduct has caused any prejudices to the plaintiff, the people's court may, in light of the plaintiff's claims and the findings of facts, order the defendant to cease infringement, indemnify losses, and assume other civil liability in accordance with law.

Upon the request of the plaintiff, the people's court may count the plaintiff's reasonable expenses for investigation and prevention of the monopolistic conduct in damages.

Article 15 Where the alleged contractual provisions, bylaws of a guild, and so on, are in violation of the mandatory provisions of the Anti-Monopoly Law or any other laws or administrative regulations, the people's court shall find such contractual provisions or bylaws invalid in accordance with law.

Article 16 The statute of limitations for claims for damages arising from monopolistic conduct shall be calculated from the date when the plaintiff knows or should have known that the monopolistic conduct infringes upon its rights and interests.

Where the plaintiff reports the alleged monopolistic conduct to the anti-monopoly law enforcement authority, the statute of limitations is interrupted from the date of filing such a report. If the anti-monopoly law enforcement authority decides not to open a case, decides to revoke a case or decides to terminate investigation, the statute of limitations shall be re-calculated from the date when the plaintiff knows or should have known about such decision. If the anti-monopoly law enforcement authority, after investigation, ascertains the monopolistic conduct, the statute of limitations shall be re-calculated from the date when the plaintiff knows or should have known that the decision of the anti-monopoly law enforcement authority affirming the monopolistic conduct has come into force.

Where the alleged monopolistic conduct has continued for more than two years when the plaintiff files the lawsuit, if the defendant raises a statute of limitations defense, the damages shall be calculated two years prior to the date when plaintiff files for the lawsuit.

IP GENERAL

Administrative

Regulations of the People's Republic of China Regarding Customs Protection of Intellectual Property Rights (2010)

(Issued by the State Council of the People's Republic of China in Decree No. 395 on 2 December 2003; amended according to the State Council's Decision on the Amendment to the Regulations of the People's Republic of China Regarding Customs Protection of Intellectual Property Rights dated 24 March 2010; and entering into force as of 1 April 2010)

Chapter I General Provisions

Article 1 With a view to effecting the protection of intellectual property rights by the customs authorities, promoting the economic, trade, scientific, technical and cultural exchanges with foreign countries and safeguarding the public interests, these Regulations have been formulated under the Customs Law of the People's Republic of China.

Article 2 For the purpose of these Regulations, the customs protection of the intellectual property rights shall refer to the protection by the customs authorities over the exclusive right to use trademark, the copyright and the copyright-related rights and the patent right (hereinafter all referred to as the intellectual property rights) that are related to import and export goods and are protected under the laws and administrative regulations of the People's Republic of China.

Article 3 The People's Republic of China prohibits the importation or exportation of goods that infringe the intellectual property rights.

The customs authorities effect the protection of the intellectual property rights pursuant to the relevant laws and provisions of these Regulations, and exercise the related power as provided for in the Customs Law of the People's Republic of China.

Article 4 Owners of intellectual property rights who request the Customs to protect their intellectual property rights shall file application with the Customs for taking the protection measures.

Article 5 The consignees of import goods or consignors of export goods and their agents shall, in accordance with the State regulations, declare to the customs authorities the state of the intellectual property rights related to the import or export goods and submit the relevant certifying documents.

Article 6 In protecting the intellectual property rights, the Customs shall keep confidential trade secrets of the interested parties.

Chapter II Recordal of Intellectual Property Rights

Article 7 Owners of the intellectual property rights may apply to the General Administration of Customs for the recordal of their intellectual property rights according to the provisions of these Regulations; those applying for the recordal shall file an application in writing. The application shall cover the following:

- (1) the name or personal name and the place of registration or nationality of the owner of the intellectual property right;
- (2) the title, contents and relevant information of the intellectual property right;
- (3) the state of license and exploitation of the intellectual property right;
- (4) the designation, origin, customshouse of entry or exit, importer or exporter, principal features and price of the goods in respect of which the intellectual property right owner has lawfully exercised the intellectual property right; and
- (5) the manufacturer, importer or exporter, customshouse of entry or exit, principal features and price of the known infringing goods;

Where there are certifying documents relating to the contents of the application provided for in the proceeding Article, the intellectual property right owner shall attach them with the application.

Article 8 The General Administration of Customs shall, within thirty working days from the date of receipt of all the application documents, decide and inform in writing the applicant whether his application for the recordal of his intellectual property right is approved or not. Where the General Administration of Customs does not grant the recordal, it shall explain the reason.

Under any one of the following circumstances, the General Administration of Customs shall not grant its recordal:

- (1) where the application documents are incomplete or invalid;
- (2) where the applicant is not an intellectual property right owner; or
- (3) where the intellectual property right is no longer protected under the law and the administrative regulations.

Article 9 The General Administration of Customs may cancel the recordal if it finds that the intellectual property right owner applying for recordal of the intellectual property right fails to provide the truthful facts or documents.

Article 10 The recordal for the customs protection of an intellectual property right shall take effect from the date of approval of the recordal by the General Administration of Customs. The recordal shall be valid for ten years.

Where the intellectual property right is valid, the owner of the intellectual property right may, within six months prior to the expiration of the term of validity of the recordal for the customs protection of the intellectual property right, apply to the General Administration of Customs for renewal of the recordal. The term of validity of each renewal of the recordal shall be ten years.

Where no renewal is applied for upon the expiration of the term of validity of the recordal for the customs protection of an intellectual property right or where the intellectual property right ceases to be protected under the law and administrative regulations, the recordal for the customs protection of the intellectual property right shall become invalid immediately.

Article 11 Where there is any change in respect of the state of recordal of an intellectual property right, the owner of the intellectual property right shall, within thirty working days from the date of the change, go through the formalities of modification or cancellation of the recordal at the General Administration of Customs.

Where the owner of the intellectual property right fails to go through the formalities of modification or cancellation of the recordal and his failure has serious impact on another party's legitimate import or export or on the Customs performance of its functions of supervision and administration under the law, the General Administration of Customs may cancel, at the request of an interested party or ex officio, the recordal of the relevant intellectual property right.

Chapter III Application for Detention of Suspected Infringing Goods and Handling of the Matter

Article 12 Where the owner of the intellectual property right discovers that the suspected infringing goods are about to be imported or exported, he may file an application with the Customs at the port of entry or exit for detaining the suspected infringing goods.

Article 13 The owner of the intellectual property right requesting the Customs to detain suspected infringing goods shall file a written application and submit the relevant certifying documents and evidence sufficient to prove the obvious infringement fact.

The application shall cover the following:

- (1) the name or personal name and the place of registration or nationality of the owner of the intellectual property right;
- (2) the title, contents and relevant information of the intellectual property right;
- (3) the name of the consignees or consignors of the suspected infringing goods;
- (4) the designation, specifications or other relevant information on the suspected infringing goods;
- (5) the possible port of entry or exit of the suspected infringing goods, the possible time and means of transport via which the suspected infringing goods could be imported or exported.

Where the suspected infringing goods are suspected of infringing a recorded intellectual property right, the application shall also indicate the number of the Customs recordal.

Article 14 Where the owner of the intellectual property right requests the Customs to detain suspected infringing goods, he shall submit to the Customs a guaranty bond not exceeding the value of the goods to compensate possible losses inflicted to the consignee or consignor due to unmerited application and to cover the expenses of warehousing, storage and disposal of the goods after the Customs detention. Where the owner of the intellectual property right directly pays a warehouse owner for the expenses of the warehousing and storage, the payment shall be deducted from the guarantee. The specific measures on the matter shall be formulated by the General Administration of Customs.

Article 15 Where the application filed by the owner of the intellectual property right for detaining suspected infringing goods is in conformity with the provisions of Article 13 of these Regulations and the guaranty bond is posted according to the provision of Article 14 of these Regulations, the Customs shall detain the suspected infringing goods, notify in writing the owner of the intellectual property right and serve the consignee or consignor with the Customs detention warrant.

Where the application filed by the owner of the intellectual property right for detaining suspected infringing goods is not in conformity with the provision of Article 13 of these Regulations or the guaranty bond is not posted according to the provision of Article 14 of these Regulations, the Customs shall dismiss the application and notify the owner of the intellectual property right in writing.

Article 16 Where the Customs discovers that a consignment of import or export goods is suspected of infringing a recorded intellectual property right, it shall immediately notify the owner of the intellectual property right in writing. Where the owner of the intellectual property right files an application within three working days from the date of service of the notification according to the provisions of Article 13 of these Regulations and posts guaranty bond according to the provision of Article 14 of these Regulations, the Customs shall detain the suspected infringing goods, notify the owner of intellectual property right in writing and serve the warrant of customs detention to the consignee or consignor. Where the intellectual property right owner fails to file an application or fails to post guaranty bond within the time limit, the Customs shall not detain the goods.

Article 17 With the consent of the Customs, the owner of the intellectual property rights and consignees or consignors may inspect the relevant goods.

Article 18 Where the consignee or consignor believes that his goods do not infringe the intellectual property right of the owner of the intellectual property right, he shall present a written explanation to the Customs, with the relevant evidence attached.

Article 19 Where the consignee or consignor of the suspected infringing goods believes that his import or export goods do not infringe the patent right, he may, after posting to the Customs a guaranty bond equivalent to the value of the goods, request the Customs to release his goods. Where the owner of the intellectual property right fails to institute proceedings in the people's court within a reasonable time limit, the Customs shall return the guaranty bond.

Article 20 Where after the Customs discovers that a consignment of import or export goods is suspected of infringing a recorded intellectual property

right and informs the owner of intellectual property right, the owner of intellectual property right requests the Customs to detain the suspected infringing goods, it shall, within thirty working days from the date of detention, investigate and determine whether the suspected infringing goods detained have infringed the intellectual property rights. Where the Customs finds that the suspected goods do not infringe the recorded intellectual property right, it shall notify the owner of the intellectual property right in writing immediately.

Article 21 Where the Customs investigates the suspected infringing goods detained and requests the competent intellectual property department for assistance, the relevant competent intellectual property department shall provide the assistance.

Where the competent intellectual property department handling cases involving infringement of the import or export goods requests the Customs for assistance, the Customs shall provide the assistance.

Article 22 When the Customs investigates the detained suspected infringing goods, the intellectual property right owner and the consignees or consignors shall cooperate.

Article 23 After filing an application with the Customs for taking the protection measures, the owner of the intellectual property right may file an application with the people's court seeking for court order on the cessation of infringement or execution of property preservation measures in connection with the suspected infringing goods detained pursuant to the Trademark Law of the People's Republic of China, the Copyright Law of the People's Republic of China, the Patent Law of the People's Republic of China or other relevant laws.

Where the Customs received the notification from the people's court seeking assistance in enforcement relating to the order for cessation of the infringement or property preservation, the Customs shall provide the assistance.

Article 24 The Customs shall, in one of the following events, release the detained suspected infringing goods:

(1) where the Customs detains the suspected infringing goods according to Article 15 of these Regulations and does not receive notification for assistance in enforcement from the people's court within twenty working days from the date of detention;

(2) where the Customs detains the suspected infringing goods according to Article 16 of these Regulations and does not receive notification for

assistance in enforcement from the people's court within fifty working days from the date of detention and cannot ascertain that the suspected infringing goods have infringed the intellectual property right upon investigation;

(3) where the consignee or consignor of the goods suspected of infringing other's patent, after posting with the Customs the guaranty bond equivalent to the value of the goods, requests the Customs to release his goods;

(4) where the Customs ascertains that the consignee or consignor has sufficient evidence to prove that his goods do not infringe the intellectual property right of the owner of the intellectual property right; or

(5) where the owner of the intellectual property right withdraws his application for detention of the suspected infringing goods before the Customs ascertains that the suspected infringing goods detained are infringing goods.

Article 25 Where the Customs detain the suspected infringing goods, the owner of the intellectual property right shall pay for the expenses for the warehousing, storage and disposal of the goods. Where the owner of the intellectual property right fails to pay for the relevant expenses, the Customs may deduct them from the guaranty bond the owner has posted therewith, or require the guarantor to fulfill the relevant guarantee obligation.

Where it is established that the suspected infringing goods have infringed an intellectual property right, the owner of the intellectual property right may include the expenses for the warehousing, storage and disposal of the goods in the reasonable expenses paid to cease the infringement.

Article 26 Where the Customs find a criminal offence when enforcing the intellectual property right, the matter shall be transferred to the public security authority.

Chapter IV Legal Responsibility

Article 27 Where it is established that upon Customs' investigation, the detained suspected infringing goods infringes the intellectual property rights, the Customs shall confiscate them.

After the Customs confiscate the goods infringing the intellectual property rights, they shall notify in writing the owner of the intellectual property right of the relevant circumstance about the goods infringing the intellectual property rights.

Where the confiscated infringing goods may be used for the purpose of public

welfare, the Customs shall transfer them to the relevant public welfare organisation to be used for the public welfare; where the owner of the intellectual property right is willing to procure the confiscated goods, such goods may be disposed by the Customs by means of paid transfer to the owner of the intellectual property right. Where it is impossible for the confiscated infringing goods to be used for the purpose of public welfare and the owner of the intellectual property right is unwilling to procure them, the Customs may auction such according to the law after eliminating the infringing features, but in respect of imported goods of counterfeit trademarks, except under exceptional circumstances, they shall not be allowed to enter the channel of commerce after merely removing their trademark representations; and where the infringing features are impossible to be eliminated, the Customs shall destroy the goods.

Article 28 Where, after accepting an application for recordal for protection of an intellectual property right and for taking measures to protect the intellectual property right, the Customs cannot locate infringing goods, or fails to take the protection measures in a timely manner, or fails to take adequate protection measures because the intellectual property right owner did not provide the exact information, the owner of the intellectual property rights shall assume the responsibility.

Where, after the owner of the intellectual property right requests the Customs to detain the suspected infringing goods, the Customs cannot establish that the detained suspected infringing goods have infringed the intellectual property right of the owner thereof or the people's court ascertains the non-infringement of the intellectual property right, the owner of the intellectual property right shall be liable for indemnify the damages under law.

Article 29 Anyone who imports or exports infringing goods and whose act constitutes a crime shall be prosecuted for criminal liabilities under law.

Article 30 Any customs official who, when protecting the intellectual property right, neglects his duty, abuses his power or engages in malpractice for personal gains and whose acts constitute a crime shall be prosecuted for his criminal liabilities under law; where his acts are not serious enough to constitute a crime, he shall be given administrative disciplinary penalty under law.

Chapter V Supplementary Provisions

Article 31 Where the goods which an inbound or outbound passenger carries or posts are more than the reasonable amount for personal use and have infringed the intellectual property right provided for in Article 2 of these Regulations, the Customs shall treat them as infringing goods.

Article 32 Where the owner of an intellectual property right has recorded his intellectual property right with the General Administration of Customs, he shall pay the recordal fee pursuant to the relevant regulations of the State.

Article 33 These Regulations shall enter into force as of 1 March 2004. The Regulations of the People's Republic of China Regarding Customs Protection of Intellectual Property Rights issued by the State Council on 5 July 1995 shall be abrogated simultaneously.

Rules of the General Administration of Customs of the People's Republic of China for Implementation of the Regulations of the People's Republic of China on Customs Protection of Intellectual Property Rights (2009)

(Adopted at the Executive Meeting of the General Administration of Customs on February 17, 2009, promulgated by Decree No. 183 of the General Administration of Customs of the People's Republic of China on March 3, 2009, and effective as of July 1, 2009)

Chapter I General Provisions

Article 1 These Rules are formulated in accordance with the Customs Law of the People's Republic of China and other laws and administrative regulations for the purpose of effectively implementing the Regulations of the People's Republic of China on Customs Protection of Intellectual Property Rights (hereinafter referred to as the Regulations).

Article 2 Where an intellectual property right holder requests Customs to take measures to protect his/her intellectual property right, or goes through recordal formalities with the General Administration of Customs for Customs protection of his/her intellectual property right, he/she may, in the case of an intellectual property right holder resided in the Chinese mainland, lodge an application directly or by entrusting an agent established in the Chinese mainland or, in the case of an intellectual property right holder resided outside the Chinese mainland, lodge an application by entrusting his/her representative office or agent established in the Chinese mainland.

Where an intellectual property right holder files an application by entrusting his/her agent established in the Chinese mainland in accordance with the provisions of the preceding paragraph, he/she shall produce a power of attorney in the prescribed format.

Article 3 Where an intellectual property right holder or the agent thereof (hereinafter referred to collectively as the intellectual property right holder) requests Customs to detain any goods pending importation or exportation that are suspected of infringement, he/she shall, in accordance with the relevant provisions of these Rules, file an application with Customs for detention of such goods.

Article 4 The consignee or consignor of import or export goods or the agent thereof, (hereinafter referred to collectively as the consignee or consignor) shall, to a reasonable extent, have knowledge of the status of intellectual property rights of the goods imported or exported by him/her. Where Customs asks him/her to declare the status of the intellectual property rights

of the import or export goods, he/she shall, within the time limit specified by Customs, make a faithful declaration to Customs and submit relevant evidentiary documents.

Article 5 Where any business secret is involved in the relevant documents or evidence submitted to Customs by the intellectual property right holder or the consignee or consignor, an explanation in writing shall be presented to Customs by the intellectual property right holder or the consignee or consignor.

When providing protection for intellectual property rights, Customs shall keep the confidentiality of the business secrets of the interested parties unless Customs is legally obligated to make the information public.

Chapter II Recordal of Intellectual Property Rights

Article 6 An intellectual property right holder applying to the General Administration of Customs for recordal of his/her intellectual property right for Customs protection, shall file a written application with the General Administration of Customs, which shall include the following particulars:

- (a) the name, personal name, place of registration or nationality, and postal address of the intellectual property right holder, the name, telephone and fax numbers, and e-mail address of the contact person thereof, etc.;
- (b) the name of the registered trademark, the classification and name of the commodities in respect of which the use of the trademark has been approved, the device of the trademark, the term of validity of the registration, the status of assignment, modification and renewal of the registered trademark; the name of the works, the date of completion of creation, the classification of the works, the pictures of the works and the status of assignment and modification of the works; the name, classification, date of application, and status of assignment and modification of the patent, etc.;
- (c) the name of the licensees, the commodities in respect of which the license is given, the term of validity of the license, etc.;
- (d) the name, origin, importers or exporters, main features and prices of the goods on which the intellectual property right holder lawfully exercises his/her right, the Customs at the place of entry or exit of the goods, etc.; and
- (e) the known manufacturers, importers or exporters, main features and prices of the goods that have infringed the intellectual property right, the Customs at the place of entry or exit of the goods, etc.

The intellectual property right holder shall submit a copy of the written application for each item of his/her intellectual property rights for which recordal is applied for. Where the intellectual property right holder applies for recordal of an international registered trademark, he/she shall submit a copy of the written application for each class of commodities covered by the application.

Article 7 An intellectual property right holder, submitting a written application for recordal to the General Administration of Customs, shall attach the following documents or evidence accordingly:

(a) the photocopy of the personal identity certificate or the photocopy of the business license for industry and commerce of the intellectual property right holder, or the photocopies of other registration documents;

(b) the photocopy of the Trademark Registration Certificate as issued by the Trademark Office of the administrative authority for industry and commerce under the State Council. Where the applicant has been permitted to alter any of the particulars of the trademark registration, renew the trademark registration, assign the registered trademark, or apply for recordal of an international registered trademark, he/she shall also submit the relevant proof issued by the Trademark Office of the administrative authority for industry and commerce under the State Council in relation to the above matters of trademark registration.; the photocopy of the Certificate of Voluntary Copyright Registration as issued by the authority for copyright registration and the photographs of the works that are certified by such authority. Where the applicant has not gone through the procedures of voluntary copyright registration, he/she shall submit a sample of his/her works that can prove he/she is the copyright holder, and other relevant evidence of the copyright ownership; and the photocopy of the Patent Certificate as issued by the State Council's patent authority. Where the patent has been granted for more than one year since the date of announcement, the applicant shall also submit a duplicate of the patent register issued, within six months prior to the applicant's application for recordal, by the State Council's patent authority; where the applicant applies for recordal of a utility model patent or a design patent, he/she shall also submit the patent assessment report made by the State Council's patent authority.;

(c) the photocopy of the license contract, if any, where the intellectual property right holder has licensed another party to use any of his/her registered trademarks, works or exploit any of his/her patents; or a written statement on the licensee, scope and term of the license, etc., if no license contract is concluded;

(d) the photographs of the goods and their packaging on which the intellectual property right holder has lawfully exercised his/her rights;

(e) known evidence of importation or exportation of infringing goods. Where the infringement dispute between the intellectual property right holder and another party has been handled by a people's court or the competent authority for the intellectual property right, the photocopies of the relevant legal instruments shall also be submitted; and

(f) any other documents or evidence that the General Administration of Customs deems necessary to present.

The documents and evidence submitted to the General Administration of Customs by the intellectual property right holder in accordance with the provisions of the preceding paragraph shall be complete, truthful and valid. Where the relevant documents and evidence are in a foreign language, a Chinese translation shall be attached. Where the General Administration of Customs deems necessary, it may ask the intellectual property right holder to submit the notarised or legalised instruments of the relevant documents or evidence.

Article 8 The intellectual property right holder, applying to the General Administration of Customs for recordal of an intellectual property right for Customs protection, or reapplying to the General Administration of Customs after the expiry of the previous recordal, shall pay a recordal fee. The intellectual property right holder shall remit the recordal fee through a bank to the account number designated by the General Administration of Customs. The General Administration of Customs collecting the recordal fee shall produce a receipt. The rate of the recordal fee shall be set down separately by the General Administration of Customs in conjunction with the relevant authorities of the State and publicized thereby.

No recordal fee is required when an intellectual property right holder applies for renewal or modification of a recordal.

Where an intellectual property right holder withdraws his/her recordal application before the General Administration of Customs approves it, or his/her recordal application is rejected, the General Administration of Customs shall refund the recordal fee. Where a recordal approved by the General Administration of Customs is deregistered or revoked by the General Administration of Customs, or becomes invalid due to any other reason, the recordal fee shall not be refunded.

Article 9 The recordal of an intellectual property right for Customs protection shall take effect as from the date of approval by the General Administration of Customs and be valid for a term of 10 years. Where the term of validity of an intellectual property right is less than 10 years as from the effective date of recordal, the term of validity of the recordal shall be subject to the term of validity of the intellectual property right.

Where a recordal or the renewal of a recordal was approved by the General Administration of Customs prior to the implementation of the Regulations, the term of validity of the recordal shall be calculated according to the original term of validity.

Article 10 An intellectual property right holder may, within six months prior to the expiry of the recordal of his/her intellectual property right for Customs protection, file a written application with the General Administration of Customs, with the relevant documents attached, for renewing the recordal. The General Administration of Customs shall, within 10 working days as from the date of receipt of all the documents of renewal application, make a decision of approval or disapproval and notify the intellectual property right holder of the decision in writing. In the case of disapproval, it shall state the reasons therefor.

The term of validity of a renewed recordal shall be 10 years, calculated from the day following the expiry date of the previous recordal. Where the term of validity of the intellectual property right is less than 10 years, calculated from the day following the expiry date of the previous recordal, the term of validity of the renewed recordal shall be subject to the term of validity of the intellectual property right.

Article 11 After the General Administration of Customs has approved the recordal of an intellectual property right for Customs protection, if any change occurs to any of the contents of the written application submitted to Customs in accordance with the requirements of Article 6 of these Rules, the intellectual property right holder shall, within 30 working days as from the date of occurrence of the change, file an application with the General Administration of Customs, with the relevant documents attached, for modification of the recordal.

Article 12 Where, prior to the expiry of its recordal, an intellectual property right is no longer subject to protection by laws and administrative regulations or is assigned, the original intellectual property right holder shall, within 30 working days as from the date of cessation of protection by laws and administrative regulations or the effective date of assignment, file an application with the General Administration of Customs, with the relevant documents attached, for deregistration of the Customs recordal of his/her intellectual property right. Where an intellectual property right holder renounces a recordal still within its term of validity, he/she may apply to the General Administration of Customs for deregistration of the recordal.

If no application is filed to the General Administration of Customs for modification or deregistration of the recordal in accordance with Article 11 of these Rules and the provisions of the preceding paragraph of this Article, and grave consequences have therefore been caused to the legitimate

importation or exportation activities of another party, the General Administration of Customs may deregister the recordal of the relevant intellectual property right on its own initiative or upon the application of any interested party.

Where the General Administration of Customs deregisters a recordal, it shall notify the relevant intellectual property right holder in writing. The recordal of the intellectual property right for Customs protection shall become invalid as from the date of deregistration by the General Administration of Customs.

Article 13 Where the General Administration of Customs revokes the recordal of an intellectual property right for Customs protection in accordance with Article 9 of the Regulations, it shall notify the intellectual property right holder in writing.

Where the General Administration of Customs revokes a recordal, and the intellectual property right holder reapplys, within one year as from the date of revocation of the recordal, for recordal of the same intellectual property right whose original recordal has been revoked, the General Administration of Customs may reject the reapplication.

Chapter III Detention upon Application

Article 14 Where an intellectual property right holder discovers that suspected infringing goods are about to be imported or exported, and requests Customs to detain them, he/she shall, in accordance with the provisions of Article 13 of the Regulations, file a written application with the Customs at the place of entry or exit of the goods. If the relevant intellectual property right is not recorded at the General Administration of Customs, the intellectual property right holder shall, in addition to the application, present the documents and evidence as prescribed in items (a) and (b), paragraph 1, Article 7 of these Rules.

Where an intellectual property right holder requests Customs to detain suspected infringing goods, he/she shall, also submit to Customs evidence sufficient to prove the obvious existence of the fact of infringement. The evidence submitted by the intellectual property right holder shall be able to prove the following facts:

- (a) The goods that he/she requests Customs to detain are about to be imported or exported; and
- (b) The goods has been using a trademark sign infringing his/her exclusive right to use a trademark, or has been infringing his/her works or has been exploiting his/her patent without authorisation.

Article 15 Where an intellectual property right holder requests Customs to detain goods suspected of infringement, he/she shall, within the time limit specified by Customs, provide a guaranty bond equivalent to the value of the goods to Customs.

Article 16 Where an intellectual property right holder files an application that does not correspond with the provisions of Article 14 of these Rules, or he/she fails to post a guaranty bond in accordance with the provisions of Article 15 of these Rules, Customs shall reject the application and notify the intellectual property right holder in writing.

Article 17 Where Customs detains suspected infringing goods, it shall notify the intellectual property right holder in writing of the description, quantity and value of the goods, the name of the consignee or consignor, the date of declaration of import or export, the date of detention by Customs, etc.

Upon the approval of Customs, the intellectual property right holder may check the relevant goods detained by Customs.

Article 18 Where, within 20 working days as from the date of detention of the suspected infringing goods, Customs receives a written notice from a people's court asking it to provide assistance in detaining the relevant goods, Customs shall provide such assistance. If no notice is received from a people's court asking for detention assistance, or the intellectual property right holder asks Customs to release the relevant goods, Customs shall release the goods.

Article 19 Where Customs detains suspected infringing goods, it shall serve the detention warrant of the goods on the consignee or consignor.

Upon the approval of Customs, the consignee or consignor may check the relevant goods detained by Customs.

Article 20 Where the consignee or consignor, in accordance with the provisions of Article 19 of the Regulations, requests Customs to release his/her goods suspected of infringing a patent that have been detained by Customs, he/she shall file a written application with Customs and post a guaranty bond equivalent to the value of the goods.

Where the consignee or consignor requests Customs to release goods suspected of infringing a patent, and the request is in conformity with the provisions of the preceding paragraph, Customs shall release the goods and notify the intellectual property right holder in writing.

Where the intellectual property right holder has brought a lawsuit before a

people's court in respect of the relevant dispute of patent infringement, he/she shall, within 30 working days as from the date of service of the written notification by Customs as specified in the preceding paragraph, present to Customs a photocopy of the case acceptance notice issued by the people's court.

Chapter IV Ex Officio Action

Article 21 If, in exercising Customs control over import and export goods, Customs discovers any import or export goods involving an intellectual property right recorded with the General Administration of Customs, and the use of the intellectual property right by the importer/exporter or by the manufacturer has not been recorded with the General Administration of Customs, it may ask the consignee or consignor to, within the time limit specified by Customs, declare the status of the intellectual property right of the goods and present relevant evidentiary documents.

Where the consignee or consignor fails to declare the status of the intellectual property right of the goods or present relevant evidentiary documents in accordance with the provisions of the preceding paragraph, or Customs has grounds to believe that the goods are suspected of infringing an intellectual property right recorded with the General Administration of Customs, Customs shall suspend the release of the goods and notify the intellectual property right holder in writing.

Article 22 The intellectual property right holder shall, within three working days as from the date of service of the written notification by Customs as specified in Article 21 of these Rules, make a reply in accordance with the following provisions:

(a) Where the intellectual property right holder believes the goods have infringed his/her intellectual property right recorded with the General Administration of Customs and therefore requests Customs to detain the goods, he/she shall file a written application with Customs for detaining the suspected infringing goods, and provide a guaranty bond in accordance with Article 23 or 24 of these Rules; or

(b) Where the intellectual property right holder believes the goods haven't infringed his/her intellectual property right recorded with the General Administration of Customs, or does not request Customs to detain the suspected infringing goods, he/she shall explain the reasons to Customs in writing.

Upon the approval of Customs, the intellectual property right holder may check the relevant goods.

Article 23 Where an intellectual property right holder requests Customs to detain suspected infringing goods in accordance with the provisions of item (a), paragraph 1, Article 22 of these Rules, he/she shall provide a guaranty bond to Customs in accordance with the following provisions:

(a) Where the value of the goods is less than RMB20,000 yuan, a guaranty bond equivalent to the value of the goods shall be provided;

(b) Where the value of the goods is RMB20,000 yuan and above but no more than RMB200,000 yuan, a guaranty bond equivalent to 50% of the value of the goods shall be posted, with a minimum amount no less than RMB20,000 yuan; or

(c) Where the value of the goods is more than RMB200,000 yuan, a guaranty bond of RMB100,000 yuan shall be posted.

Where an intellectual property right holder, in accordance with the provisions of item (a), paragraph 1, Article 22 of these Rules, requests Customs to detain goods suspected of infringing his/her exclusive right to use a trademark, he/she may provide a general guaranty bond with the General Administration of Customs as prescribed in Article 24 of these Rules.

Article 24 A holder of the exclusive right to use a trademark recorded with the General Administration of Customs may, with the approval of the General Administration of Customs, present a letter of guarantee issued by a bank or a non-bank financial institution to the General Administration of Customs in order to provide a general bond for the application for Customs protection of his/her exclusive right to use the trademark.

The amount of the general bond shall be equivalent to the total sum of the warehousing, storage and disposal expenses incurred after the intellectual property right holder applied to Customs for detention of suspected infringing goods in the previous year. Where the intellectual property right holder did not apply to Customs for detention of suspected infringing goods in the previous year, or the warehousing, storage and disposal expenses are less than RMB200,000 yuan, the amount of the general security shall be RMB200,000 yuan.

From the date of approval by the General Administration of Customs of his/her application for using a general bond until December 31 of the same year, if the intellectual property right holder, in accordance with the provisions of Article 16 of the Regulations, requests Customs to detain import or export goods suspected of infringing his/her exclusive right to use a trademark recorded with the General Administration of Customs, he/she does not need to provide additional guaranty bond, unless he/she fails to pay the relevant

charges as prescribed in Article 25 of the Regulations, or fails to assume the liability for damages as prescribed in Article 29 of the Regulations, and the General Administration of Customs has issued a notice to the guarantor for performance of guarantee obligations.

Article 25 Where an intellectual property right holder has filed an application as prescribed in item (a), paragraph 1, Article 22 of these Rules and provided a guaranty bond in accordance with Articles 23 and 24 of these Rules, Customs shall detain the suspected infringing goods and notify the intellectual property right holder in writing. Where the intellectual property right holder fails to file an application or fails to post guaranty bond, Customs shall release the goods.

Article 26 When detaining suspected infringing goods, Customs shall serve the detention warrant of the goods on the consignee or consignor.

Upon the approval of Customs, the consignee or consignor may check the relevant goods detained by Customs.

Article 27 After detaining suspected infringing goods, Customs shall, in accordance with law, conduct investigations on the goods and other relevant matters thereto. The consignee or consignor and the intellectual property right holder shall cooperate in the Customs investigations and faithfully provide relevant information and evidence.

When conducting an investigation on suspected infringing goods, Customs may request the relevant competent authorities for intellectual property right to provide advice.

Where the intellectual property right holder and the consignee or consignor have reached agreement on the suspected infringing goods detained by Customs, and have filed a written application with Customs, with the relevant agreement attached, requesting Customs to lift the detention of the goods, Customs may terminate the investigation unless it believes a crime may have been constituted.

Article 28 Where, after investigation on the detained goods suspected of infringement, Customs cannot determine whether the goods have infringed the relevant intellectual property right, it shall, within 30 working days as from the date of detention of the goods, notify the intellectual property right holder and the consignee or consignor in writing.

Where Customs cannot determine whether the goods have infringed the relevant patent, the consignee or consignor may, after posting a guaranty bond equivalent to the value of the goods, request Customs to release the

goods. Where Customs agrees to release the goods, it shall follow the procedures as prescribed in paragraphs 2 and 3 of Article 20 of these Rules.

Article 29 An intellectual property right holder may, in accordance with the provisions of Article 23 of the Regulations, apply to a people's court seeking for cessation of the infringing act or for preservation of property, if Customs cannot determine whether the relevant goods have infringed his/her intellectual property right.

If, within 50 working days as from the date of detention of the suspected infringing goods, Customs receives a written notice from a people's court requesting assistance in detaining the relevant goods, Customs shall provide such assistance. Where Customs has not received any notice from a people's court requesting assistance in detention, or the intellectual property right holder requests Customs to release the relevant goods, Customs shall release the goods.

Article 30 Where Customs makes a decision to confiscate infringing goods, it shall notify the intellectual property right holder in writing of the following known particulars:

- (a) Description and quantity of the infringing goods;
- (b) Name of the consignee or consignor;
- (c) Date of import or export declaration of the infringing goods, date of detention by Customs and date when Customs' decision of punishment takes effect;
- (d) Place of departure and destination of the infringing goods; and
- (e) Any other information relating to the infringing goods that Customs can provide.

If, in handling an infringement dispute between the interested parties, a people's court or a competent authority for intellectual property right requests assistance from Customs in taking evidence related to the relevant import or export goods, Customs shall provide such assistance.

Article 31 Where Customs discovers that certain inbound or outbound articles carried or mailed by individuals are both suspected of infringing an intellectual property right specified in Article 2 of the Regulations and in excess of the reasonable quantity for personal use, it shall detain the articles unless the passenger, or the sender or recipient of the mail, provides

Customs with a statement of renouncement and obtains approval from Customs.

Intellectual property right holders shall provide assistance to Customs when Customs conducts investigations on infringing articles. Where an inbound or outbound passenger, or a sender or recipient of inbound or outbound mails, believes that the articles detained by Customs haven't infringed the relevant intellectual property right or that the articles are for personal use, he/she may make a written explanation to Customs and provide the relevant evidence.

Article 32 If, after investigation, Customs determines that the import/export goods, or the inbound/outbound articles, have infringed an intellectual property right, the goods or articles shall, as prescribed in paragraph 1 of Article 27 and Article 28 of the Regulations, be confiscated by Customs. Where it is difficult to identify the interested parties, the goods or articles may be expropriated by Customs upon the expiry of a three-month period as from the issuance of an announcement by Customs.

Where the import or export infringement act is suspected of constituting a crime, Customs shall transfer the case to the public security authority.

Chapter V Disposal of Goods and Relevant Expenses

Article 33 The confiscated infringing goods shall be disposed of by Customs in accordance with the following provisions:

(a) Where the relevant goods can be directly used for public welfare undertakings or the intellectual property right holder has the intention of purchasing the goods, they shall be handed over to the relevant public welfare organizations for use in public welfare undertakings or transferred to the intellectual property right holder for a fee;

(b) Where the relevant goods cannot be disposed of in accordance with item (a) but the infringing features can be removed, the goods shall be auctioned in accordance with law after removal of the infringing features. The proceeds from the auction of the goods shall be turned over to the State treasury; or

(c) Where the relevant goods cannot be disposed of in accordance with item (a) or (b), they shall be destroyed.

Before proceeding with the auction of the infringing goods, Customs shall first seek the opinion of the intellectual property right holder. The intellectual property right holder shall provide necessary assistance if infringing goods are to be destroyed by Customs. Where the relevant public welfare organizations use the infringing goods confiscated by Customs in public

welfare undertakings, or the intellectual property right holder, as entrusted by Customs, destroys the infringing goods, Customs shall exercise necessary supervision.

Article 34 Where Customs assists a people's court in detaining suspected infringing goods or releases the detained goods, the intellectual property right holder shall pay the expenses for warehousing, storage, disposal, etc. of the goods incurred during the period of detention by Customs.

Where Customs confiscates infringing goods, the intellectual property right holder shall pay the expenses for warehousing, storage, disposal, etc. of the goods according to the actual period of storage after detention by Customs. However, if Customs fails to complete the disposal of the goods within three months as from the date of service of the decision of confiscation of the infringing goods on the consignee or consignor, and such a failure is not due to the consignee or consignor applying for administrative reconsideration, filing administrative proceedings or other special reasons relating to the disposal of the goods, the intellectual property right holder does not need to pay the relevant expenses incurred after the three months.

Where Customs auctions the infringing goods in accordance with item (b), paragraph 1, Article 33 of these Rules, the outlay of auction expenses shall be handled in accordance with relevant regulations.

Article 35 Where the intellectual property right holder fails to pay the relevant expenses as prescribed in Article 34 of these Rules, Customs may deduct the relevant expenses from the guaranty bond provided by the intellectual property right holder or demand that the guarantor perform its guarantee obligations.

In confiscating infringing goods, Customs shall refund the guaranty bond to the intellectual property right holder or lift the guarantor's guarantee liabilities after the disposal of the goods has been completed and the relevant expenses have been settled.

Where Customs assists a people's court in detaining suspected infringing goods, or releases detained goods in accordance with items (a), (b) and (d), Article 24 of the Regulations, the consignee or consignor may apply to the people's court for preservation of property against the guaranty bond provided by the intellectual property right holder. If, within 20 working days as from the date of detention by Customs of the suspected infringing goods upon the request of the people's court or from the date of release of the goods, Customs has not received any notice from the people's court for assistance in enforcing measures of property preservation against the guaranty bond provided by the intellectual property right holder, it shall refund the security to the intellectual property right holder or lift the guarantor's

guarantee liabilities. If it receives a notice from the people's court for assistance in enforcement, it shall provide such assistance.

Article 36 After Customs has, in accordance with Article 19 of the Regulations, released the goods it detained due to suspicion of infringement of a patent, if the intellectual property right holder, in accordance with paragraph 3 of Article 20 of these Rules, presents to Customs a photocopy of a case acceptance notice from a people's court, Customs shall dispose of the guaranty bond posted by the consignee or consignor in accordance with the relevant verdict of the people's court. Where the intellectual property right holder fails to present the photocopy of the case acceptance notice from the people's court, Customs shall refund the guaranty bond to the consignee or consignor. The consignee or consignor may apply to the people's court for preservation of property against the guaranty bond posted to Customs by the intellectual property right holder. If Customs has not received any notice from the people's court for assistance in enforcing measures of property preservation against the guaranty bond posted by the intellectual property right holder, it shall, after 20 working days as from the date of disposal of the guaranty bond posted by the consignee or consignor, refund the guaranty bond to the intellectual property right holder or lift the guarantor's guarantee liabilities. If it receives a notice from the people's court for assistance in enforcement, it shall provide such assistance.

Chapter VI Supplementary Provisions

Article 37 Customs protection of the Olympic symbols and the World Expo signs shall be handled in reference to these Rules.

Article 38 In these Rules, the term "guaranty bond" refers to a cash deposit as a guarantee or a letter of guarantee provided by a bank or a non-bank financial institution.

Article 39 The value of goods in these Rules shall be assessed and determined by Customs on the basis of the transaction value of the goods. Where the transaction value cannot be determined, the value of the goods shall be assessed by Customs in accordance with law.

Article 40 The written notifications by Customs specified in Articles 17, 21 and 28 of these Rules may be served directly, or be posted, faxed or served in any other appropriate way.

Article 41 The time limits as prescribed in paragraph 3 of Article 20 and paragraph 1 of Article 22 of these Rules shall be calculated from the day following the date of service of the written notification by Customs. The deadline of the time limits shall be determined in accordance with the

following provisions:

(a) Where an intellectual property right holder submits the relevant documents or posts the guaranty bond to Customs through a postal office or a bank, the documents/guaranty bond shall be submitted/posted by 24:00 of the due date; or

(b) Where an intellectual property right holder submits the relevant documents or posts the guaranty bond vis-à-vis, the documents/guaranty bond shall be submitted/posted by the normal office hours of Customs of the due date.

Article 42 Where an intellectual property right holder or a consignee or consignor presents a photocopy of a relevant document to Customs pursuant to these Rules, he/she shall verify the photocopy against the original. Once the photocopy has been verified as being in order, the words "TRUE COPY" shall be noted on the photocopy, which shall then be signed and/or sealed in confirmation.

Article 43 These Rules shall go into effect as of July 1, 2009. Rules of the General Administration of Customs of the People's Republic of China for Implementation of the Regulations of the People's Republic of China on Customs Protection of Intellectual Property Rights promulgated by Decree No. 114 of the General Administration of Customs on May 25, 2004 shall be abolished simultaneously.

Criminal

Interpretation I of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Concrete Application of Laws in Handling Intellectual Property Criminal Cases (2004)

Fa Shi [2004] No. 19

(The Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Concrete Application of Laws in Handling Intellectual Property Criminal Cases, which was adopted at the 1331st meeting of the Judicial Committee of the Supreme People's Court on November 2, 2004 and the 28th meeting of the Tenth Procuratorial Committee of the Supreme People's Procuratorate on November 11, 2004, is hereby issued, and shall become effective as of December 22, 2004.)

To punish intellectual property criminal offences in accordance with law and to maintain the order of the socialist market economy, this interpretation aims to interpret, in accordance with the provisions of the Criminal Law of the People's Republic of China, some concrete issues regarding law application in handling intellectual property criminal offence as follows("the Criminal Law"):

Article 1 Using an identical trademark on the same merchandise without permission of its registered owner in any of the following circumstances falls under the definition of "the circumstances are serious" as stipulated in Article 213 of the Criminal Law and shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined for committing the crime of forging registered trademarks:

- (1) the amount of illegal business turnover being more than RMB 50,000 or that of illegal gains being more than RMB 30,000;
- (2) forging more than two registered trademarks, the amount of illegal business turnover being more than RMB 30,000 or that of illegal gains being more than RMB 20,000;
- (3) other circumstances of a serious nature.

Whoever having any of the following acts that falls under the definition of "the circumstances are especially serious" as stipulated in Article 213 of the Criminal Law shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined for

committing the crime of forging registered trademarks:

- (1) the amount of illegal business turnover being more than RMB 250,000 or that of illegal gains being more than RMB 150,000;
- (2) forging more than two registered trademarks, the amount of illegal business turnover being more than RMB 150,000 or that of illegal gains being more than RMB 100,000;
- (3) other circumstances of an especially serious nature.

Article 2 Whoever knowingly sells commodities bearing counterfeited registered trademarks, if the amount of sales is more than RMB 50,000, and thus falls under the definition of "the amount of sales is relatively large" as stipulated in Article 214 of the Criminal Law shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined for committing the crime of selling commodities bearing counterfeited registered trademarks.

Whoever selling such commodities of more than RMB 250,000 in value falls under the definition of "the amount of sales is huge" as stipulated in Article 214 of the Criminal Law and shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined for the crime of selling commodities bearing counterfeited registered trademarks.

Article 3 Whoever forges or makes representations of another person's registered trademarks without authorization of the person or sells such representations in any of the following circumstances and thus falls under the definition of "the circumstances are serious" as stipulated in Article 215 of the Criminal Law shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention or public surveillance and shall also, or shall only, be fined for committing the crime of illegally making registered trademarks or selling illegally-made registered trademarks:

- (1) the amount of the representations of other person's registered trademarks forged or made without authorization or that of the sold representations of other person's registered trademarks forged or made without authorization being more than 20,000 copies, or the amount of illegal business turnover being more than RMB 50,000, or the amount of illegal gains being more than RMB 30,000;
- (2) the amount of the representations of more than two of other person's registered trademarks forged or made without authorization or that of the sold representations of more than two of other person's registered trademarks

forged or made without authorization being more than 10,000 copies, or the amount of illegal business turnover being more than RMB 30,000, or the amount of illegal gains being more than RMB 20,000;

(3) other circumstances of a serious nature.

Whoever having any of the following acts that falls under the definition of "circumstances of an especially serious nature" as stipulated in Article 215 of the Criminal Law shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined for committing the crime of illegally making registered trademarks or selling illegally-made registered trademarks:

(1) the amount of the representations of other person's registered trademarks forged or made without authorization or that of the sold representations of other person's registered trademarks forged or made without authorization being more than 100,000 copies, or the amount of illegal business turnover being more than RMB 250,000, or the amount of illegal gains being more than RMB 150,000;

(2) the amount of the representations of more than two of other person's registered trademarks forged or made without authorization or that of the sold representations of more than two of other person's registered trademarks forged or made without authorization being more than 50,000 copies, or the amount of illegal business turnover being more than RMB 150,000, or the amount of illegal gains being more than RMB 100,000;

(3) other circumstances of an especially serious nature.

Article 4 Whoever counterfeits the patent of another person in any of the following circumstances and thus falls under the definition of "the circumstances are serious" as stipulated in Article 216 of the Criminal Law shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined for committing the crime of counterfeiting the patent of another person:

(1) the amount of illegal business turnover being more than RMB 200,000 or that of illegal gains being more than RMB 100,000;

(2) causing direct economic loss of more than RMB 500,000 to the owner of patent;

(3) counterfeiting more than two patents, the amount of illegal business turnover being more than RMB 100,000 or that of illegal gains being more than RMB 50,000;

(4) other circumstances of a serious nature.

Article 5 Whoever, for the purpose of making profits, commits any of the acts of copyright infringement as stipulated in Article 217 of the Criminal Law, if the amount of illegal gains is more than RMB 30,000, and thus falls under the definition of "the amount of illegal gains is relatively large"; or whoever has any of the following acts and thus falls under the definition of "there are other serious circumstances" shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined for committing the crime of infringing on copyright:

- (1) the amount of illegal business turnover being more than RMB 50,000;
- (2) reproducing and distributing more than 1,000 illegal copies of a written work, musical work, motion picture, television program or other visual works, computer software or other works without permission of the copyright owner;
- (3) other circumstances of a serious nature.

Whoever, for the purpose of making profits, commits any of the acts of copyright infringement as stipulated in Article 217 of the Criminal Law, if the amount of illegal gains is more than RMB 150,000, and thus falls under the definition of "the amount of illegal gains is huge"; or whoever has any of the following acts and thus falls under the definition of "there are other especially serious circumstances" shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined for committing the crime of infringing on copyright:

- (1) the amount of illegal business turnover being more than RMB 250,000;
- (2) reproducing and distributing more than 5,000 illegal copies of a written work, musical work, motion picture, television program or other visual works, computer software or other works without permission of the copyright owner;
- (3) other circumstances of an especially serious nature.

Article 6 Whoever, for the purpose of making profits, commits any of the acts as stipulated in Article 218 of the Criminal Law, if the amount of illegal gains is more than RMB 100,000, and thus falls under the definition of "the amount of illegal gains is huge" shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined for committing the crime of selling works reproduced by infringing on other's copyright.

Article 7 Whoever commits any of the acts as stipulated in Article 219 of the Criminal Law to cause losses of more than RMB 500,000 to the obligee of

trade secrets and thus falls under the definition of "causing heavy losses to the obligee of trade secrets" shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined for committing the crime of infringing on trade secrets.

Whoever causes losses of more than RMB 2.5 million to the obligee of trade secrets and thus falls under the definition of "the consequences are especially serious" as stipulated in Article 219 of the Criminal Law shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined for committing the crime of infringing on trade secrets.

Article 8 "Identical trademarks" as stipulated in Article 213 of the Criminal Law refers to the trademarks either identical to the registered trademarks being infringed on, or barely exhibiting any visual difference from the trademarks being infringed on and thus being misleading to the public.

"Use" as stipulated in Article 213 of the Criminal Law refers to such acts as applying registered trademarks or counterfeited registered trademarks to commodities, commodity packing or containers, commodity user guides or commodity transaction documents, or using registered trademarks or counterfeited registered trademarks for advertisement, promotion, exhibitions and other business activities.

Article 9 "Amount of sales" as stipulated in Article 214 of the Criminal Law refers to all the illegal incomes gained or ought to be gained by selling commodities bearing counterfeited registered trademarks.

Any of the following circumstances shall be regarded as falling under the definition of "knowingly" as stipulated in Article 214 of the Criminal Law:

- (1) Knowing that the registered trademarks on the commodities that one sells have been altered, replaced or covered;
- (2) Selling the same commodities for which one has already been imposed administrative penalty or has borne civil responsibilities for selling commodities bearing counterfeited registered trademarks;
- (3) Counterfeiting or altering the authorization documents of the registrant or knowing such documents have been counterfeited or altered;
- (4) Other circumstances in which the fact that the registered trademarks borne by the commodities are counterfeited is known.

Article 10 Any of the following acts falls under the definition of "counterfeiting patent of another person" as stipulated in Article 216 of the Criminal Law:

- (1) Citing patent number on the commodities or the packing of the commodities one produces or sells without permission of the owner of the patent;
- (2) Citing patent number in advertisement or other promotion materials without permission of the owner of the patent so as to mislead people to construe that the involved technology is the patented technology of another person;
- (3) Citing patent number in contract without permission of the owner of the patent so as to mislead people to construe that the involved technology in the contract is the patented technology of another person;
- (4) Counterfeiting or altering the patent certificates, patent documents or patent application documents of another person.

Article 11 The circumstances of charging directly or indirectly by such means as publishing paid advertisement fall under the definition of "for the purpose of making profits" as stipulated in Article 217 of the Criminal Law.

"Without permission of the copyright owner" as stipulated in Article 217 of the Criminal Law refers to the circumstances where authorization of the copyright owner is not obtained, the authorization documents of the copyright owner are forged or altered or the authorization scope is exceeded.

Disseminating a written work, musical work, motion picture, television program or other visual works, computer software or other works to the public by information network falls under the definition of "reproducing and distributing" as stipulated in Article 217 of the Criminal Law.

Article 12 "Illegal business turnover" as stipulated in the Interpretation refers to the value of the products produced, stored, transported and sold by the offender in the course of implementing intellectual property infringement activities. Value of the infringing products being sold shall be computed according to the prices at which such products are actually sold. Value of the infringing products being produced, stored, transported, and those not yet being sold shall be computed according to the labeled prices or the actual average sales prices of the infringing products verified through investigation. Value of the infringing products without labeled prices or whose actual prices are impossible to be ascertained shall be computed according the middle market prices of such products.

Values of illegal business turnover, illegal gains and amount of sales shall be computed cumulatively in cases of repeatedly infringing on intellectual property where such acts have not yet been imposed administrative penalty or have not so far initiated criminal procedures.

"Copies" as stipulated in Article 3 of the Interpretation refers to one piece of representation of the complete logo of the trademark.

Article 13 Committing the crime of counterfeiting registered trademarks as stipulated in Article 213 of the Criminal Law while selling commodities bearing such counterfeited registered trademarks and thus constituting a crime shall be convicted and punished in accordance with provisions of Article 213 of the Criminal Law for committing the crime of counterfeiting registered trademarks.

To whoever that commits the crime of counterfeiting registered trademarks as stipulated in Article 213 of the Criminal Law while knowingly selling commodities bearing counterfeiting registered trademarks and thus constituting a crime, a combined punishment for several crimes shall be applied.

Article 14 Committing the crime of infringing on copyright as stipulated in Article 217 of the Criminal Law while selling works reproduced by infringing on copyright and thus constituting a crime shall be convicted and punished in accordance with provisions of Article 217 of the Criminal Law for committing the crime of infringing on copyright.

To whoever that commits the crime of infringing on copyright as stipulated in Article 217 of the Criminal Law while knowingly selling works reproduced by infringing on other's copyright and thus constituting a crime, a combined punishment for several crimes shall be applied.

Article 15 Where an organisation commits any of the crimes as stipulated in the Articles 213 through 219 of the Criminal Law, it shall be convicted and sentenced according to the criteria by tripling those for convicting and sentencing the individuals committing same crimes according to the Interpretation.

Article 16 Whoever knowingly provides loans, funds, bank accounts, invoices, certificates, licenses, production and operation premises, as well as facilitates or provides assistance in transportation, storage or import-export agency services shall be deemed an accomplice in the crime of infringing on intellectual property.

Article 17 Should discrepancies arise between the Interpretation and other

legal interpretations promulgated earlier regarding intellectual property crimes, the previously promulgated interpretations shall not be applied after the Interpretation goes into effect.

Interpretation II of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Concrete Application of Laws in Handling Intellectual Property Criminal Cases (2007)

Fa Shi [2007] No. 6

(The Interpretation II of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Concrete Application of Laws in Handling Intellectual Property Criminal Cases, which was adopted at the 1422nd meeting of the Judicial Committee of the Supreme People's Court and the 75th meeting of the Tenth Procuratorial Committee of the Supreme People's Procuratorate on April 4, 2007, is hereby issued, and shall become effective as of April 5, 2007.)

In order to maintain the order of the socialist market economy and punish the intellectual property criminal offences according to law, in accordance with the relevant provisions of the Criminal Law and Criminal Procedural Law, this interpretation aims to interpret some concrete issues concerning the application of law in handling intellectual property criminal offences as follows:

Article 1 The “other serious circumstance” as stipulated in Article 217 of the Criminal Law shall refer to any for-profit duplication and/or distribution, without permission from the copyright holder, of the literal, musical, cinematic, television or video works, computer software or other works of the copyright holder with at least 500 copies of duplicates in total; and the “other especially serious circumstance” as stipulated in Article 217 of the Criminal Law shall refer to any for-profit duplication and/or distribution of the above with at least 2,500 copies of duplicates in total.

Article 2 The “duplication and/or distribution” in a crime of infringement of copyright in Article 217 of the Criminal Law shall refer to duplication or distribution or both duplication and distribution.

The “distribution” in Article 217 of the Criminal Law shall include the marketing of infringing products by the holder of infringing products in such a manner as advertising or subscription.

The crime of copyright infringement and the penalties thereof shall apply to the illegal publication, duplication or distribution of other's works, which infringes the copyright and constitutes a crime.

Article 3 Probation shall apply according to law, if the conditions for

probation in the Criminal Law are satisfied in a crime of infringement of intellectual property rights. However, probation shall usually not apply to:

- (a) A perpetrator that infringes intellectual property rights and thus constitute the crime of infringement of intellectual property rights again after being imposed a criminal or administrative penalty for its prior infringement of intellectual property rights;
- (b) A perpetrator that shows no remorse for the crime committed;
- (c) A perpetrator refusing to surrender its illegal proceeds; or
- (d) Any of other circumstances where probation shall not apply.

Article 4 For a crime of infringement of intellectual property rights, the people's court shall impose a fine according to law by taking into consideration such comprehensive circumstances as the illegal proceeds of crime, amount of illegal turnover, damages to the right holder and degree of social danger. The amount of the fine shall usually be the amount of illegal income up to five times the amount of illegal proceeds, or 50% of the amount of illegal turnover up to the amount of illegal turnover.

Article 5 The people's court shall accept according to law a criminal case of infringement of intellectual property rights where the victim has evidence to prove the same filed directly with the people's court; a criminal case of infringement of intellectual property rights where the social order and national interests have been seriously compromised shall be prosecuted by the people's procuratorate according to law.

Article 6 The corresponding standards for conviction and sentencing of individuals set forth in the *Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Concrete Application of Laws in Handling Intellectual Property Criminal Cases* and this interpretation shall apply to the conviction and sentencing of those organizations guilty of the crimes as set forth in Articles 213-219 of the Criminal Law.

Article 7 This interpretation shall prevail, in the event of any discrepancy arising between this interpretation and any interpretation previously issued.

Procedural

Decision of the Standing Committee of the National People's Congress on Establishing Specialized IP Courts in Beijing, Shanghai and Guangzhou (2014)

(Adopted at the 10th Session of the Standing Committee of the Twelfth National People's Congress on August 31, 2014)

The following decision is hereby promulgated in accordance with the provisions of the Constitution and the Organic Law of the People's Courts, with a view to facilitating the implementation of the national strategy of innovation-driven development, further strengthening the judicial protection of intellectual property rights, as well as protecting the legitimate rights and interests of the right owners and public interests.

1. Specialised intellectual property courts will be established in Beijing, Shanghai and Guangzhou.

The internal structure and organization of intellectual property courts will be determined by the Supreme People's Court, according to the types and amounts of intellectual property cases.

2. Intellectual property courts have jurisdiction over highly technical first instance civil and administrative matters including those involving patents, new plant varieties, integrated circuit layout designs, and technical secrets.

The Beijing Intellectual Property Court will hear first instance administrative proceedings about objections to the rulings or decisions made by the administrative departments under the State Council concerning the granting and affirmation of intellectual property rights.

Intellectual property courts shall have cross-territorial jurisdiction over the cases as prescribed by Article 1. Within 3 years from its establishment, intellectual property court shall have cross-regional jurisdiction throughout the province or municipality directly under the central government where the court is located.

3. The first instance intellectual property civil and administrative judgment or verdict concerning copyright and trademark rendered by a basic-level people's court of the city where an intellectual property court is located shall be appealed before the intellectual property court.
4. The first instance judgment or verdict rendered by an intellectual property court shall be appealed before the High People's Court of the

city where that intellectual property court is located.

5. The adjudication practice of intellectual property courts will be supervised by the Supreme People's Court and the High People's Courts of the cities where the intellectual property courts are located. Intellectual property courts will be supervised, according to law, by the People's Procuratorate.
6. The President of an intellectual property court shall be nominated by the Director of the Standing Committee of the local People's Congress of the city where the intellectual property court is located and subject to the appointment or dismissal of the aforesaid Standing Committee of the municipal People's Congress.

The Vice President, Presiding Judges of tribunals and adjudicating judges, as well as members of the judicial committee of an intellectual property court shall be nominated by the President and subject to appointment or dismissal of the Standing Committee of the local People's Congress of the city where the intellectual property court is located.

Intellectual property courts shall answer for and report to the Standing Committee of the local People's Congress of the cities where the intellectual property courts are located.

7. The Supreme People's is scheduled to report to the Standing Committee of the National People's Congress after three years on the implementation of the Decision.
8. The Decision shall enter into force as of the date of promulgation.

Provisions of the Supreme People's Court on the Jurisdiction of the Intellectual Property Courts of Beijing, Shanghai and Guangzhou over Cases (2014)

Fa Shi [2014] No.12

(The Provisions of the Supreme People's Court on the Jurisdiction of the Intellectual Property Courts of Beijing, Shanghai and Guangzhou over Cases, which have been adopted at the 1628th meeting of the Judicial Committee of the Supreme People's Court on October 27, 2014, are hereby promulgated for implementation as of November 3, 2014.)

For the purpose of further specifying the jurisdiction of the intellectual property courts of Beijing, Shanghai and Guangzhou over cases, the Provisions of the Supreme People's Court on the Jurisdiction of the Intellectual Property Courts of Beijing, Shanghai and Guangzhou over Cases are formulated in accordance with the Civil Procedure Law of the People's Republic of China, the Law of the People's Republic of China on Administrative Proceedings as well as the Decision of the Standing Committee of the National People's Congress on the Establishment of Intellectual Property Courts in Beijing, Shanghai and Guangzhou.

Article 1 Intellectual property courts have jurisdiction as courts of first instance over the following cases within their municipal jurisdictions:

1. civil and administrative cases involving patents, new varieties of plants, layout design of integrated circuits, technical secrets and computer software;
2. administrative cases about legal proceedings against administrative actions involving copyrights, trademarks, unfair competition and so on of departments under the State Council or of local people's governments at or above county level; and
3. civil cases involving the recognition of well-known trademarks.

Article 2 Guangzhou Intellectual Property Court shall practice cross-regional jurisdiction over cases in Guangdong Province specified by Items 1 and 3 of Article 1 in these Provisions.

Article 3 Intermediate people's courts in Beijing, Shanghai and Guangzhou will no longer accept civil and administrative cases concerning intellectual property rights.

Other intermediate people's courts in Guangdong Province will no longer

accept the cases specified by Items 1 and 3 of Article 1 in these Provisions.

Basic-level people's courts in Beijing, Shanghai and Guangdong Province will no longer accept the cases specified by Items 1 and 3 of Article 1 in these Provisions.

Article 4 If the subject matter of a case includes both the matters specified by Items 1 and 3 of Article 1 in these Provisions and other matters, the jurisdiction over the case shall be determined according to Articles 1 and 2 in these Provisions.

Article 5 The following administrative cases of first instance shall fall under the jurisdiction of Beijing Intellectual Property Court:

1. any case about objection to the ruling or decision made by a department under the State Council on granting and affirmation of intellectual property rights relating to patents, trademarks, new varieties of plants, layout design of integrated circuits and so on;
2. any case about objection to the decision made by a department under the State Council on a compulsory license relating to patents, new varieties of plants and layout design of integrated circuits and to the ruling made by such department on royalties or remunerations pertaining to such compulsory license; and
3. any case about objection to any other administrative action of a department under the State Council involving granting and affirmation of intellectual property rights.

Article 6 A case of appeal instituted by a party concerned against the civil and administrative judgment and verdict of first instance concerning copyright, trademark, technology contract, unfair competition, and other intellectual property rights rendered by a basic-level people's court in the city where the corresponding intellectual property court is located shall be heard by the intellectual property court.

Article 7 A case of appeal instituted by a party concerned against the judgment and verdict of first instance made by an intellectual property court and a case of lawful application for reconsideration by the court at the next higher level shall be heard by the intellectual property tribunal of the higher people's court at the place where the intellectual property court is located.

Article 8 Any case as specified in Item 1 or 3 of Article 1 in these Provisions, which has been accepted by a basic-level people's court in the province (or municipality directly under the Central Government) of an intellectual property

court before the establishment thereof but has not yet been concluded, shall still be heard by the said basic-level people's court.

Any case as specified in Item 1 or 3 of Article 1 in these Provisions, which has been accepted by any intermediate people's court in Guangdong Province other than the Intermediate People's Court of Guangzhou before the establishment of the Guangzhou Intellectual Property Court but has not yet been concluded, shall still be heard by the said intermediate people's court.

Decision on Several Issues Concerning the Litigation Procedures of Patent and Other Intellectual Property Cases (2018)

(Adopted at the sixth session of the Standing Committee of the 13th National People's Congress on October 26, 2018)

The following decision is hereby promulgated with a view to unifying the standard for adjudicating intellectual property cases, further strengthening the judicial protection of intellectual property rights, improving the legal environment for technological innovation and facilitating the implementation of the national strategy of innovation-driven development:

1. The Supreme People's Court has jurisdiction over appeals about objection to the first-instance judgments or verdicts of highly technical civil intellectual property cases, including those involving invention patents, utility models, new plant varieties, integrated circuit layout designs, technical secrets, computer software, and monopoly;
2. The Supreme People's Court has jurisdiction over appeals about objection to the first-instance judgments or verdicts of highly technical administrative intellectual property cases, including those involving patents, new plant varieties, integrated circuit layout designs, technical secrets, computer software, and monopoly;
3. The Supreme People's Court jurisdiction over retrial or prosecutorial protest filed against a first-instance judgment, verdict or mediation agreement that has come into effect, provided that the procedure for judicial supervision is applicable. The Supreme People's Court may also designate a lower people's court as the retrial court for such case.
4. The Supreme People's is scheduled to report to the Standing Committee of the National People's Congress after three years on the implementation of the Decision.
5. The Decision shall enter into force as of January 1, 2019.

Provisions of the Supreme People's Court on Several Issues Concerning the Intellectual Property Court (2018)

Fa Shi [2018] No. 22

(The "Provisions of the Supreme People's Court on Several Issues Concerning the Intellectual Property Court" has been adopted at the 1756th meeting of the Judicial Committee of the Supreme People's Court on December 3, 2018. It is hereby promulgated and shall enter into force as of January 1, 2019.)

With a view to further unify adjudicating criteria of intellectual property cases, promote fair protection of the legitimate rights and interests of various market players, ramp up judicial protection of intellectual property rights, improve the rule of law for technology innovation and expedite the execution of innovation-driven development strategy, the provisions concerning some matters of the intellectual property court of the Supreme People's Court are issued in accordance with the "Law of the People's Republic of China on the Organization of the People's Courts", the "Civil Procedure Law of the People's Republic of China", the "Administrative Procedure Law of the People's Republic of China", the "Decision of the National People's Congress on Several Issues Concerning the Litigation Procedures of Patent and Other Intellectual Property Cases" and in combination with the judicial practice.

Article 1 The Intellectual Property Court is inaugurated by the Supreme People's Court to adjudicate those highly technical intellectual property appeals such as patent appeal cases.

Situated in Beijing, the Intellectual Property Court is a permanent judicial organ of the Supreme People's Court.

The judgments, verdicts, mediation decisions or decisions rendered by the Intellectual Property Court are deemed to be rendered by the Supreme People's Court.

Article 2 The Intellectual Property Court has jurisdiction over the following cases:

- 1) Appeal filed against the first-instance judgments or verdicts of civil intellectual property cases, including those involving invention patents, utility models, new plant varieties, integrated circuit layout designs, technical know-how, computer software and monopoly, rendered by the high people's courts, intellectual property courts or intermediate people's courts;
- 2) Appeal filed against the first-instance judgments or verdicts of administrative intellectual property cases, including those involving

invention patents, utility models, design patents, new plant varieties and integrated circuit layout designs, rendered by the Beijing Intellectual Property Court;

- 3) Appeal filed against the first-instance judgments or verdicts of intellectual property cases pertaining to administrative penalty decisions involving invention patents, utility models, design patents, new plant varieties, integrated circuit layout designs, technical know-how, computer software and monopoly, which are rendered by the high people's courts, intellectual property courts or intermediate people's courts;
- 4) First-instance civil or administrative intellectual property cases nationwide mentioned under sub-articles 1), 2) and 3) of this article that are either high-profile or complex;
- 5) Retrial request or prosecutorial protest filed against first-instance judgments, verdicts or mediation decisions mentioned under sub-articles 1), 2) and 3) of this article that have become effective, provided that the procedure for judicial supervision is applicable;
- 6) Cases involving jurisdictional dispute, application for reconsideration over fines or decision of detention, or application for extension of trial time limit, etc. of first instance proceeding as mentioned under sub-articles 1), 2) and 3) of this article and
- 7) Other cases that the Supreme People's Court deems fit to be adjudicated by the Intellectual Property Court.

Article 3 The first-instance courts in cases as mentioned under sub-articles 1), 2) and 3) of Article 2 of the Provisions shall transfer the case file, both in hard copy and electronically, to the Intellectual Property Court, as required, in a timely manner.

Article 4 With the consent of the litigating parties, the Intellectual Property Court may serve the court documents, evidentiary materials and judgments via e-litigation platform, China Judicial Process Information Online, facsimile, email or resort to other electronic serving means of its choice.

Article 5 The Intellectual Property Court may conduct evidence exchange or convene pretrial conference via e-litigation platform or video conference.

Article 6 The Intellectual Property Court, according to the circumstances of a case, may have a judges panel adjudicate such case on the scene or at the place where the trial court is located.

Article 7 The Intellectual Property Court shall adopt preservation measures in accordance with the provisions of execution procedure where applicable.

Article 8 The Intellectual Property Court shall make public the filing information, members of the collegiate bench, trial procedure and judgments of its cases to the litigating parties and the public. Such information shall be simultaneously

accessible in the e-litigation platform and China Judicial Process Information Online.

Article 9 The judges council of the Intellectual Property Court, composed of the president, vice president and several senior judges, shall discuss high-profile, controversial or complex cases.

Article 10 The Intellectual Property Court shall endeavour to conduct trial research and establish adjudicating criteria and trial rules so as to guide the judicial practice of the lower people's courts.

Article 11 Where a provincial People's Procuratorate files a prosecutorial protest before a High People's Court against a first-instance judgment, verdict or mediation decision in cases mentioned under sub-articles 1), 2) and 3) of Article 2 of the Provisions that were rendered by Intellectual Property Courts or Intermediate People's Courts and have become effective, the High People's Court shall inform the Procuratorate that such protest should be filed by the Supreme People's Procuratorate, with the Supreme People's Court, and that the case falls under the jurisdiction of the Intellectual Property Court.

Article 12 Where appeal or reconsideration is filed by a litigating party against a first-instance judgment, verdict or mediation decision as in a case mentioned under sub-articles 1), 2) and 3) of Article 2 of the Provisions, that was rendered before January 1, 2019, the case shall fall under the jurisdiction of the Higher People's Court above the trial court.

Article 13 Where a retrial request or prosecutorial protest is filed by a litigating party against a first-instance judgment, verdict or mediation decision in a case mentioned under sub-articles 1), 2) and 3) of Article 2 of the Provisions, that was rendered and had become effective before January 1, 2019, the "Civil Procedure Law of the People's Republic of China" and the "Administrative Procedure Law of the People's Republic of China" shall apply.

Article 14 The basic level people's courts that had been authorized, prior to the entry-into-force of the Provisions, to adjudicate first instance civil and administrative cases involving patents, technical know-how, computer software and monopoly, shall cease to accept such cases.

Where an appeal is filed in a case mentioned in the preceding paragraph is still pending on January 1, 2019, such appeal shall fall under the jurisdiction of the Higher People's Court above the trial court.

Article 15 The Provisions shall enter into force as of January 1, 2019. In case of any discrepancies between previous Interpretation of the Supreme People's Court and the Provisions, the Provisions shall prevail.

PART II – CASES

Note:

Part II is a collection of some recent exemplary trademark, unfair competition and patent cases. Most of the cases are foreign-related, though exception has been made to include a few that are not foreign-related, yet of case law significance.

The cases are organised in three sections of "Trademark", "Anti-Unfair Competition", and "Patent". Under each section, there are subsections named by means of the abbreviation of the laws, eg. TML (Trademark Law), AUCL (Anti-Unfair Competition Law) and PTL (Patent Law) and the Article No. concerned.

Each case is numbered by certain rules. Take the case "Wang Suiyong v ELLASSAY Company et al." for example:

**ABF, ELLASSAY-20140814/A20170306-82/B2014-20/F2014-22
(Trademark acquired in bad faith cannot be enforced against legitimate use)**

Capital Letters **A, B, C, D, F, S and W** are used to indicate the **source of the cases**. Cases categorised as "A" are those selected from the **SPC's Guiding Cases**, "B" from the **SPC Annual Reports on IP Cases**, "C" from the **SPC Gazettes**, "D" from the **SPC's TOP 10 IP cases**, and "F" from its 50 Typical IP cases. "S" means these cases are selected by the editor based on their significance. "W" means Wanhuida cases where the firm represents either party of the dispute.

In case one specific matter is simultaneously included by more than one source, it will be categorized as a combination of the letters concerned. The letter will then be followed by the **keywords** of the case, **date of the final judgment**, and the **date of inclusion in the relevant sources**.

Therefore, this particular case "Wang Suiyong v ELLASSAY Company et al." has been included in the SPC's Guiding Cases, the SPC Annual Reports and the SPC's 50 Typical IP cases. The final judgment was rendered on August 14, 2014. It was released by the SPC on March 6, 2017 as a guiding case No. 82. It was also numbered 20 in the **SPC Annual Reports 2014** and 22 in the **50 Typical IP cases 2014** selected by the SPC.

Basic case information, Synopsis (keyword summary) and an Excerpt of the Ruling will be offered in each case for the readers' quick grasp of the substance.

The Excerpt of the Ruling offers a word for word translation of some selected text of the original judgment, with the "[No.]" referring to the sequential order of the paragraph in the court reasoning.

Although every effort has been made to verify the accuracy of items in the handbook, readers are urged to check independently on matters of specific concern or interest.

TRADEMARK

TML 7

BD, UL-20181228/B2018-20/D2018-02 (Trademark acquired in bad faith cannot be enforced and protected by law)

- Compass Exhibition Service Company et al. v UNIQLO et al.
- Retrial, SPC, (2018) Zui Gao Fa Min Zai No. 396
- Judges: Wang Chuang, Wang Yanfang, Du WeiKe

Synopsis:

Compass Exhibition Service Company and Zhongwei Company jointly own the “UL” device trademark in Class 25 – infringement lawsuits are filed against UNIQLO and UNIQLO Yuexing Shop before the Shanghai Second Intermediate Court – similar lawsuits targeting UNIQLO and its local stores were filed in many other cities of China – the first instance court found trademark infringement – no damages granted – the Court of Appeal affirmed the 1st instance judgment – After the 2nd instance, the cited trademark was invalidated on the ground that the registration was obtained by other unfair means - no intention of genuine use – the plaintiffs only used the Cited Trademark in order to claim damages – the Retrial Court repealed the 1st and 2nd instance judgments – bad faith of the Plaintiffs – violation of the principle of good faith – the act of abusing the judicial resource for unjustifiable interests shall not be supported

Excerpt of the ruling:

[5] ...Compass Exhibition Service Company and Zhongwei Company, upon obtaining the trademark registration by unfair means, targeted UNIQLO and intended to assign the trademark at an exorbitant price. Failing to sell the trademark to UNIQLO, they filed a series of trademark infringement lawsuits nationwide against UNIQLO, Fast Retailing (China) Company (outsider of the case) and the shops thereof based on almost identical facts.....demanding cessation of “infringement” and negotiation for damages. The plaintiffs are clearly acting in bad faith. Their acts are in violation of the Principle of Good Faith. The Court will not support the act of abusing judicial resource by exploiting the trademark right acquired in bad faith, for unjustifiable interests...

**ABF, ELLASSAY-20140814/A20170306-82/B2014-20/F2014-22
(Trademark acquired in bad faith cannot be enforced against
legitimate use)**

- Wang Suiyong v ELLASSAY Company et al.
- Retrial, SPC, (2014) Min Ti Zi No. 24
- Judges: Wang Yanfang, Zhu Li, Tong Shu

Synopsis:

Wang Suiyong registered “歌力思” trademarks – initiated trademark infringement litigation against the defendants – infringement ascertained by courts of first and second instance – retrial – no infringement – plaintiff's trademark acquired in bad faith – abuse of trademark right – legitimate use by the defendants

Excerpt of the ruling:

[7] The principle of good faith is the fundamental rule to be abided by all market players. On the one hand, it encourages and supports people to build wealth and create value through honest work and protects the property rights and interests generated therefrom, as well as the legitimate and fair rights and freedom to dispose such property rights and interests; on the other hand, it requires that people act in good faith and pursue their own interests without harming others' legitimate interests or public interests, or disturbing the market order. The principle of good faith shall also be applied in judicial proceedings. It enables the parties to correctly exercise and dispose of their civil rights and rights of action within the legal framework, without prejudicing others' or public interests. Enforcing the rights acquired in bad faith so as to prejudice others' legitimate rights and disrupt market competition shall be ascertained as abuse of rights, which shall be discouraged by the laws. [8]...“歌力思” (ELLASSAY in Chinese characters), which is a coined word, is inherently distinctive. With no prior contact or knowledge, the chances that two registrants file for the registration of identical trademark by coincidence is relatively low. ELLASSAY Company is located in Shenzhen, Guangzhou Province. Wang Suiyong has been running a leather products company in Guangzhou, Guangdong Province. The geographical proximity and the close association between Wang's trade and ELLASSAY's business means that it is unlikely that Wang had no knowledge of the “歌力思” trademark and the trade name. Under this circumstance, Wang's registration of “歌力思” trademark in respect of handbag and wallet, which are closely associated with clothing, is hardly justified. Wang Suiyong's claim is based on trademark rights registered in bad faith, and his enforcing of such rights against ELLASSAY Company's legitimate use constitutes an abuse of rights, which shall not be upheld by the court.

TML 8**S, Red Sole-20181224 (Single-color trademark designated to be applied at a specific position)**

- Christian Louboutin v TRAB
- 2nd instance, Beijing High Court, (2018) Jing Xing Zhong No. 2631
- Judges: Zhou Bo, Yu Huibin, Su Zhifu

Synopsis:

Christian Louboutin filed application for international registration with territorial extension to China – CMO refused - devoid of distinctiveness – CMO decision upheld by TRAB – the first instance court overruled the TRAB's finding that the applied trademark is a device trademark – 3D trademark – the Court of Appeal defined the trademark as single-color trademark designated to be applied at a specific position – order the TRAB to re-make decision



Applied Trademark

Excerpt of the ruling:

[6] In this case, the applied trademark is a single color trademark designated to be applied at a specific position. The TRAB's refusal decision is based on the grounds that the applied trademark is devoid of distinctiveness thus is non-registrable, as provided by Article 11.1.3 of the Trademark Law. However, it would be logical to subject a mark to distinctiveness assessment only if such mark is a registrable sign as prescribed in the Trademark Law. . Pursuant to Article 8 of the Trademark Law, any sign ... that is capable of distinguishing the goods of a natural person, legal person or other organization from those of others may be applied for registration as trademarks". Although Article 8 does not specifically list the applied mark as a registrable sign, it does not specifically exclude the same from the registrable signs. Given that the TRAB did not find the applied trademark as being an intrinsically non-registrable sign, it should re-assess the distinctiveness of the applied trademark by considering all the evidence submitted by Christian Louboutin in the review procedure and the 1st and 2nd instance judicial proceedings.

**BD, Dior Perfume Bottle-20180426/B2018-21/D2018-01
(Consistency of examination criteria in assessing
distinctiveness; the applicant of international trademark
registration with territorial extension to China should be given
reasonable chance to make corrections.)**

- PARFUMS CHRISTIAN DIOR v TRAB
- Retrial, SPC, (2018) Zui Gao Fa Xing Zai No. 26
- Judges: Tao Kaiyuan, Wang Chuang, Tong Shu

Synopsis:

Christian Dior filed an application for international registration of the teardrop shape 3D trademark with territorial extension to China – the CTMO refused on the grounds that “*the mark is devoid of distinctiveness*” – the TRAB confirmed the refusal – the first instance court and the Court of Appeal upheld the TRAB’s decision – the SPC overturned the decisions of the lower courts and TRAB, ordering the TRAB to re-make its decision



Applied Trademark



Earlier Registration

Excerpt of the ruling:

[7]...The filing documents of the applied mark, a Madrid international registration with territorial extension to China, shall be subject to those documents forwarded by the International Bureau to the China Trademark Office. It is reasonable to presume by evidence that Christian Dior has stated, in the international registration procedure, the fact that the applied mark is a 3D mark and the means of use thereof, and has produced a one-view drawing. Based on the aforesaid facts, Christian Dior has completed the international registration procedure in accordance with the Madrid Agreement and the Madrid Protocol and fulfilled its obligation of statement as set forth by Article 13 of the Regulations for Implementation of the Trademark Law, so that its filing documents should be deemed as basically complete. In the event that only certain drawings of the applied mark as prescribed by the

Regulations for Implementation of the Trademark Law is missing from the filing documents, the trademark administrative authority should respect its obligation under the international conventions and grant Christian Dior an opportunity to make supplement and / or amendment...

[10] Given that Christian Dior has characterized its applied trademark as a 3D trademark during the international registration procedure, the SPC finds that it was incorrect for the CTMO to identify the applied mark as a device mark and assess its distinctiveness thereon. The TRAB therefore should, based on Christian Dior's arguments regarding the nature of the applied trademark raised in the review procedure, have corrected the CTMO's erroneous determination and re-assessed whether the applied mark is a distinctive 3D mark so as to grant Christian Dior's territory extension application. The court held that the CTMO and the TRAB should consider the following elements in the re-examination of the case: 1) the inherent distinctiveness and the distinctiveness acquired through use, in particular the time when the applied trademark entered Chinese market, the genuine use and promotion proved by the existing evidence, and the possibility of the applied trademark functioning as a source identifier; 2) the consistency of examination criteria. Even if the decisions made in trademark review and the judicial procedure is on a case-by-case basis, the consistency of the examination criteria should also be respected.

TML 11**F, QQ Beeping Sound-20180927/F2018-48 (Distinctiveness acquired through use only applies to the goods/services on which the trademark is genuinely used)**

- TENCENT Shenzhen v TRAB
- 2nd instance, Beijing High Court, (2018) Jing Xing Zhong No. 3673
- Judges: Zhou Bo, Yu Huibin, Su Zhifu

Synopsis:

TENCENT seeking to register its signature beeping sound “DIDIDIDIDIDI” – in services of Class 38 – refused by CTMO – too simple – devoid of distinctiveness – upheld by the TRAB – the first instance court acknowledged the distinctiveness acquired through use – the Court of Appeal denied the distinctiveness for the services on which the trademark is not used – upheld the conclusion of the 1st instance judgment.

Excerpt of the ruling:

[4] A mark which is devoid of intrinsic distinctiveness in respect of certain goods or services may serve as a source identifier through use and thus become registrable pursuant to Article 11.2 of the Trademark Law. Where distinctiveness is acquired through use, the registration shall be limited to the goods and services on which the trademark is genuinely used. [5] In this case, the evidence submitted by TENCENT suffices to prove that the applied sound trademark “DIDIDIDIDIDI” has acquired distinctiveness through long-term use as a beeping sound by the QQ instant messaging software and thereof is capable of functioning as the source identifier of the service....However, the applied trademark has not been genuinely used on the service of “TV broadcast, news agency, conference call”. The original judgment erroneously ascertained the distinctiveness of the applied trademark on the aforesaid services based on the fact that “conference call” service and the “super group chat” service share identical functions and on the possibility of providing TV broadcast and news service on the instant messaging software service platform. It contradicts the fact that distinctiveness of the applied trademark is acquired through use and inappropriately expands the registrable scope of the applied trademark.

**SW, Color Combination “Orange and Grey” -20180807
(Distinctiveness of color combination acquired through use)**

- Andreas Stihl v TRAB
- 1st instance, Beijing IP Court, (2017) Jing 73 Xing Chu No. 6150
- Judges: Ning Bo, Li Xinpeng (juror), Zhang Feng (juror)

Synopsis:

Andreas Stihl filed application for color combination trademark “orange and grey” – refused by CTMO – devoid of distinctiveness – the CTMO decision upheld by the TRAB – the first instance court acknowledged the distinctiveness acquired through use



Applied Trademark

Excerpt of the ruling:

[7]...Color combination is registrable under the Trademark Law.... [9]...The applied trademark has no inherent distinctiveness, but it has acquired distinctiveness through use... The evidence submitted by the plaintiff can prove that its chain saws have secured a high market share in China and that the applied trademark displaying the combination of orange & grey, has acquired distinctiveness through use. [10]...The fact that plaintiff's earlier “orange and grey” colour combination trademark (No. 9137205) has been approved for registration on forestry and gardening chain saw in Class 7 substantiates that the TRAB acknowledges its distinctiveness and registrability. The applied trademark consists of the same colours placed in the same positions as in the said registered trademark. Notwithstanding the case-by-case principle in trademark examination procedure, it is essential to maintain, in the context of almost identical circumstances, consistency of examination criteria so that it is in line with the Principle of Legitimate Expectation.

TML 13**F, Lafite - 20171227/F2017-18 (Recognising a trademark as an unregistered well-known trademark allows the awarding of damages for infringement committed preceding the registration)**

- Chateau Lafite Rothschild v Mellowines Development Co., Ltd. et al.
- 1st instance, Shanghai IP Court, (2015) Hu Zhi Min Chu Zi No. 518
- Judges: Wu Yingzhe, Liu Jing, Cheng Li

Synopsis:

Chateau Lafite Rothschild sued the defendants for infringing its registered trademark "LAFITE" by using "LAFITTE" and for infringing its unregistered well-known trademark "拉菲" by using "拉菲特" – "拉菲" was approved for registration after a lengthy opposition procedure – the alleged infringement acts occurred before "拉菲" was registered – "拉菲" recognized as unregistered well-known trademark – the first instance court affirmed trademark infringement – granted damages of RMB 2,000,000

Excerpt of the ruling:

[5]...The application of trademark "拉菲" (Chinese characters of "LAFITE") was preliminarily approved and published on January 27, 2014...and approved for registration by the TRAB in February 2017...The date when the plaintiff obtained the trademark right "拉菲" shall be calculated retroactively as of April, 28 2014 (expiry date of the three-month opposition period following the preliminary examination publication). During the period starting on the date of expiry of the said opposition period and ending on the date of the decision approving the registration of the trademark, the trademark has no retroactive effect on the use of an identical or similar mark by another party on the same kind of goods or similar goods. Considering that the alleged infringement acts occurred prior to the date when the plaintiff obtained the exclusive right of trademark "拉菲", therefore, whether the acts constitute infringement depends on whether the "拉菲" trademark had reached the well-known status as an unregistered trademark when the alleged infringement acts occurred. Based on the request of the plaintiff and the circumstance of the case, it is necessary to ascertain whether "拉菲" could be recognized as an unregistered well-known trademark. [13] Article 36.2 of the Trademark Law provides remedy for the loss suffered by the registrant during the period where the chance of the applied trademark being approved for registration is uncertain, provided that such loss is caused by the user acting in bad faith. The alleged infringement occurred prior to the time when the plaintiff obtained the exclusive right of "拉菲". Although there is

no explicit provision in the Trademark Law and judicial interpretations that damages could be awarded to the owner of an unregistered well-known trademark due to trademark infringement, in consideration of the bad faith of the defendants, of the legislative purpose of Article 36.2 and of the actual losses the plaintiff suffered from the infringement upon its unregistered well-known trademark, the defendants should bear the liability to indemnify the damages of the plaintiff caused by the infringement acts from the beginning.

SW, KuGou - 20170313 (It is still necessary to examine whether Article 13.1 applies when applying Article 31 of the 2001 Trademark Law, cannot grant an unregistered trademark full protection to all the goods or services designated by the disputed trademark)

- Lifeng Ltd. v TRAB et al.
- 2nd instance, Beijing High Court, (2017) Jing Xing Zhong No. 248
- Judges: Xie Zhenke, Yuan Xiangjun, Wang Xiaoying

Synopsis:

Lifeng Ltd. registered the trademark “酷狗 & KuGou” (KuGou in Chinese characters & pinyin) for “arrangement and organization of concerts, training; providing karaoke services; entertainment, etc.” in Class 41 – KuGou Company filed an invalidation application – the TRAB recognized the well-known status of KuGou Company’s unregistered trademark and invalidated the disputed mark on all designated services – the first instance court partially affirmed the invalidation under Article 31 but found no need to recognize well-known trademark – the Court of Appeal affirmed invalidation for all designated services - It is still necessary to examine whether Article 13.1 applies when applying Article 31 cannot grant unregistered trademark full protection to all the goods or services designated by the disputed trademark.

Excerpt of the ruling:

[4] The Court opined that the difference between Article 13.1 and Article 31 of the 2001 Trademark Law lies in the extent of reputation of the unregistered mark and the object of the prior rights seeking protection. Article 31 intends to protect the prior trademark owner's interests generated by its trademark use while Article 13.1 focuses on preventing confusion in the market. The court supported KuGou's argument that, for the services (fitness clubs etc.) for which Article 31 could not be applied, Article 13.1 should apply because, in view of the trademark reputation and of the similarity of such services, there was a risk of confusion.

TML 14**SW, MIGUMIGU-20180730 (Evidence for well-known trademark recognition should be examined comprehensively)**

- Migu Company v TRAB et al.
- 2nd instance, Beijing High Court, (2018) Jing Xing Zhong No. 2596
- Judges: Zhou Bo, Yu Huibin, Su Zhifu

Synopsis:

Migu Company filed an application to invalidate the “咪咕咕咪 MIGUMIGU and device” trademark registered by a natural person by citing the registered trademark “咪咕” owned by its parent company China Mobile Corporation – the TRAB and the first instance court maintained the registration – dissimilar services – cited trademark not well-known – the Court of Appeal overturned the 1st instance judgment, recognizing the cited trademark as well-known, and upheld the application for invalidation.

Excerpt of the ruling:

[4]...Evidence suffices to prove that, prior to the application date of the disputed trademark, the cited trademark has been known by the relevant public through long-term, extensive and continuous use by China Mobile Corporation and its affiliates, thus has acquired relatively high reputation and should be recognized as well-known trademark... [5] ...The Chinese characters of the disputed trademark contain the cited trademark, and the pinyin of the disputed trademark is identical with the pronunciation of the cited trademark, which constitutes copy and imitation of the cited trademark. The disputed trademark's services (hotel, restaurant and bar etc.) are dissimilar from those of the cited trademark (recreational activities and entertainment information). However, due to their overlapping service purposes, methods and consumer groups, considering the well-known status of the cited trademark and that the disputed trademark contains the entirety of the cited trademark, the relevant public is likely to misconstrue that the disputed trademark is somewhat associated with the cited trademark, which will undermine the distinctiveness of the cited trademark or unfairly exploit the reputation of the cited trademark, so as to impair the interests of Migu company over the well-known cited trademark. Therefore, the application for the registration of the disputed trademark violates the provisions of the Article 13.3 of the 2013 Trademark Law and shall be invalidated

SW, Meituxiuxiu-20180730 (Recognition of a well-known trademark in the internet context)

- Bei Rongxiong v TRAB et al.
- Retrial, SPC, (2018) Zui Gao Fa Xing Shen No. 3605
- Judges: Wang Yanfang, Mao Lihua, Du Weike

Synopsis:

Bei Rongxiong registered the trademark “美图秀秀 meituxiuxiu” in class 3 – Meitu Technology filed an application for invalidation by citing its trademark “美图秀秀” in class 9 – the TRAB recognized the cited trademark as well-known trademark and upheld the invalidation request – The first instance court, the Court of Appeal and the Retrial Court affirmed the TRAB decision.

Excerpt of the ruling:

[4] ...The evidence can prove that the cited trademark has been put into use since 2008 and has acquired high reputation on "recorded computer programs (programs), computer programs (downloadable software), and computer software (recorded)" products through long-term, continuous and extensive use and promotion, which has made it a well-known trademark. The cited trademark “美图秀秀”, which is a coined words, is intrinsically distinctive. The disputed trademark and the cited trademark are highly similar. If the two trademarks were to co-exist in the market, the consumers are likely to misconstrue that the products to which the cited trademark and the disputed trademark are attached or the sources thereof are associated, thus sever the innate relation between the cited trademark and its proprietor so as to harm the legal interests of the well-known trademark owner.....

F, Suo Fei Ya-20170315/F2017-14 (A party is allowed to choose from its trademark portfolio the trademark for which the well-known status recognition is sought)

- Suo Fei Ya Company v Nanyang Suo Fei Ya Company et al.
- 2nd instance, Zhejiang High Court, (2016) Zhe Min Zhong No. 794
- Judges: He Qiong, Teng Lingyong, Wang Lei

Synopsis:

The plaintiff sued the defendants for infringement and unfair competition by citing its registration of the trademark “索菲亞” in class 20 and claiming recognition of the well-known status of the trademark – The first instance court – no need to grant well-known trademark status, plaintiff could have based its claim on its registered trademark in class 6 – no trademark infringement but unfair competition – the Court of Appeal granted the well-known trademark status to the cited trademark in Class 20 – found trademark infringement and unfair competition

Excerpt of the ruling:

[3]...The right of prohibiting others from using a trademark has some uncertainty. It is a common practice that businesses attempting to effectively protect their goodwill often resort to registration of a series of trademarks to set boundaries and strengthen their right portfolio. In the case of infringement dispute, the trademark owner is entitled to choose on its own accord, the most favorable trademark to file its action, by using its trademark portfolios and designing its litigation strategy. In this case, the plaintiff acknowledges in its statement during the trial of the second instance that its registered trademark in class 6 is a defensive trademark because it does not produce or sell integrated ceilings. The defensive trademark, which has not been put into long-term and genuine use, is less known for its distinctiveness and reputation. Consequently, the protection granted by law is relatively weak. Even if trademark infringement could be established, it would be unlikely for the right owner to obtain high damages. The judicial recognition of well-known trademarks purports to offer the well-known trademarks a stronger protection. In the case that a right owner have multiple trademark rights, if the court, in order to avoid granting well-known trademark status, forbids the right owner from seeking more favorable remedy and resorting to cross-class protection of a well-known trademark, the trademark owner's legitimate interests cannot be fully protected, which runs counter to the original purpose of the judicial recognition of well-known trademarks.

TML 15**S, CHOPPIES-20171228 (Article 15.2 applies to indirect business relationships)**

- CHOPPIES ENTERPRISES LIMITED v TRAB et al.
- 1st instance, Beijing IP Court, (2016) Jing 73 Xing Chu No. 1441
- Judges: Zhou Liting, Liu Xiaohe (juror), Tong Lianfei (juror)

Synopsis:

Topseller Chemicals registered trademark “CHOPPIES” in Class 3 – CHOPPIES ENTERPRISES LIMITED applied for invalidation, citing Article 15 – the TRAB maintained the registration – the first instance court overruled the TRAB decision – indirect business relations between the plaintiff and the third party – Article 15.2 applies.

Excerpt of the ruling:

[6] Article 15.2 of the Trademark Law applies to cases where the trademark registrant has “particular relations” with the owner of an unregistered but already used trademark. Article 15.2 enumerates the circumstances (contractual or business relations) that fall under “particular relations”, and employs a fallback provision to include those relations, other than the “agent and representative relations”, in the context of which the registrant is enabled to know about the existence of the prior unregistered trademark. Since Article 15.2 does not exhaust all the circumstances of particular relations, the “business relations” prescribed therein shall be interpreted as covering both direct business relations and indirect business relations, provided that such relations enable the trademark applicant to know about the trademark of the party with which the registrant has particular relations. [7] In this case, the evidence can prove that there are transaction and business relations regarding “CHOPPIES” detergent powder products between the plaintiff and Kerry Company, and between Kerry Company and the third party. The detergent powder manufactured by the third party is sold to Kerry Company, which is later resold to the plaintiff. There is an indirect business relation between the plaintiff and the third party.

TML 30

S, YEMA-20181224 (The reputation of a trademark does not automatically mean that where such trademark is combined with the less known trademark of another person, such combined trademark can resist the invalidation requested by the owner of such less known trademark)

- Yema Company v TRAB et al.
- 2nd instance, Beijing High Court, (2018) Jing Xing Zhong No. 4897
- Judges: Ji Luohong, Zhou Bo, Yu Huibin

Synopsis:

Ford Motor, who owns the trademark "福特" (Ford in Chinese) registered the trademark "福特野马" (Chinese characters of Ford Yema) for automobiles in Class 12 – Yema Company applied for invalidation, citing, among others, its prior registration of "Yema in Chinese and device", "Yema Auto in Chinese" – the TRAB maintained the registration of the Disputed Trademark – Ford argued on the reputation of its name in Chinese – The first instance court finds that the Disputed Trademark and the Cited Trademarks constitute similar trademarks on similar goods – It would be inappropriate to presume that the reputation of Ford Motor's "Ford in Chinese" makes the Disputed Trademark "Ford Yema in Chinese" distinguished from the Cited Trademarks – the Court of Appeal affirmed the 1st instance judgment.

Excerpt of the ruling:

[4] Ford Motor argues that its "Ford in Chinese" trademark enjoys relatively high reputation and that the Disputed Trademark is the translation of its registered trademark "FORD MUSTANG". Given that the Cited Trademarks are less known among the relevant public, the co-existence of the Disputed Trademark and the Cited Trademarks is unlikely to create confusion or misidentification. The court states in its reasoning that reputation is one of the many factors in assessing trademark similarity. Where the Cited Trademarks are registered earlier, it would be detrimental to the legitimate trademark rights of others if the owner of a trademark with certain reputation is allowed to register a combination of its trademark and of other's trademark. Due to the independent nature of trademark rights, Ford Motor's registered trademark "FORD MUSTANG" does not necessarily guarantee that the registration of its Disputed Trademark should be granted.

**BFW, Crocodile Device-20181129/B2018-22.25/F2018-46
(Co-existence Agreement reached outside the jurisdiction of
China has no bearing on the assessment of trademark similarity
in China)**

- CARTELO CROCODILE PTE LTD v TRAB et al.
- Retrial, SPC, (2018) Zui Gao Fa Xing Zai No. 134
- Judges: Xia Junli, Lang Guimei, Ma Xiurong

Synopsis:

Disputed Trademark applied by LACOSTE - Crocodile International Pte Ltd filed application for invalidation – CARTELO CROCODILE PTE LTD participates in the proceeding by undertaking the rights and obligations of Crocodile International Pte Ltd – the TRAB maintained the registration of the Disputed Trademark – the relevant public when applying general attention could distinguish the Disputed Trademark from the Cited Trademark – the first instance court overruled the TRAB decision – co-existence could lead to confusion and misidentification among the relevant public – the Court of Appeal affirmed the 1st instance judgment – the Retrial Court overruled the 2nd instance judgment and sustained the registration of the Disputed Trademark.

Excerpt of the ruling:

[6] ...On the one hand, the registrability of the Disputed Trademark should be assessed according to the Trademark Law and related judicial interpretations. There is no legal basis for CARTELO to claim, by citing its crocodile device trademark registered in other countries and regions and the Settlement Agreement reached in 1983, that the Disputed Trademark should not be approved for registration. On the other hand, a trademark right is regional...The Settlement Agreement only applies to the five countries and regions specified in the Agreement. It cannot be used as fact or basis in assessing the similarity between the Disputed Trademark and the Cited Trademark and the registrability of the Disputed Trademark.

B, XILIUFU-20181126/B2018-23 (The reputation of the later applied disputed trademark is generally not to be considered when assessing the similarity of the trademarks)

- Xiliufu Company v TRAB et al.
- Retrial, SPC, (2018) Zui Gao Fa Xing Zai No. 100
- Judges: Xia Junli, Lang Guimei, Ma Xiurong

Synopsis:

Disputed Trademark “XILIUFU JEWELLERY” in English and traditional Chinese Characters and device – applied and registered by Xiliufu Company – LUK FOOK HOLDINGS COMPANY LIMITED applied for invalidation – the TRAB and the first instance court upheld the invalidation request – similar trademarks on identical or similar goods – the Court of Appeal overruled the 1st instance judgment – different consumer groups – consumers are able to distinguish the Disputed Trademark and the Cited Trademark – the Retrial Court found similarity and confusion – overruled the 2nd instance judgment and upheld the invalidation.

Excerpt of the ruling:

[9]...Xiliufu Company argued that the Disputed Trademark has acquired a high reputation through use, that due to its great sales performance and extensive scale of use, the Disputed Trademark can be distinguished from the Cited trademark. However, according to the Trademark Law and the related judicial interpretation, the reputation of the later applied disputed trademark is generally not to be considered when assessing the similarity of the trademarks.

SW, SUPOR-20181115 (A prior trademark that has not been used cannot be used to invalidate a later trademark which has been used and has acquired a reputation)

- Zhejiang Supor Co., Ltd. v TRAB et al.
- 2nd instance, Beijing High Court, (2018) Jing Xing Zhong No.4791
- Judges: Tao Jun, Sun Zhuyong, Chen Xi

Synopsis:

Zhejiang Supor Co., Ltd. registered the Disputed Trademark “SUPOR” in Class 11 – Yihua Group applied to invalidate the Disputed Trademark by citing prior trademarks in Class 11 – the TRAB and the first instance court upheld the invalidation – similar trademarks on identical or similar goods – the Court of Appeal partially maintained the registration – the Cited Trademark has not been used on some designated goods – the Disputed trademark has been used on these goods and has obtained a reputation, which enables these goods to form a stable correspondence with its owner – invalidation decision maintained on the goods on which the Disputed Trademark has not been used

Excerpt of the ruling:

[3]... Trademark similarity shall be ascertained if it is likely to create confusion or misidentification on the source of the goods....[4] ...In the event that there is no evidence showing the bad faith of the applicant or right holder of a later registered trademark, in the procedure involving granting or affirmation of trademark right, the evidence of the genuine use of the later trademark and the use of prior cited trademark shall be taken into account when assessing the likelihood of confusion... [5]...The evidence suffices to prove that Supor has exhibited no bad faith in filing for the registration of the Disputed Trademark, and through long-term and extensive use and promotion, the Disputed trademark has acquired relatively high reputation and market share on some of the designated goods in class 11, which enables the relevant public to associate the Disputed Trademark with Supor. Due to Yihua Group’s failure to submit sufficient evidence to prove the genuine use of its cited trademark on these aforesaid goods, it is safe to draw the conclusion that the Disputed Trademark has attained stable market share on these goods and the fact has been recognized by the relevant public. Since Supor’s other registered trademarks in class 11 has been co-existing with Yihua Group’s Cited Trademarks for more than 20 years, the registration of the Disputed trademark should be maintained on the goods it has been used and acquired relatively high reputation...

CW, Spider-20171222/C2018-11 (The reputation built up on a prior mark may extend to a later mark filed by the same applicant, but trademark registration can only be extended through renewal)

- Spider King Group v TRAB et al.
- Retrial, SPC, (2017) Zui Gao Fa Xing Shen No. 3297
- Judges: Wang Yanhua, Mao Lihua, Du Weike

Synopsis:

US Spider Company filed the opposed trademark – Spider King Group filed opposition citing three trademarks – US Spider Company argued that it owned a prior registered trademark, similar to the newly filed trademark – the CTMO approved the registration – the TRAB affirmed the CTMO decision – the first instance court overruled the TRAB decision by finding similarity between the Opposed Trademark and the Cited Trademarks 2 and 3 – the Court of Appeal affirmed the similarity finding of the 1st instance judgment – the co-existence of US Spider Company's prior registration and the Cited Trademark 2 and 3 cannot justify the registration of the opposed trademark.

Excerpt of the ruling:

[3]...The goodwill built up by a market player in the course of business operation, may be, in a certain manner, shifted among or extended to a variety of carriers such as the trade name, trademark, packaging and decoration of goods of such market player, or any other signs that may serve as the source identifier of its goods or services. Nevertheless, ... where a new trademark that is associated with a prior registered trademark needs to be registered it is necessary) to file a new application with the trademark administrative department, which shall review such application, no matter whether the prior registered trademark has built up a certain reputation, or how the goods designated by the new trademark relate with that of the prior trademark, or what the relationship between the two marks is. The registrability of the Opposed Trademark shall be reassessed by the trademark administrative department, rather than being justified by its association with a prior registration. Other than trademark renewal, Article 38 of the Trademark Law provides NO alternative form of trademark extension."

BF, Montagut-20131213/B2013-23/F2013-47 (The reputation/good will of a prior trademark may extend to a later mark of the same applicant)

- Bonneterie Cévenole SARL v TRAB et al.
- Retrial, SPC, (2012) Xing Ti Zi No. 28
- Judges: Yu Xiaobai, Wang Yanfang, Li Rong

Synopsis:

Foshan Mingshi Industrial Co., Ltd. applied to invalidate the “flower device” trademark registered by Bonneterie Cévenole SARL – citing prior similar mark – the TRAB ruled to invalidate the registration on some goods – partial invalidation decision upheld by the first instance court and the Court of Appeal – registration maintained by the Retrial Court – Bonneterie Cévenole SARL had a similar prior mark – reputation of the prior mark may extend to the later mark.

Excerpt of the ruling:

[8]...Even if the Disputed Trademark is different from the well-known trademarks “MONTAGUT & flower device” and “flower device” of Bonneterie Cévenole SARL, the “flower device” in the Disputed Trademark has been put into long-term and extensive use and the good will vested in these well-known trademarks has been incarnated on the Disputed “flower device” Trademark. Therefore, the later Disputed Trademark is able to acquire a high reputation in a relatively short period of time due to the good will of the prior well-known trademarks. [9] ...The Disputed Trademark enjoys a relatively high reputation and the relevant public can distinguish the Disputed Trademark from the Cited Trademark of Foshan Mingshi. The registration of the Disputed Trademark only affects the scope of protection of the Cited Trademark against the use of others, which has no bearing on Foshan Mingshi's exclusive right to use the Cited Trademark....

B, Apple Man-20100910/B2010-20/F2010-20 (When assessing the similarity between the opposed mark and the cited mark, the Court may take into consideration the similarity between the opposed mark and a prior registered mark owned by the applicant of the opposed mark)

- TEXWOOD LIMITED v TRAB et al.
- Retrial, SPC, (2009) Xing Ti Zi No. 2
- Judges: Xia Junli, Yin Shaoping, Wang Yanfang

Synopsis:

Guangzhou Apple Company applied to register “苹果男人” (Chinese character of “Apple Man”) trademark – TEXWOOD LIMITED file an application for opposition, citing a prior trademark – Guangzhou Apple Company owns a similar trademark on goods of same class, registered prior to the cited trademark – opposition application dismissed by the CTMO, the TRAB, courts of first and second instance, as well as the retrial court.

Excerpt of the ruling:

[4] The registration of the opposed trademark is sought in respect of the goods in Class 18. Prior to the application, Guangdong Apple Company registered “APPLES”, “apple device”, and “苹果” (Chinese character of “Apple”) in Class 18. The opposed trademark is more similar to the aforesaid registered trademarks of Guangdong Apple Company, in particular the “苹果” mark. Under such circumstance, it would be inappropriate for the court to find that the opposed mark is a reproduction or imitation of the opponent's well-known trademark. Therefore, the opponent's well-known trademark on the goods of clothes cannot block the registration of the opposed trademark on the leather goods.

TML 32**S, Kui Hua Bao Dian-20190130 (The current jurisprudence does not afford direction protection over merchandising rights)**

- UQEE Network v TRAB et al.
- 2nd instance, Beijing High Court, (2018) Jing Xing Zhong No. 6240
- Judges: Zhou Bo, Yu Huibin, Su Zhifu

Synopsis:

UQEE Network registered in Class 41 the trademark "葵花宝典" – fabricated name of a mysterious martial arts manuscript in a famous martial arts fiction – Perfect World Investment & Holding Group filed an application for invalidation, citing merchandising rights – the TRAB sustained the invalidation – The majority opinion of the first instance court opines that "葵花宝典" does not fall under the prior merchandising rights which may be granted protection – the TRAB erred partially in fact finding and application of the law — the Court of Appeal found no legal basis in China's current jurisprudence that could afford protection over merchandising rights.

Excerpt of the ruling:

[6] ...There is no provision in the current laws or judicial interpretations, which could serve as direct legal basis affirming that a fabricated name of works in literature can be protected as prior right. ...[7]... In the event that the name of the works or the name of the character in the works enjoys a relatively high reputation, the relevant public is apt to associate the goods or services using such name with the copyright owner of these works, and believe there is certain relationship between the person who uses the name and the copyright owner. Using without authorization of the copyright owner the name of the works or the name of the character in the works so as to create misidentification constitutes unfair competition...[8] ...According to Article 126 of the General Provisions of the Civil Law, merchandising rights do not fall under "other civil rights and interests enjoyed by civil subjects provided by laws". It is difficult to explicitly define the contents and boundaries of merchandising rights. The relevant public would be unable to foresee the so-called civil rights, let alone avoid the infringement...The disputed decision is erroneous in facts finding and law application...The conclusion of the original judgments is correct.

BCF, Jordan II-20171227/B2017-26/C2018-09/F2017-44 (The portrait seeking prior right protection should be identifiable)

- Michael Jordan v TRAB et al.
- Retrial, SPC, (2015) Zhi Xing Zi No. 332
- Judges: Xia Junli, Wang Yanfang, Du WeiKe

Synopsis:

Michael Jordan applied to invalidate the Disputed Mark – citing the prior right of portrait – invalidation application dismissed by the TRAB, the First Instance court and the Court of Appeal – the image of the Disputed Mark is unlikely to be perceived as Michael Jordan – Retrial –the SPC decides to hear first another case which has a connection with this case – suspension of action on this case.



Image of the Disputed Mark

Excerpt of the ruling:

[7] ...The right of portrait grants protection over those identifiable "portraits" embodying the personal features that enables the relevant public to identify the corresponding natural person. [8]... It is the universal acknowledgement that the facial features of a natural person are the most prominent physical characteristics. In the event that the image over which the party seeks right of portrait protection is devoid of identifiable facial features, sufficient evidence needs to be submitted to prove that the image contains other identifiable personal characteristics so that the public is aware that the image clearly refers to the natural person. [9] ...Even if the Disputed Trademark, a black human silhouette is almost consistent with the profile of the retrial petitioner's athletic image, it is devoid of any personal characteristics of the retrial petitioner...therefore is not identifiable, and does not clearly refer to the retrial petitioner. The retrial petitioner's claim that the registration of the Disputed Trademark prejudices his right of portrait is not tenable.

BD, Jordan I-20161207/B2016-21.22.23/D2016-01 (Right of name may be protected as prior right under the Trademark Law)

- Michael Jordan v TRAB et al.
- Retrial, SPC, (2016) Zui Gao Fa Xing Zai No. 27
- Judges: Tao Kaiyuan, Wang Chuang, Xia Junli, Wang Yanfang, Du WeiKe

Synopsis:

Qiaodan Sport Company registered the trademark “乔丹” (Chinese transliteration of “Jordan”) – USA basketball superstar Michael Jordan filed for invalidation – dismissed by the TRAB – upheld by courts of first and second instance – no “other adverse effect” – not “registration obtained by other unfair means” – overruled by the retrial court – right of name - business success and market order built on bad faith acts cannot justify trademark registration.

Excerpt of the ruling:

[7]...Registering as a trademark, without authorization a name over which another person has a prior right of name, thus causing the relevant public to misconstrue that there is certain connection between the goods or services bearing the trademark and such natural person, shall be ascertained to prejudice the prior right of name of the other person, which violates the provisions of Article 31 of the Trademark Law. [13]...When applying Article 31 to determine whether a person enjoys the right of name over a specific name, it is necessary to establish that: (1) such name has a certain degree of popularity among the relevant public; (2) the relevant public uses such name to refer to this person;(3) there is a stable association between such name and the person..... [14] Due to different language and cultural background, the relevant public in China usually refers to a foreigner, using part of rather than the entirety of his name's Chinese translation. Therefore, the aforesaid circumstance shall be taken into consideration when assessing whether to grant right of name protection over part of the Chinese translation of a foreigner's name.

TML 44**S, AmCham-20170711 (An application filed in bad faith may be refused by applying Article 44 and the Principle of Good Faith)**

- The American Club v TRAB et al.
- 2nd instance, Beijing High Court, (2016) Jing Xing Zhong No. 2802
- Judges: Cen Hongyu, Ma Jun, Yuan Xiangjun

Synopsis:

The American Club filed an application to register “AmCham” as a trademark in respect of beer, soda water and other goods in Class 32 – opposed by the American Chamber of Commerce in the People's Republic of China – the CTMO approved the registration – the TRAB overruled the CTMO decision – the first instance court sided with the CTMO on the ground that the American Chamber of Commerce has not used its trade name “AmCham” in respect of beer and soda water in Class 32 and failed to prove that its trade name has acquired a certain reputation prior to the application date of the Opposed Trademark – no likelihood of confusion or misidentification – the Court of Appeal applied Article 44 – the Opposed party knows about the American Chamber of Commerce's prior use, yet still filed massive applications in multiple Classes – violation of the good faith principle – disrupted the trademark registration administration order, undermined fair competition of the market – trademark registration obtained by fraudulent or other unfair means.

Excerpt of the ruling:

[3] The legislative intent of Article 44 of the Trademark Law is to implement the Principle of Good Faith and the Principle of Public Order and Good Custom... Pursuant to its literal meaning, this Article only applies to invalidation procedures of registered trademarks, rather than to the examination and approval of applications for registration. However, if, an application filed by fraudulent or other unfair means is allowed to proceed to registration and be dealt with in the subsequent invalidation proceeding, rather than being dealt with at an early stage, it would be inconducive to curbing improper registration. Therefore, the legislative spirit should apply to the whole process from examination, approval and invalidation... In the current case ...the American Club knew about the American Chamber of Commerce's prior use of “AmCham” sign, yet still applied “AmCham” trademark in respect of multiple goods and services. The act is unjustifiable, it violates the Principle of Good Faith, disrupts the trademark registration administration order, and undermines fair competition of the market. Pursuant to Article 44, ...the Disputed Trademark should not be approved for registration.

TML 49**S, USAPRO-20181220 (Affixing trademark on OEM products and facilitating the exportation of such products by OEM manufacturer may be ascertained as genuine trademark use of the trademark by its owner)**

- Menfushi Co., Ltd. v TRAB et al.
- Retrial, SPC, (2018) Zui Gao Fa Xing Shen No. 8135
- Judges: Wang Yanfang, Du Weike, Mao Lihua

Synopsis:

USA PRO IP LIMITED registered the trademark “USAPRO” in respect of, *inter alia*, clothing in Class 25 – OEM manufacturer Shanghai Taihong Co., Ltd. was commissioned to manufacture and export products bearing the “USAPRO” trademark outside China – Menfushi Co., Ltd. brought cancellation action against the trademark on the ground of non-use for 3 consecutive years – evidence sufficient to prove genuine use – registration maintained by the CTMO, the TRAB, the first instance court and the Court of Appeal.

Excerpt of the ruling:

[2] Given that Shanghai Taihong was entrusted by USA PRO to manufacture in China the OEM products bearing the Disputed Trademark, Shanghai Taihong was acting in the capacity of agent for USA PRO, affixing the Disputed Trademark to the products and arranging for the exportation thereof in the name of USA PRO. Under USA PRO's authorization, Shanghai Taihong is in charge of affixing the signs of the Disputed Trademark to the OEM products and arranging for the exportation of such products to facilitate the oversea sale thereof. USA PRO manufactures and distributes the OEM products by proxy (Shanghai Taihong). As far as the relevant public is concerned, Shanghai Taihong is the actual manufacturer that goes through customs clearance to export the OEM products. However, the OEM products will eventually be traced back to USA PRO, the registrant of the Disputed Trademark, which is to reap the benefits and bear the liability pertaining to the Disputed Trademark. Therefore, Shanghai Taihong is only an executor, while USA PRO is the trademark user in the sense of the Trademark Law. [3]...the evidence above is sufficient to prove that USA PRO has genuinely and effectively used the Disputed Trademark in respect of the designated goods during the prescribed period.

F, MANGO-20171215 (A trademark affixed on OEM products does not function, in mainland China, as a source identifier of the goods to which it is affixed, and is not used in the sense of the Trademark Law)

- Sona International Co., Ltd. v TRAB et al.
- 2nd instance, Beijing High Court, (2016) Jing Xing Zhong No. 5003
- Judges: Zhou Bo, Yu Huibin, Su Zhifu

Synopsis:

Cancellation against the Disputed Trademark “MANGO” – non-use for 3 consecutive years – registration hinges on trademark use by licensee Sona, oversea buyer of the OEM products bearing the Disputed Trademark and later assignee of the said trademark – cancellation upheld by the TRAB, the first instance court and the Court of Appeal – Disputed Trademark affixed to the designated goods – all goods exported overseas – Disputed Trademark not functioning as a source identifier of the goods to which it is affixed in mainland China – not trademark use in the sense of the Trademark Law.

Excerpt of the ruling:

[3]...Given that the products to which the Disputed Trademark are affixed, are for exportation only, therefore are not offered for sale in mainland China, the Disputed Trademark fails to function as a source identifier for these goods in mainland China. The court finds that such OEM manufacturing or exportation does not suffice to sustain the registration of the Disputed Trademark. [6] ...Notwithstanding the fact that the Disputed Trademark had been affixed to the designated goods during the prescribed period, as substantiated by existing evidence, the Disputed Trademark does not function as an actual source identifier in mainland China, because all the goods bearing the Disputed Trademark are exported outside mainland China. Therefore, even considering all the evidence submitted by Sona International in the TRAB proceeding, and in the 1st and 2nd instance, the Court still finds it insufficient to prove that the Disputed Trademark has been put into genuine use in respect of designated goods.

TML 57**F, DOMINO-20181225/F2018-23 (Whether remodeling and selling other's products constitutes trademark infringement depends on the extent of the remodeling)**

- Domino Printing Sciences Plc v Dugao Company et al.
- 2nd instance, Guangdong High Court, (2017) Yue Min Zhong No. 2659
- Judges: Wang Jing, Deng Yanhui, Zheng Ying

Synopsis:

Domino Company filed lawsuits against Dugao Company and Xinke Company for trademark infringement of its registered trademark – the first instance court found that the act of using the alleged sign on the inkjet printers A200 and E50 constitutes trademark infringement – the defense based on exhaustion of trademark right is untenable – the Court of Appeal revoked the 1st instance judgment – act of using the alleged sign on the inkjet printers A200 does not constitute trademark infringement – the defense based on exhaustion of trademark right is tenable – the act of using the alleged sign on the inkjet printers E50 constitutes trademark infringement.

Excerpt of the ruling:

[4] After Domino Printing Sciences Plc first sold its ink jet printers E50, Dugao Company remodeled the ink system of products and re-sold such remodeled products. The court found that this act constitutes trademarks infringement, because 1) ...Without altering the trademark, if, without the consent of the trademark owner, the products are substantially replaced so that the quality of the products are substantially changed, the goods and the trademarks affixed thereon are artificially separated, which will impede the function of such trademark; 2) the ink system is core part of ink jet printers...Dugao Company's remodeling substantially changed the products...and its quality. 3) When the remodeled ink jet printers E50 are re-sold with Domino's trademark, regardless of whether Dugao Company apprises the relevant public of the remodeling, the function of Domino's trademark as to indicating the source of the products and bearing responsibility for the quality of products is impaired...

[6] ...Dugao Company and Xinke Company recycled the used motherboards of Domino's A200 inkjet printers and assembled them as components into new printers to sell. Except the default boot screen, there is no other sign on the printers or the packaging thereof. ... The court found that this act does not constitute infringement for the following reasons. 1) Even though there is no provision of defense based on exhaustion of trademark right in China's

Trademark LawHowever, legally speaking, every right has boundaries and a possibility of being exhausted. 2)...Regarding the recycled products, whether there is exhaustion of trademark right depends on the recycling method and specific circumstances. 3) Dugao Company and Xinke Company recycled the used motherboards of Domino's A200 inkjet printers and both parties confirmed that the boot screen displays the Cited Trademark by default, therefore, Dugao Company and Xinke Company did not voluntarily use Domino's trademark. There is no sign of Domino on the re-assembled new products, without direct contact with Domino's trademark, it is therefore unlikely to create confusion among the relevant public. Meanwhile, what is recycled is only a part of the original products. The assembling is not the remodeling to the whole products. It neither changes the quality of the products nor removes the trademark from the original products and re-launches them in the market. Therefore, it does not impede the function of Domino's trademark.....4) Domino argued that it may cause confusion or after-sale-confusion and thereof constitutes trademark infringement. The court opined that confusion about the products does not necessarily lead to trademark infringement. Under such circumstance, Domino Company may resort to other remedy.

S, DONG FENG-20171228 (The OEM manufacturer does not commit trademark infringement if he fulfills its duty of care and causes no substantial damages)

- SDEC v Changjia Company
- Retrial, SPC, (2016) Zui Gao Fa Min Zai No. 339
- Judges: Xia Junli, Cao Gang, Dong Xiaomin

Synopsis:

SDEC registered “东风” trademark in class 7 - PT ADI registered “东风 DONG FENG” trademark (Dong Feng in Chinese Character and Pinyin) in Indonesia – Changjia Company signed an OEM contract with PT ADI to manufacture diesel engines and fittings, bearing “东风 DONG FENG” trademark, for exclusive distribution in Indonesia – the first instance court found no trademark use in China and thereof no infringement – the Court of Appeal found that Changjia did not fulfill its duty of care and committed infringement – the Retrial Court overturned the 2nd instance judgment – fulfilled the duty of care – no substantial damage – no infringement.

Excerpt of the ruling:

[1] ...Considering OEM is a common and legitimate form of international trade, the OEM manufacturer's act shall not be found to constitute trademark infringement unless there is contrary evidence proving that such manufacturer has failed to fulfill its duty of care and causes substantial prejudice to the trademark owner. [3] ...When entering into an OEM manufacturing business contract with PTADI, Changjia had fulfilled its duty of care by examining PTADI's trademark status. During the legal dispute over the proprietorship of the DONG FENG marks in Indonesia, Changjia complied with the ruling of the Indonesian judiciary, in which the Indonesian Supreme Court ruled in favor of SDEC in the appeal, before reversing its decision in the retrial proceeding, by entering into a compensation agreement with SDEC and paying the latter a certain amount of damages. The Jiangsu Court erred in finding that Changjia had failed to fulfil its duty of care. ...When Changjia was engaged in the litigious OEM manufacturing business, the Indonesian Supreme Court had settled the legal battle between SDEC and PTADI in its retrial ruling, which confirmed PTADI's proprietorship over the DONG FENG marks. It was therefore impossible to legitimately export the products of SDEC, which bore the identical mark in respect of similar goods, to Indonesia. ...Changjia's OEM business had no material impact on the opportunity to compete and market interests that SDEC sought in Indonesia based on the litigious marks. Though a trademark functions as a source identifier for the goods or services to which it is affixed, after all, what the consumers seek is not the trademark *per se* but the goods that the trademark

indicates and the premium quality thereof. Even if international trade reality merits comprehensive consideration, there are no good reasons to affirm that the OEM manufacturing act of Changjia has caused material prejudice to SDEC, which makes it unnecessary to examine whether the same constitutes infringement in the sense of the Trademark Law.

S, MOBIL-20171129 (Determination on trademark dilution)

- EXXON MOBIL CORPORATION v Beijing Beinong Guoxin Technology Development Ltd. et al.
- 2nd instance, Beijing High Court, (2016) Jing Min Zhong No. 544
- Judges: Cen Hongyu, Dai Yiting, Ma Jun

Synopsis:

Plaintiff EXXON MOBIL CORPORATION registered the trademarks “MOBIL” and “MOBIL in Chinese Character” in class 1, 4 and 5 – the Defendant has been using “MOBIL” and “MOBIL in Chinese Character” on fertilizer and pesticides products – during the first instance trial, the defendants admitted the well-known status of “MOBIL” and “MOBIL in Chinese Character” trademarks in the lubricant field before 2012, but argued that these trademarks are no longer well-known – the first instance court ascertained the well-known status of the Cited Trademarks – cross-category confusion – infringement – the Court of Appeal upheld the infringement finding

Excerpt of the ruling:

[21] The following factors may be taken into consideration if the litigious trademark is to be ascertained as having certain association with the well-known trademark so as to dilute the distinctiveness of the latter: [22] The distinctiveness and reputation of the well-known trademark. Stronger distinctiveness and higher reputation, the broader protection scope of the well-known trademark, higher likelihood that the relevant public would associate the litigious trademark with the well-known trademark and bigger chance that the exclusive correspondence relations is undermined...[23] The overlapping extent of the relevant public... [24] The extent of similarity of the trademarks...

S, PEAK-20170421 (Exportation cannot deny the trademark use and the possibility of confusion in the environment of internet economy)

- Peak Sports Goods v Wuxi Zhenyu International Trade Co., Ltd. et al.
- 1st instance, Shanghai IP Court, (2016) Hu 73 Min Zhong No. 37
- Judges: Chen Huizhen, Yang Wei, Liu Jing

Synopsis:

Peak Sports Goods registered “PEAK” and “PEAK & device” trademarks – Zhenyu International Trade, OEM manufacturer of ISAAC MORRIS LTD, exports products bearing “PEAKSEASON” trademark – in actual use, “PEAKSEASON” was split into “PEAK” and “SEASON” and displayed in two rows, with “PEAK” used prominently and “SEASON” inconspicuously – the first instance court found no infringement – no trademark use – the Court of Appeal found infringement – Exportation cannot deny the trademark use and the possibility of confusion in the environment of internet economy

Excerpt of the ruling:

[2] With the development of the internet economy, the online marketplace is increasingly globalized,...even if the exported goods are not distributed within the Chinese territory, via various e-commerce platforms, the exported goods together with the marks attached are still accessible to the Chinese customers. Under this circumstance, the mark functions as a source identifier of the OEM goods to which it is affixed. Moreover, one of the appellant ISAAC MORRIS LTD. acknowledged that it may sell the clothes manufactured in China to Amazon for further distribution. Thus, the appellants should not be exempted from the liability of trademark infringement on the ground of “no trademark use in the sense of the Trademark Law”.

BF, PRETUL-20151126/B2015-19/F2015-07 (Affixing trademark on OEM products is not trademark use)

- Focker Security Products International Limited v Pujiang Yahuan Locks Co., Ltd.
- Retrial, SPC, (2014) Min Ti Zi No. 38,
- Judges: Wang Yanfang, Tong Shu, He Peng

Synopsis:

OEM products – destined to be exported to Mexico – sued for infringing on cited mark “PRETUL” – the first instance partially upheld the trademark infringement claim – the Court of Appeal completely upheld the infringement – the Retrial court found no trademark use and no trademark infringement

Excerpt of the ruling:

[2] Yahuan Locks was authorized by TRUPER HERRAMIENTAS, S.A.DE C.V. to manufacture and export to Mexico all the padlocks bearing the “PRETUL” marks. Since the padlocks manufactured by Yahuan are not for distribution in the Chinese market, the PRETUL marks do not fulfil the trademark function of ‘distinguishing the origin of the commodities’ in China. Therefore, such marks are unlikely to cause confusion and misidentification among the relevant public in China between the products to which they are affixed and the source of the goods manufactured by FOCKER. The primary function of a trademark, which the Trademark Law intends to protect, is to be source indicator. Yahuan Locks, by physically affixing a trademark to the OEM products provided necessary technical means to TRUPER HERRAMIENTAS, S.A.DE C.V., which facilitated the consignor’s use of its registered trademark in Mexico. The marks, however, does not function as source identifier in China. Therefore... the marks affixed by Yahuan are not trademarks, and the act of affixing such marks is not trademark use in the sense of the Trademark Law.

TML 63**S, FILA -20181120 (Court grants punitive damages of three times the proceeds earned by the infringer)**

- Fila Sports v Zhejiang Zhongyuan Footwear et al.
- Retrial, Beijing High Court, (2018) Jing Min Shen No. 4666
- Judges: Liu Xiaojun, Zhang Lingling, Jiang Qiang

Synopsis:

Fila Sports sued the defendants for trademark infringement and unfair competition – partially upheld by the first instance court – damages calculated by reference to the proceeds earned by the infringer from the infringement – bad faith – punitive damages - not less than one time but not more than three times the proceeds earned by the infringer – the Court of Appeal and the retrial court affirmed the calculation method of the 1st instance judgment and the punitive damages.

Excerpt of the ruling:

[5]...Pursuant to Article 63 of the Trademark Law, where an infringer maliciously infringes upon another party's exclusive right to use a trademark, in case of serious circumstances, the amount of damages may be determined as not less than one time but not more than three times the amount that is determined according to the aforesaid methods. In this case, the petitioners of the retrial, Zhongyuan Footwear, Wenzhou Dute Company and Liu Jun are peer operators of Fila Sports in the same industry. After a failed attempt to register a trademark similar to a registered trademark of Fila Sports, the petitioners still used the altered form of their registered trademark on the infringing goods, which caused confusion and misidentification among the customers. In light of the staggering sales amount of the infringing goods, it is appropriate for the first instance court and the court of appeal to impose 3-times punitive damages...

DW, Xinhua Dictionary-20171228/D2017-05 (The Court uses the method of prejudice calculation provided in the Trademark Law for the infringement of an unregistered well-known trademark)

- Commercial Press v Sinolingua Corporation et al.
- 1st instance, Beijing IP Court, (2016) Jing 73 Min Chu No. 277
- Judges: Zhang Lingling, Feng Gang, Yang Jie

Synopsis:

Commercial Press sued Sinolingua Corporation et al. for infringement on its unregistered well-known trademark “新华字典” (Chinese characters for “Xinhua Dictionary”) and infringement on its unique decoration of famous commodities – first instance court – awarded damages RMB 3,000,000.

Excerpt of the ruling:

Article 13 of the Trademark Law only mentions the prohibition to register and use and makes no reference to infringement and compensation. The court firstly cited the “Tort Liability Law” which provides that where civil rights, which include trademark rights, are violated, the violator should compensate the damage caused. The Court, then, cited the Anti-Unfair Competition Law and article 17 of 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”, which provides that the “amount of compensation (may be) determined by reference to the infringement of the exclusive right to use a registered trademark”. The Court, therefore, used the method of prejudice calculation provided in the Trademark Law for the infringement of a registered trademark. Furthermore, the court used Article 63.1 of the “Trademark Law”, which provides that, in case of bad faith where the infringement is serious, the amount of compensation may be increased to a maximum of three times (“punitive damages”). The court ascertained that the profit earned by the defendant was RMB 2,293,017.064, and decided to impose a punitive damages by multiplying the amount by 1.5, which exceeded the 3 million claimed by TCP. However, the court could not award more than what was asked by the plaintiff. The court, thus, decided to grant TCP the full amount claimed.

PATENT

PTL 11

S, Huawei SEP-20180104 (Fault determination in the negotiations on SEP licensing)

- Huawei Technologies Co., Ltd v. Samsung (China) Investment Co., Ltd., et al.
- First instance, Shenzhen Intermediate Court, (2016) Yue 03 Min Chu No. 816
- Judges: Hu Zhiguang, Zhu Jianjun, Chen Wenquan

Synopsis:

Plaintiff Huawei sued Samsung for SEP infringement, claiming for injunction but not for damages – Samsung argued it has no fault in the negotiations – The court found fault of Samsung in both procedural and substantive issues during the negotiations on patent cross-licensing, but no obvious fault of Huawei whose conduct conforms to the FRAND rule – Samsung was ordered to stop infringement

Excerpt of the Rulings:

[7] In terms of the scope and preconditions of the SEP cross-licensing negotiations, Samsung insisted on negotiating a bundle deal for the licensing of SEPs and non-SEPs, and refused to negotiate cross-licensing solely on SEPs, resulting in a significant delay to the negotiations on SEP cross-licensing between the two parties.

[11] In discussion of technologies with Huawei for the negotiations of SEP cross-licensing, Samsung did not respond positively to the SEP Claim Chart (CC) submitted by Huawei, resulting in a significant delay to the negotiations on SEP cross-licensing between the two parties.

[16] Samsung exhibits laches in providing quotation. It neither actively providing offer to Huawei nor actively counter offer to Huawei's quotation, suggesting that Samsung has a subjective fault of maliciously delaying the negotiations.

[20] In the negotiation process between the two parties, Huawei attempted to

facilitate the conclusion of the SEP cross-licensing between two parties through a neutral third-party arbitration, which was in accordance with the negotiation practice. Samsung refused without proper reasons. This shows that Samsung has a subjective fault of maliciously delaying the negotiations.

[70] According to the above facts ascertained by the court, the court holds that Huawei and Samsung have the equivalent SEP strengths in the world (with no significant difference). From Samsung's offer to Huawei, the license rate charged to Huawei is three times that Huawei charges Samsung. At the same time, Samsung's strength in 3G/UMTS SEPs is weaker than that in 4G/LTE SEPs it owns worldwide. However, on July 25, 2011, Samsung proposed to Apple with the unilateral UMTS SEP license rate of 2.4%. Comparing the license rate of 2.4% with the above-mentioned 3G and 4G SEP license rates offered by Samsung to Huawei, the former is nearly * times higher. The quotation rate of the SEP licensing may be different from the final agreed rate. The quotation rate may be adjusted accordingly with the negotiation process, thus leaving room for bargaining, but it should not greatly deviate from the value of SEPs and each party's strength of SEPs. Samsung's offer clearly deviates from its strength on SEPs compared with that of Huawei. It obviously does not conform to the FRAND rule, and Samsung is therefore subjectively malicious. Furthermore, the SEP rate proposed by Samsung in this case is obtained according to the Huawei v. IDC case. The rate determined in the Huawei v. IDC case is not a global rate but a regional rate that Huawei should pay to IDC for SEPs in China. The SEPs for cross-licensing negotiations between Huawei and Samsung are SEPs across the world. Samsung provided quotation by reference to Huawei's v. IDC case, which was not comparable. IDC is a non-implementation entity of SEPs that adopts SEP licensing as its business model. This is not the case with Huawei and Samsung, both of which are the world's leading SEP implementation entities. The license agreement between Huawei and IDC submitted by Huawei can prove that after the final judgment of Guangdong High Court, Huawei and IDC reached and fulfilled the new global license agreement, in which the SEP license rate in China determined in the judgment was not implemented. As a result, it would be inappropriate to use the IDC rate in China determined by Guangdong High Court's final judgment as a comparable rate for this case. That is to say, considering the characteristics of the licensor, the scope of the licensed SEPs, and the geographical scope, it is obviously unreasonable for Samsung to quote according to the judgment of Huawei v. IDC case. At the same time, Huawei indicated to Samsung that it was willing to share with Samsung the Huawei and IDC global agreement for Samsung's reference under the conditions of arbitration confidentiality procedures. The above facts prove that Samsung has obvious subjective fault, and its offer to Huawei does not conform to the FRAND rule.

[80] Since July 2011, Huawei and Samsung have been negotiating for more than six years. The plaintiff Huawei has no obvious fault during the

negotiation process, which is in line with the FRAND rule. When Samsung and the plaintiff Huawei conducted the SEP cross-licensing negotiations, it has obvious faults in both procedural and substantive aspects, which does not conform to the FRAND principle. The plaintiff, Huawei, sought injunctive relief from the court, on the condition that it was impossible to resolve the issue of SEP cross-licensing between the two parties through negotiations or arbitration. In the mediation held by the court, there were malicious delays on Samsung's side. In view of this, the court upheld the plaintiff's claim that the four defendants should stop patent infringement, that is, stop exploiting the 4G SEP in this case.

[83] Considering that the patent in this case is a 4G SEP, it is different from the non-SEP in stopping infringement. After the court's injunction takes effect, Huawei and Samsung can still negotiate on the SEP cross-licensing. If the plaintiff and Samsung reach a SEP cross-licensing agreement or the plaintiff agrees, the court shall not enforce the injunction.

PTL 13**D, Zhongnan Shuanglv Co.-20170907 (Determination of royalties for invention patent in temporary protection period)**

Zhongnan Shuanglv Co., Nidec Co.,Ltd. v LG Co., Ltd.
Second instance, Beijing High Court, (2017) Jing Min Zhong No. 55
Judges: Fan Xue, Chen Xi, Liu Xiaojun

Synopsis:

The plaintiff LG Co. sued the defendant Nidec Co., asking for royalties during patent temporary protection period for using a spindle motor invention patent – the defendant argued that the fee was improperly calculated – the first instance court supported the plaintiff's claim – the second instance court affirmed the decision – the royalties can be determined by reference to the related patent licensing fees; if there is no licensing fees for reference, the people's court may decide by reference to damages calculation as provided by Article 65 of the Patent Law in consideration of such factors as the type of patent, nature and seriousness of the exploitation of the invention patent, and so forth.

Excerpt of the ruling:

[6] First, regarding determination of royalties in temporary protection period. Although the exploitation of technical solution during the temporary protection period of an invention application does not constitute infringement of the patent right, the patentee has the right to claim the benefit or loss during the temporary protection period after the invention application is granted. The royalties may be reasonably determined by reference to the relevant patent licensing fees; where there is no patent licensing fee for reference, the people's court may decide by reference to damages calculation as provided by Article 65 of the Patent Law considering such factors as the type of patent, nature and seriousness of the exploitation of the invention patent, and so forth. In this case, Nidec Co. manufactures and sells the J130 model spindle motor during the temporary protection period of the patent, and shall bear the corresponding civil liability. While LG Co. asserts that according to the data obtained by the court from HITACHI-LG Data Storage, Inc., from May 2013 to June 2014, a total of 6,966,060 pieces of J130 model spindle motors were purchased. Based on the unit price and 6% profit margin acknowledged by Nidec, Nidec earned a profit of 2,426,834 RMB. Therefore, the royalties for exploitation of the invention during the temporary protection period shall be paid in accordance with the amount of profit. The court found that, according to the evidence, from May 2013 to June 2014 (in the temporary protection period of the patent), HITACHI-LG Data Storage, Inc. purchased a total of

J130 model 6,966,060 spindle motors from Nidec with a total price of approximately US\$6,587,132. In evidence preservation, the court of first instance requested Nidec to provide the amount of production, unit price and profit of the J130 model spindle motor from 2013 to 2015, but Nidec only provided production and sales data of three models of spindle motors, K160, K070 and G210, and refused to provide data about J130 model because "it could not be found". Also in the evidence preservation proceeding, the staff of Nidec stated that in general the profit margin of the alleged infringing products was 5% to 6%, and admitted that HITACHI-LG Data Storage, Inc. did purchase the accused infringing products from Nidec. In response to Nidec Company's objection to the profit calculation, the court has elucidated that Nidec may supplement corresponding evidence to support their assertion, but Nidec failed to do so after the court hearing. In view of the fact that LG Company has provided *prima facie* evidence on the benefits of Nidec, and Nidec did not provide the manufacturing and sales document of J130 model spindle motor without any justifiable reasons, and did not submit evidence of operating profits of the accused infringing product, it is appropriate for the first-instance court to support LG's assertion in calculating the royalties during temporary protection period based on the output, unit price provided by HITACHI-LG Data Storage, Inc., and the 6% profit margin acknowledged by Nippon Electric Co., Ltd.

PTL 23**B, Staples-20171225 (Only the prior rights holder and interested parties are allowed to file an invalidation petition on the grounds that the design patent rights conflict with the prior legal rights acquired by others)**

- Staples, Inc. v PRB et al
- Retrial application, Supreme People's Court, (2017) Zui Gao Fa Xing Shen No. 8622
- Judges: Mao Lihua, Zhu Li, Tong Shu

Synopsis:

Staples, Inc. filed invalidation petition and the PRB made a decision to maintain the patent validity – Staples, Inc. sued this decision – The first-instance and second-instance courts upheld the decision, and Staples applied for retrial – The Supreme People's Court held that conflict between the design patent right and the prior legal rights acquired by others is a relative invalidity ground – Considering the nature, legislative purpose, and the effect of legal order, and other factors, petitioner's eligibility for citing relative invalidity ground should be restricted, and in principle, only the prior legal right holders and their interested parties can file invalidity action on such ground

Excerpt of the ruling:

[4] First of all... if the design patent right conflicts with the prior legal rights acquired by others, it directly affects only the prior legal rights, and has no bearing on the public interest. At the same time, in legal practice, the evidence proving the conflicts is usually only available to the prior right holder or interested parties, and such evidence is usually inaccessible to others. Therefore, conflict between the design patent right and prior legal rights acquired by others is a relative invalidity ground, and can only be claimed by the prior right holder or the interested parties. The eligibility of the invalidation petitioner alleging this right conflict is inherently limited due to the nature of a relative invalidity ground.

[5] Secondly, regarding the legislative purpose of Article 23 of the Patent Law related to the rights conflict. The provision “a patented design may not conflict with the legal rights acquired by others in prior”, which is introduced during the second amendment to the Patent Law, is purported to provide a legal basis for the prior right holder seeking to declare a design patent invalid if the design patent applicant, without prior right owner's permission, simply apply

others' legal rights to the applicant's own product.. Therefore, the legislative purpose of this article is to protect the prior rights.

[6] Finally, regarding the effect of the legal order. If anyone is eligible to request design patent invalid on the ground of conflict of right, it may cause negative effects to legal order. Allowing anyone to request for invalidation on the grounds that the design patent is in conflict with other's prior legal rights will inevitably result in a dilemma against the intention of the prior owner. It should also be noted that the nature of the conflict between the design patent right and prior legal rights lies in that the exploitation of the design patent right will infringe the prior rights of the other party, and this conflict will be eliminated if the design patent owner obtains the permission or consent of the prior right holder. Therefore, if the public other than the prior right holder or interested parties initiate invalidation procedure, the subsequent administrative procedures and administrative litigation proceedings may be of no avail at any time due to the elimination of the conflict, resulting in waste of administrative and judicial resources. Conversely, if only the prior rights holder and interested parties are allowed to request patent invalid on the ground of conflict of rights, the above-mentioned adverse effects can be avoided.

PTL 59**S, VALEO-20190327(Criteria for ascertaining infringement of functional features)**

- Xiamen Lukasi v. VALEO et al.
- Second instance, Supreme People's Court, (2019) Zui Gao Fa Zhi Min Zhong No. 2
- Judges: Luo Dongchuan, Wang Chuang, Zhu Li, Xu Zhuobin and Ren Xiaolan

Synopsis:

Valeo sued Lukasi, Fuke and Chen Shaoqiang for infringing patent rights – Valeo sought in-suit injunction from the court of first instance – Shanghai IP Court, the court of first instance, granted the plaintiff's application, ordering the defendants to instantly stop infringement actions, leaving the issues of compensation and others for further trial – the defendants appealed - the SPC upheld the conclusion of the lower court but held that the court of first instance had erred on its finding of some functional features of the patent at issue – if a certain technical feature has defined or implied the specific structure, components, procedures, conditions or relations thereof in the technical solution of the patent, even it describes functions or effects as well, in principle it should not be taken as functional features for infringement analysis — since the order to stop infringement by court of first instance has not come into effect, court of second instance should continue to review the application of in-suit injunction.

Excerpt of the ruling:

[13] ...Functional feature means the a technical feature that does not directly define, but rather define through their functions or effects, the structure, components, procedures, conditions or the relations thereof in the technical solution of the patent. If a certain technical feature has defined or implied the specific structure, components, procedures, conditions or relations thereof in the technical solution of the patent, even the functions or effects are limited as well, it is still not generally considered a functional feature in the sense of the judicial interpretation, and should not be taken as functional feature for infringement analysis.

[17] Valeo applied in first instance proceedings for the in-suit injunction for Lukasi, Fuke and Chen Shaoqiang's infringement action, and provided corresponding guarantees. The court of first instance did not respond to the in-suit injunction application but ordered injunction, and thus this issue is subject to review in the appeal procedure. As to the application for in-suit

injunction, the court holds that:

[18] Where a party applies for in-suit injunction in first instance proceeding, it is under the jurisdiction of the court of first instance before such case reaches the court of second instance; after that, the court of second instance should have jurisdiction over the case. In this case, as the case has been accepted by this Court, the related application for in-suit injunction shall be under the jurisdiction of this Court.

[19] The special situation to be considered in this case is that although the court of first instance has made a partial judgment ordering an injunction, the injunction has not come into effect, and the patentee insisted on the application for in-suit injunction in first instance. Although there is a possibility of overlap between the contents of the application for in-suit injunction and the injunction judgment both of which share similar function as to clarify as soon as possible the legal relationship between the parties and thus improve the efficiency of dispute resolution, however, as two separate mechanisms, the application for in-suit injunction still has unique value in specific circumstances. For instance, in the event of an emergency in which the interests of the applicant are infringed or any other circumstances where the applicant is otherwise prejudiced, whilst an injunction order has not yet come into effect because of an appeal, the in-suit injunction may stop the infringement timely and protect the patent right more effectively. In-suit injunction for stopping infringement has significant value given that relevant civil procedure law does not stipulate the temporary execution of unenforced judgments. Therefore, the court of second instance may consider the following circumstances when dealing with the application for the in-suit injunction: in the event of emergencies or other damages, where the patentee files an application for in-suit injunction, if the court of second instance is unable to make the final judgment within the time limit for the processing of the in-suit injunction application, the court shall make independent decision over the application timely in accordance with law; where the conditions for the in-suit injunction are met, the court shall award in-suit injunction timely. Meanwhile, as the first-instance court has found infringement, the court of second instance may directly examine the application for the in-suit injunction on the basis of relevant facts without further requiring a guarantee. If the court of second instance can make a final judgment within the time limit for processing the application for in-suit injunction, the court may make a final judgment and dismiss the application for in-suit injunction. In this case, Valeo insisted on its application for in-suit injunction in the second instance proceeding, the evidence submitted by Valeo, however, did not suffice to prove that an emergency has arisen and damage has been caused, and the Court had already made a final judgment at the court hearing, which has already come into effect. There is no necessity to make an additional ruling on the in-suit injunction. Valeo's application for in-suit injunction is therefore dismissed in this case.

B, Lifan Co.-20171212 (In patent infringement litigation, whether the estoppel is explicitly denied should be based on an objective and comprehensive judgment over the examination process of the patent prosecution and invalidation procedure.)

- Cao Guilan et al. v Lifan Co., Ltd. et al.
- Retrial, Supreme People's Court, (2017) Zui Gao Fa Min Shen No. 1826
- Judges: Zhou Xiang, Luo Xia, Tong Shu

Synopsis:

Jiang Xiaoping^① sued Lifan and five other defendants, alleging that their automobile antennas infringed his invention patent – the six defendants raised a prior art defense – the first instance court found infringement – the second instance court reversed the judgement, finding that the restrictive interpretation to the patent made by Jiang Xiaoping in the invalidation procedure was not explicitly denied, and doctrine of estoppel shall be applied – The Supreme People's Court corrected the lower court's application of doctrine of estoppel – The restrictive interpretation made by the patentee has been explicitly denied by the examiner in the prosecution procedure, and the panel in invalidation procedure did not overturn the examiner's conclusion. It should be determined that the patentee's restrictive interpretation has been clearly denied and thus doctrine of estoppel shall not apply.

Excerpt of the ruling:

[2] According to Article 13 of the Interpretation (II) of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Patent Infringement Dispute Cases, "Where a patentee proves that the restrictive modification or interpretation to patent claims, specifications and the attached diagrams made by the patent applicant or patentee has been explicitly dismissed in the procedure of patent prosecution or invalidation, the people's court shall determine such modification or interpretation does not result in the abandonment of the technical solution." This article uses "explicitly dismissed" as an exception to the applicable circumstances of the doctrine of estoppel. In the event that the adjudicator explicitly dismisses the interpretation by the right holder, it does not lead to abandoning of the technical solution, thus the doctrine of estoppel shall not apply. Given the consistency of the patent prosecution and invalidation procedure as regards determination of technical features, when judging whether the statement made by the right holder is "explicitly dismissed", objective and

^① Jiang Xiaoping died of illness on June 10, 2016. His legal heirs Cao Guilan, Hu Meiling, Jiang Li, and Jiang Haotian applied in writing as inheritance parties in accordance with the relevant provisions of the Civil Procedure Law.

comprehensive judgment should be made over the examination of the technical features in the patent prosecution and invalidation procedure, focusing on whether the restrictive interpretation of the technical solution made by the right holder is finally recognized by the adjudicator, and whether the patent application is granted or the patent right is maintained thereon. According to the related facts in this case, the patent examination department of the State IP Office did not approve Jiang Xiaoping's interpretations on technical features a) and b) in the prosecution procedure, and explicitly dismissed the interpretation. Moreover, the granting of the patent was not based on the restrictive interpretation on the features a) and b). In the subsequent invalidation procedure, the Patent Reexamination Board did not overturn the examiner's opinion in prosecution procedure...When evaluating the patent's inventiveness, although the invalidation decision lists technical features a) and b) as distinguishing features, they did not affect the Patent Reexamination Board's conclusion on the inventiveness of the patent at issue...because the prior art had the opposite technical teaching. Since the restrictive interpretation made by the patentee has been explicitly dismissed in the prosecution procedure, and the panel in invalidation procedure did not overturn the decision, under such circumstance, it needs to be acknowledged that the patentee's restrictive interpretation has been explicitly dismissed, which is consistent with the fact that the restrictive interpretation does not facilitate the granting or sustaining of the patent rights, and does not contradict with the purpose of "doctrine of estoppel " to prevent rights holders from "taking advantage at both sides". Therefore, Jiang Xiaoping's statement of opinion on the features a) and b) did not lead to the abandonment of the technical solution.

B, Dyson-20171113 (In patent infringement litigation, if other patents and the patent at issue enjoying common priority, the statement of opinion in the prosecution of such other patents has the effect of estoppel.)

- Dyson Technology Limited v Suzhou Sofa Electrical Machinery Co., Ltd.
- Retrial, Supreme People's Court, (2017) Zui Gao Fa Min Shen No. 1461
- Judges: Luo Xia, Tong Shu, Zhou Xiang

Synopsis:

Dyson sued Sofa alleging that Sofa's handheld vacuum cleaner infringed Dyson's patent – The patent at issue records the power source, but the alleged infringing product provides electricity by connecting the power cord to the power outlet – Sofa argued that the patentee clearly stated that "power cord is not the power source" in the invalidation procedure for other patents sharing the same priority – The Court of Second Instance and the Supreme People's Court both hold that "power source" does not include "power cord", and the patent is not infringed – when determining the meaning of claim terms, if the patentee has interpreted the terms in the prosecution or invalidation procedure of other patents with common priority, the patentee's interpretation should be taken into consideration.

Excerpt of the ruling:

[3] In the first instance proceeding, Sofa provided the prosecution histories of the invention patent No. 200780027217.X (hereinafter referred to as "the related patent") as evidence. The related patent and the patent at issue were both applied by Dyson Technology Limited and they enjoy the same priority (GB0614235.0, 2006.7.18). The scopes of independent claims of the related patent and the patent at issue are basically identical, so are the contents of the two patent descriptions. Furthermore, in the substantive examination procedure of the related patent, Dyson made a specific interpretation on the meaning of the term "power source" in its response to OA, stating that the power cord is not a power source.

[5] In this case, the related patent and the patent at issue are two Chinese patents enjoying the same foreign priority. The so-called foreign priority means that where the application firstly filed by the applicant in one member country, the subsequent application filed within a certain period of time on the same subject in other member countries have the same filing date of the priority application. At present, the criteria to determine whether the applications are of the same subject are the same as that for determining whether patent amendment is beyond its original scope. That is, the application shall not exceed the scope of the priority. In this sense, the

relationship between subsequent application and priority application is basically the same as that between divisional application and its parent application, i.e., the divisional application/later filed application shall not exceed the scope of parent application/priority application. In addition, since the later filed application enjoying priority should have the same subject with the priority application, it apparently has closer inner relationship than the non-unitary relationship between the divisional and parent application. Therefore, considering in the substantive examination procedure of the related patent, Dyson made a specific interpretation on the meaning of the word "power source", the Court found this interpretation can be used to explain the patent claim in this case, and the power cord is not a "power source".

PTL 60

B, Yulin IP Office-20171225 (In patent administrative enforcement, if a panel member that has been replaced still signs the administrative decision, it constitutes a serious violation of the due process.)

Xixia Longcheng Co., Ltd., v. Yulin IP Office et al.
Retrial, SPC, (2017) Zui Gao Fa Xing Zai No.84
Judges: Jian Li, Zhihong Zhang, WeiKe Du

Synopsis:

Xixia Longcheng Co., Ltd., sued Yulin IP Office for bringing ineligible panel member into the administrative proceeding, which is against due process – Yulin IP Office argued that the deployment of the panel member had been sanctioned by its superior department and Xixia Longcheng did not raise objection in the oral hearing procedure – the first instance court ruled in favor of the Yulin IP Office – the second instance court affirmed the decision – the Supreme People's Court found Yulin IP Office violated the due process – a panel member who has been replaced by others cannot sign on the decision, or else it will lead to the situation that “the decider did not hear the case while who heard the case did not decide”, which is a serious violation of due process

Excerpt of the ruling:

[2] Firstly, for the dispute between the two equal civil parties Xixia and Tianyuan, Yulin IP Office is neutral to decide whether Tianyuan infringed Xixia's patent right. The ascertaining of patent infringement defines the patent protection scope and thus has significant impact on the vital interest of a patentee, and it also has a bearing on the technical creation and the development of the economy and society. The impartiality of such process can only be guaranteed by rigorous and standardised dispute resolution procedure. Yulin IP Office should observe the principle of meticulousness, transparency, and equity in dealing with patent infringement disputes. However, in the event that a panel member that has been definitely replaced by another person still signed the accused administrative decision, it leads to the situation that “the decider did not hear the case while who heard the case did not decide”. This scenario deviates from the principle of administration by law and impairs the public's reliance on administration. That is also the reason why this case cannot be settled even through two instances in intermediate court and high court. Yulin IP Office did not pay sufficient attention to this vital and basic procedural matter. The error *per se* constitutes obvious and serious violation of the due process, and thus is not an

“administrative act slightly violating the due process and thus needs not to be cancelled”, as argued by Yulin IP Office.

[3] Secondly, the accused administrative act is a decision on patent infringement dispute made by Yulin IP Office. This decision was made in the name of Yulin IP Office and by a panel of five panelists. In principle, the panel should consist of staff competent to perform patent administrative enforcement duties. All the parties of this case affirmed that the administrative region recorded on the Patent Administrative Enforcement Certificate should be the region where the office that employs the holder of such certificate is located. Even as asserted by Yulin IP Office that it was newly established and does not have enough staff or experience, and needs the help of experienced administrative officer from office of other region, the circumstance that “the decider did not hear the case while who did not hear the case made the decision” shall never be allowed. Also, it did not exempt the Yulin IP Office from fulfilling formal and complete authorization formalities in the event of deployment of law enforcement officers. Otherwise, the normativity and seriousness of administrative enforcement could not be guaranteed. However, in this case, Yulin IP Office did not provide any official document, authorizing specific panel member to participate in this case. The so called Response (duplication) issued by Shanxi IP Office is an internal instruction without any docket number, any official seal, and is simple and casual. The Supreme People’s Court finds such document inadequate to serve as a legitimate and effective basis allowing such staff to participate in this case. The accused administrative decision predates the Response of the State IP Office for Deploying Administrative Officer in Specific Case, which is not directly relevant as to substantiate the formalness or completeness of the deployment formality in this case. Therefore, this Response could not be deemed as the basis for allowing the aforesaid panel member to participate in the case and make the accused decision.

[4] Thirdly, it is essential to strengthen judicial protection over IP administrative protection action. In this case, Yulin IP Office claimed it had notified the parties the specific identity of the panel member and the reason for bringing the panel member into the oral hearing, however, it didn’t provide evidence to support this argument. Therefore, whether Xixia had acknowledged the identity of the panel is not the basis or factor for this court to decide whether the accused decision is legitimate. It should be specifically pointed out that the replaced panel member’s signing on the accused decision already constitutes serious violation of due process. This conclusion will not be changed no matter the civil parties are aware of the flaw or not, and it certainly will not be changed no matter the civil parties raise objection to the flaw or not. It is sound and reasonable for Xixia to raise opposition on this issue in the re-trial proceeding. Therefore, the Supreme People’s Court finds the argument of Yulin IP Office and Tanyuan untenable.

PTL 65**S, Guowei-20180626(Method of calculating compensation for damages)**

- Guowei Co., Ltd., v Changshu Linzhi et al.
- Retrial, Supreme People's Court, (2018) Zui Gao Fa Min Zai No. 111
- Judges: Zhu Li, Mao Lihua, Tong Shu

Synopsis:

Wuxi Guowei Ceramics and Electric Appliances Co., Ltd. and Jiang Guoping sued Changshu Linzhi Electrical Heating Device Co., Ltd. and Suning.Com GROUP Co., LTD. for infringing a utility model patent – Nanjing Intermediate People's Court, the court of first instance, found infringement and ordered the defendant to pay a compensation of 15 million RMB – Jiangsu High People's Court, the court of second instance, reversed the decision for non-infringement – The Supreme People's Court found infringement, but corrected the amount of damages as 9.37 million RMB – where the evidence is adequate to find the sales amount of the infringing products, the profit should be calculated on the basis of total amount of sales, profit margin and contribution by the patent – where the evidence fails to show the sales amount of the infringing products, the damages shall be determined by reference to the statutory damages.

Excerpt of the ruling:

[16] Regarding the rationale of the method for calculating the compensation for damages proposed by Guowei Co. and Jiang Guoping. 1. Regarding the total sales amount of infringing products by Linzhi. Guowei and Jiang Guoping alleged that the total sales amount of infringing products of Linzhi Company is 169,556,341 RMB. This total amount includes the amount that Linzhi Company supplied to GD Midea AIR-Conditioning Equipment Co., Ltd., Hisense (Zhejiang) Air-Conditioning Co., Ltd., Hisense (Shandong) Air-Conditioning Co., Ltd., and TCL Air-Conditioning. However, the evidence produced by GD Midea AIR-Conditioning Equipment Co., Ltd., Hisense (Zhejiang) Air-Conditioning Co., Ltd and TCL Air-Conditioning, cannot prove that all the amount is attributed to the infringing products. Besides, the total sales amount of the product includes not only the tax-inclusive amount, but also the tax-exclusive amount. Therefore, the total sales amount of infringing products by Linzhi asserted by Guowei and Jiang Guoping is not accurate. 2. Regarding the calculation method of the compensation for damages proposed by Guowei and Jiang Guoping. Guowei and Jiang Guoping alleged that the total sales amount of infringing products should be calculated by the sales amount of the infringing products multiplied by the profit margin. Yet the

result of such calculation is the sales profit of the infringing products, not necessarily the profit obtained by the infringer from the infringement. The reason is that the profit of the infringing product may not only be contributed by the technical solution of the patent at issue, but also by other patents exploited or other components used. Therefore, the Court finds it necessary to consider the contribution of the patent at issue to the profits. Therefore, the Court will consider the calculating method proposed by Guowei Co. and Jiang Guoping by excluding the above unreasonable factors.

[19] Regarding the contribution of the patent to the profit of the infringing products. According to the technical effects recorded in the description, the benefits of patented technical solution of claim 2 include: more compact structure, stronger bonding between the parts after pressing, better heat conducting performance, less potential safety hazards caused by loose parts, higher reliability and lower manufacturing cost, etc. It can be deduced that the patent has played an important role to the market appeal of Linzhi Co.'s PTC heater. Besides, considering that the technical solution of claim 2 in this case achieves the mentioned technical effect mainly due to the semi-circular groove formed on the left and right sides of heat-conducting aluminum tube after being pressed, while the PTC heater also includes other components, so it would be inappropriate to attribute the profits of the infringing products exclusively to the infringed patent. In the case that Linzhi Co. refused to attend the court hearing without justifiable reasons, the Court exercises its discretion and ascertains that the contribution of the patent to the profits of Linzhi's infringing products is 50%.

[21] Regarding calculation of the damages caused by Linzhi's products supplied to GD Midea AIR-Conditioning Equipment Co., Ltd., Hisense (Zhejiang) Air-Conditioning Co., Ltd and TCL Air-Conditioning. As mentioned above, given the evidence is not adequate to tell the proportion of the infringing products in the total sales amount disclosed by the three parties, and that there is no reasonable royalty fee to refer to, the Court determines the foregoing part of damages caused by Linzhi's infringing products by reference to the statutory damages.

ANTI-UNFAIR COMPETITION

AUCL 2

S, Coppertone - 20180308 (Enforcing a trademark acquired in bad faith disturbs market order and constitutes unfair competition)

- Bayer Consumer Care Holdings LLC and Bayer Consumer Care AG. v Li Qing et al.
- 1st instance, Yuhang District Court, (2017) Zhe 0110 Min Chu No. 18627
- Judges: Cheng Wenjuan, Tang Shaopeng, Ling Jincai

Synopsis:

Li Qing registered two marks mimicking the distinctive part of two copyrighted designs of Bayer and uses on its Coppertone sunscreen products – repeatedly filed trademark infringement complaints with Taobao – targeted the Taobao dealers, distributors and medium-and-small-size vendors offering to sell Bayer's Coppertone sunscreen products – sent cease & desist letters to Bayer's dealers, demanding cessation of "infringement" and negotiation for damages – launched massive complaints against 121 Taobao vendors and blatantly offered to withdraw his complaints if the vendors agreed to pay damages – Bayer initiated court actions, seeking for declaratory judgment of non-infringement, cessation of unfair competition acts & damages – the first instance Court upheld Bayer's claim – unfair competition – imposed damages of RMB 700,000

Excerpt of the ruling:

[11]...Li Qing knows that the plaintiff enjoys prior right to the copyrighted device and has been using in prior such device on the sunscreen products, yet he still ... registered the main identifying part of the device as a trademark, and filed targeted complaints against Bayer's sunscreen products, seeking damages from the vendors and even exorbitant profits from peddling his preemptive trademark registration. Enforcing the trademark that is acquired by maliciously infringing other's prior right, is in violation of the good faith principle and disturbs market competition order, thus falls under the unfair competition acts as provided by Article 2 of the Anti-Unfair Competition Law.

AUCL 6**C, TIANRONG-20161110/C-201810 (Using the English enterprise name of others on exports may be found unfair-competition)**

- JIANGSU TIAN RONG GROUP v HUNAN HAOHUA COMPANY
- 1st instance, Shanghai Pudong New District Court, (2015) Pu Min San (Zhi) Chu No. 1887
- Judges: Gong Xiaoyan, Shao Xun, Li Jiaping

Synopsis:

“天容” (“TIANRONG”) is the plaintiff’s trade name – the Defendant using the English enterprise name of the Plaintiff on its pesticides exported to India – the first instance court held that the enterprise name stipulated in the AUCL is not limited to the names registered by the enterprise registration authority – Defendant was found committing acts of unfair-competition for using others’ enterprise name without authorization.

Excerpt of the ruling:

[3].....The enterprise name as stipulated in Art 5.1.3 of the 1993 version of the Anti-Unfair Competition Law (renumbered as Art 6.1.2 in the 2017 version) is not limited to names registered by the enterprise registration authority. Though neither the Anti-Unfair Competition Law nor 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 explicitly stipulate that the English name of an enterprise may be eligible for protection under the Anti-Unfair Competition Law, it cannot be inferred that an English name is excluded from protection of the Anti-Unfair Competition Law. [4].....“天容” is the Plaintiff’s trade name and “TIANRONG” is the Chinese Pinyin of such trade name. “JIANGSU TIANRONG GROUP CO., LTD”, which corresponds to the Plaintiff’s Chinese enterprise name, has been genuinely used by the Plaintiff as its English name in business operation so that the name has already functioned as an identifier of the business operator. The English name should be found to constitute the enterprise name protected under the Anti-Unfair Competition Law. [6].....The defendant’s intentional passing-off action in using the plaintiff’s English enterprise name on its exported pesticides is likely to mislead the consumers to misconstrue its products as the plaintiff’s, which misappropriated the plaintiff’s export market share and caused damage to the plaintiff. The defendant’s conduct not only prejudiced the legitimate rights and interests of the plaintiff, but also disturbed the normal foreign trade market order, which should be found unfair-competition for using others’ enterprise name without authorization as prescribed by Art. 5.3 of the Anti-Unfair Competition Law.

AUCL 17**S, Gold Mantis-20180417 (No damages can be claimed against the unfair competition act of merely registering the trademark of another person as one's enterprise name)**

- Suzhou Gold Mantis Company v Beijing Gold Mantis Company
- 2nd instance, Beijing IP Court, (2017) Jing 73 Min Zhong No. 1078
- Judges: Song Kun, He Xuan, Liu Xuanzi

Synopsis:

Suzhou Gold Mantis Company registered “金螳螂” (Gold Mantis in Chinese Character) as a trademark – reputation in building decoration industry – Beijing Gold Mantis Company registered and used “金螳螂” as its enterprise name – sued for unfair competition – upheld by the first instance court – granted cessation of the infringement, damages and reasonable expense – the Court of Appeal affirmed unfair competition finding, order cessation of infringement, reasonable expense – no damages.

Excerpt of the ruling:

[5]...In the event that unfair competition is established for the act of registering other's trademark as one's enterprise name, the accused is obligated to stop using the specific enterprise name. However, whether the accused should be held liable for indemnification depends on the way the enterprise name is used in its actual business operation. Suzhou Gold Mantis Company argued in the 1st instance that Beijing Gold Mantis Company committed unfair competition by registering “金螳螂” as enterprise name, and confirmed that the defendant has not used “金螳螂” in actual business operation. Beijing Gold Mantis Company argued that, since its establishment, it has been engaged in exhibition business, instead of building decoration industry. Suzhou Gold Mantis Company acknowledged that it has no evidence to prove that Beijing Gold Mantis Company had taken advantage of the enterprise name so as to mislead the relevant public and cause confusion on the source of the service. Given that Suzhou Gold Mantis only requests the court to recognize unfair competition of the defendant, therefore, there is no factual basis for the plaintiff to claim damages....

PART III – MATERIALS

TRADEMARK

Introduction to the 4th Amendment to the Trademark Law of China (2019)

Dr. Hui HUANG, Mr. Paul Ranjard, Ms. Cindy ZHEN

In the beginning of the year 2018, the China Trademark Office launched a vast consultation for the fourth revision of the *Trademark Law*, offering three full months to all parties concerned, both nationals and foreign, for submitting suggestions.

Meanwhile, China and the United States were engaging in active negotiations on a wide range of topics, including the protection of intellectual property.

The partial, but fast, revision of the *Trademark Law* (which will become effective since November 1, 2019) is apparently one of the big consequences of the aforementioned events.

The revision focuses on two very important issues: (1) the proliferation of trademarks, which was one of the main comments submitted, and (2) the enforcement actions against infringers, which was considered insufficiently deterrent.

(1) The proliferation of trademarks

More than 7 million trademarks applied in one year is, indeed, becoming a problem. Obviously, many of these trademarks are applied and registered, like simple commodities, with the mere intention to be hoarded and resold. Some of these trademarks are even filed in total bad faith.

The revision focused on two articles of the law: article 4 (the general principle defining who may apply for a trademark) and article 7 (principle of good faith in applying and using trademarks).

Article 4, in particular, provides for a very general condition: ".... *need to obtain the exclusive right to use a trademark for (one's) goods or services during production and business operations*". This could imply that someone

who does not have production means, for goods or services, would not be entitled to file a trademark. However, this was not specified anywhere else in the law.

The State Council proposed, on April 20, 2019, to add to article 4 the following general wording: "*Any application for the registration of a trademark that is not intended for use shall be rejected*".

This far-reaching proposition created a problem. Members of the NPC objected that it is not unusual for legitimate businesses to file "defensive" trademarks in order to protect their marks in classes of goods more or less related to their core business and avoid the risk of dilution or having to file difficult oppositions based on reputation.

Furthermore, this proposed amendment was in contradiction with article 49 of the law which provides that *where a trademark has not been used for three consecutive years without proper reason, any person may file an application with the Trademark Office for the revocation of the trademark*. Since article 49 does not impose any obligation to use during the first three years following the registration, how could a trademark application be refused for lack of intention to use?

This is why, after deliberation, the NPC decided to add the word "*bad faith*" (which is directly related to the principle of article 7), and the final text reads: "*Any bad faith application for the registration of a trademark that is not intended for use shall be rejected*".

Two independent conditions are, therefore, needed: no intention to use and bad faith.

As it may be difficult for an examiner to appreciate whether an application is made in good or bad faith (apart, maybe, from massive numbers applied at the same time), in order to be fully effective, this amendment was extended to (i) the responsibility of trademark agents, and (ii) oppositions and invalidation procedures.

- (i) Article 19.3 provides, now, that a trademark agent should not accept being entrusted where he knows or ought to know that, not only articles 15 and 32, but also the amended article 4, are violated. Furthermore, article 68 add *in fine*, that if a trademark agent files trademarks in bad faith it may be warned or punished, and if trademarks proceedings are initiated in bad faith, it may be punished by the Court.
- (ii) Article 33 (oppositions), as amended, provides that oppositions may be filed by any party that believes that, not only article 10 and 11 (absolute grounds of refusal) and 12 (three dimensional trademarks), but also the

amended article 4 and the amended article 19.4, are violated. For article 44 (invalidations) the same reference to article 4 and article 19.4 is added.

Two other modifications were made to article 68 concerning trademark agents, which seem at best, redundant, even a bit odd:

- a) Article 68.1.3 added to article 4, which seems redundant, because the new article 19.3 has already include the new article 4.
- b) New article 68.4 stipulates the liability of bad faith registration and litigation which is not clear at all: if it aims at the agent, the precedent paragraph of this Article has already the same or even serious criminal consequence; if it aims at the applicant itself, its place seems a little odd, and not supported by the legislative history, because the State Council proposal only aimed at the agent.

Another question could be asked: whether the new article 4 will apply to the registered mark or trademark in the process of registration? Theoretically not, because the new law should not have the retroactive effect. But on the one hand, the 2001 Trademark Law did such retroactive application for the well-known marks for example, and on the other hand, the court has already recourse to old article 4 to combat the bad faith and non intention to use application, which is enumerated in detail in the article 7.1 of new guideline of Beijing High Court published two days later of the new law. It is quite interesting to see how this will be implanted the new law.

(2) Enforcement of trademarks

Article 63 provides that, where an act of infringement is committed in bad faith and the circumstances are serious, the amount of compensation calculated according to the law may be multiplied by three. The new article 63 raises this possible augmentation up to five times.

Article 63 also provides for statutory damages (maximum 3,000,000RMB) in case it appears difficult to calculate the exact amount of prejudice or illegal gains. The amended law raises the statutory amount to 5,000,000 RMB.

And finally, the revised article 63 deals with the stock of counterfeiting goods, and provides that, except in special circumstances, they should be destroyed, together with the materials and tools *mainly* used to manufacture them. Furthermore, the said materials and tools, if they are not destroyed, may not re-enter the business channels. Finally, the revised article 63 clarifies an issue that had been debated many years ago, and provides that counterfeit

goods may not re-enter the business channels, even if the trademark has been removed.

This is quite an encouraging improvement, as in addition to tools, the Court, in adjudicating cases involving trademark disputes, at the request of the right holder, can order to destroy the materials which are mainly used for the manufacture of counterfeit goods. This amendment, which adds "the materials" to the tools, fills a gap and is welcome.

This improvement is not without regret: It is restricted to "commodities bearing a counterfeit registered trademark", which excludes all other infringing goods (similar trademarks) or unregistered well-known trademarks. Since counterfeiting concerns only double identity cases (same trademarks plus same goods), the improvement is narrower than the actual article 60 which concerns all infringing goods (similar marks on identical or similar goods). Is this restriction made on purpose? Why should the powers of the courts be narrower than that of the Administration?

Altogether, since the new law was promulgated in such a hurry, we by all means need to wait for further explanation or any implementing rules/regulations and observe what will happen in the future...

Introduction to the 3rd Amendment to the Trademark Law of China (2013)

Dr. Hui HUANG & Mr. Paul Ranjard

China started to work on the third amendment to its “Trademark Law” in 2003 (the second amendment was adopted in 2001 when China joined WTO). After six years of research, investigation and soliciting opinions and comments from the public about many drafts, the State Administration for Industry & Commerce, submitted to the State Council a final draft on November 18, 2009.

On October 31, 2012, the Standing Committee of the State Council issued the “*Draft Amendment to the Trademark Law of the People’s Republic of China*”, which was then submitted to the National People’s Congress, where the law went through three readings.

Finally, on August 30, 2013, at the 4th Session of the Standing Committee of the Twelfth National People’s Congress, the “*Amendment to the Trademark Law of the People’s Republic of China*” was adopted.

The newly amended “Trademark Law” (the New Law) will enter into force **on May 1, 2014**. The New Law features the following major changes:

I. Trademark Registration and Use

1. The Principle of Good Faith

The New Law introduces, in Article 7, “good faith” as a general principle, “***The application for registration and the use of a trademark shall be made in good faith***”.

The application of this “good faith principle” can be found in a large number of articles:

- The applied trademark is the same as or similar to a trademark that is already used, but not registered

Article 15.2 : “*Where a trademark applied for registration is identical with or similar to another person’s prior used but yet unregistered trademark, in respect of same or similar goods, and the applicant has contractual or business contacts, or other relations other than those prescribed by the preceding paragraph, with the prior trademark user so*

that the applicant definitely knows the existence of this person's trademark, if this person files opposition, the applied trademark shall not be registered."

WAN HUI DA comment: The restriction, contained in previous drafts, that prior use only refers to "in China" has been deleted in the New Law. This is such an important issue that it would be advisable to make this perfectly clear, in the future amended "*Implementing Regulations*", for example by adding the words "...in China and elsewhere".

- Behaviour of Trademark Agencies :

Article 19: "*Trademark agencies shall act in good faith and abide by relevant laws and administrative regulations...;*"

Article 68: "...*Any trademark agency that violates the principle of good faith... shall be held liable for the civil liability...*"

- Five Year Limit for Invalidation of a Registered Trademark, except:

Article 45: "...*In the case of malicious registration, the registrant of the well-known trademark shall not be subject to the five-year time limit.*"

- No retroactive effect of the approval of a trademark following an opposition where a third party has used the trademark (identical or similar) between the decision rejecting the opposition and the date of validity of the trademark, which is retroactively fixed at the end of the 3 months opposition period, except:

Article 36: "...*However, the registrant of the opposed trademark is entitled to compensation where another party acts in bad faith and causes damages to the said registrant*"

- No retroactive effect of the declaration of invalidity of a registered trademark, (no reimbursement of money received while the trademark was valid), except :

Article 47: (If the person who received the money - compensation for infringement, assignment fee, royalties -

refuses to reimburse and is deemed to : "...violate the principle of fairness, total or partial refund should be made".

- "Repeat offenders" (more than two times within 5 years) and "other serious circumstances": Article 60 stipulates a higher administrative penalty.
- Infringement made in "bad faith where circumstances are serious" : article 63 provides for punitive damages no more than three times but no less than the amount (of the prejudice).

2. Protection of the Prior User of a Trademark

The New Law introduces an exception to the basic principle of "first application". The exception is in favour of someone who has been using the same or a similar trademark and had already achieved a certain level of reputation, when the trademark was applied. However, this exception has a limit: the prior user is allowed to continue using but only within its "previous usage range".

Article 59.3: "Where, prior to the application date of a registered trademark, a person has been using a trademark identical with or similar to such registered trademark in respect of the same or similar goods, and such use has started before the registrant of the registered trademark, and has acquired a certain influence, the holder of the registered trademark has no right to prohibit such person from continuing using his trademark within its previous usage range. However, the holder of the registered trademark may ask such person to properly attach distinguishable marks."

WAN HUI DA comment: What is unclear is the scope of this "usage range". Is this geographical range or more? This term should be clarified in the future revised "*Implementing Regulations*".

3. Definition of Use

The New Law "upgrades" Article 3 of the current "*Implementing Regulations*" into the law and adds a reference to *distinguishing the origin of the commodities*:

Article 48: "...affixing trademarks to commodities, commodity packages or containers as well as commodity exchange documents or using trademarks to advertisements,

exhibitions and other commercial activities to distinguish the origin of the commodities”

4. Consequences of NON Use

- Revocation

In the previous law (Article 44), the situation of non use for three consecutive years was cited as one of those “acts” that the Trademark Office shall “order to rectify” within a specified period, or that may “even” justify revocation of the trademark.

In practice and pursuant to the “*Implementing Regulations*”, the situation is handled on the basis of an application by a third party, and no opportunity to “rectify” is given.

The New Law brings the issue in line with the “*Implementing Regulations*” and the practice.

Article 49: “*Where the registered trademark has become the generic name of the designated goods or has not been used for three consecutive years without proper reason, any entity or individual may file an application with the Trademark Office for the revocation of the registered trademark*”.

- No Compensation In Case of Infringement

The infringer may argue that the trademark has not been used, and if the trademark owner cannot prove having used the trademark within the last 3 years ... :

Article 64: “*... the accused infringer shall not be held liable for compensation*”.

WAN HUI DA comment. At least, the infringement will cease. But it might be useful to clarify, in the future revised “*Implementing Regulations*”, whether the “compensation” includes the reasonable cost that the trademark owner has incurred in order to obtain a judgment ordering the cessation of the infringement.

II. Well-known Trademark Recognition

1. Conditions for Requesting to Be Recognised as a Well-known Trademark

The New Law adds a general principle governing the request for this special protection :

Article 13.1: *"Where the owner of a trademark that is well-known by the relevant public, believes that his right is being infringed, he may request the protection of the well-known trademark in accordance with the provisions of this Law".*

WAN HUI DA comment: The conditions in paragraphs 13.2 and 13.3 are unchanged. Therefore, the only purpose of this new paragraph seems to emphasize that the issue should be handled strictly "in accordance with this law".

2. Authorities Who Have the Power to Recognise a Well-known Trademark

Article 14 upgrades to the status of legal provisions the regulations governing the recognition of the well-known status of a trademark: those who have the power to make such decisions are

- the Trademark Office (in an opposition case or in the course of administrative enforcement by a local AIC bureau) ,
- the TRAB (when handling a trademark dispute), or
- the People's Court in the trademark civil or administrative cases.

3. Conditions for Recognising Well-known Trademark Status

Article 14 adds a limit to the power of the authorities. They may recognise a trademark as well-known only "*where the recognition decision is a necessary fact of the case*".

4. Prohibition to Use of the Well-known Trademark Status as an Advertising Tool

Finally, Article 14 adds a clause stipulating that:

"The manufacturer or operator is not allowed to use the "well-known trademark" expression on the commodities, the commodity packages, the containers, or in advertisement, exhibition or other commercial activities".

Violations of this prohibition are sanctioned under Article 53:

Article 53: “*... the local (AIC) shall order him to rectify the situation and may, in addition, impose a fine of 100,000 Yuan*”.

III. Substantial Conditions for Trademark Registration

1. More Signs May Be Registered

Article 8 removes the restriction of the word “*visual*” and gives an example of non visual sign: “*sounds*”. The word is followed by the symbol “*etc*”, which implies that the door is open for other non visual signs.

Correlatively, the list of prohibited signs in Article 10 is expanded, with the reference to the “*national anthem*” and “*military song*” of China.

2. Reinforcement of the Principle that Non-distinctive Signs Cannot Be Registered

- Article 11.1.3: “*those lacking distinctive features*”, is changed into “*others lacking distinctive features*”.

WAN HUI DA comment: The intention behind this apparently modest change is more significant than it seems. The word “others” implies that there is only one general category of non-distinctive signs, and that the references to “generic” and “descriptive” in the first two sub-paragraphs are only to give the main examples of such general category.

- Article 49: allows any entity or individual to file an application with the Trademark Office for the revocation of a registered trademark that “*has become the generic name of the designate goods*”.
- Article 59 stipulates that, when a trademark contains non-distinctive or functional elements the “*holder of the registered trademark has no right to prohibit others from fairly using*” such elements.

IV. Application, Renewal, Opposition, Revocation, Invalidation of Trademarks

1. Facilitation of the Trademark Application

- Article 22 allows one trademark application to designate goods or services in “several classes” and accepts “electronic” applications.
- Article 29 re-introduces the principle of the “*examination notice*” that was put into practice from 1993 until 2001, which allows the applicant to “*describe*” or “*amend*” the application.

WAN HUI DA comment: What should be clarified in the future revised “*Implementing Regulations*” is whether the amendments that the applicant is requested to make refers to the mere form of the application or to the substance, or both.

2. More Flexibility for the Renewal Procedure

Article 40 allows the trademark owner to proceed with the renewal procedure within 12 months (instead of 6 months) before the expiration of the registered trademark.

3. Important Modification to the Opposition Procedure

- Article 33 provides that (only) “a prior right owner or interested party” may raise opposition based on *relative grounds* whereas “any person” may raise an opposition based on *absolute grounds*.
- Article 35.2 provides that when an opposition is rejected by the Trademark Office the trademark is immediately approved for registration and the only recourse is to file an application to declare the trademark invalid with the Trademark Review and Adjudication Board (TRAB).

As a consequence, Article 42 of the previous law, which prohibited filing an application for invalidation based on the facts and grounds as a previous opposition is deleted.

WAN HUI DA comment: The main concerns raised by this radical change is that, notwithstanding the acceleration of the administrative procedure before the Trademark Office and the TRAB, there is still a possibility, in case of judicial appeal(s), that a long time may pass before a final decision is rendered. Therefore, it is still hoped that additional modification will be added to allow any prior right owner to introduce a legal action before the Courts, even before the attacked trademark is finally invalidated (for the moment, this possibility is opened to “other prior right owners” and

to the owner of well-known trademark, but not to the owner of an “ordinary” registered trademark).

4. Effective Date of the Revocation

Article 55 provides that when a trademark is revoked, the termination date of the exclusive right is the date of publication of the decision and not anymore “*the date when the decision is made*” (Article 40 of the Current “*Implementing Regulations*”).

5. Date of Entry into Force of All CTMO & TRAB Decisions

The New Law clarifies in Article 36, Article 46 and Article 55 that all the decision of the Trademark Office or of the TRAB, relating to refusing a trademark application, rejecting the registration upon opposition, declaring a trademark invalid and revoking a trademark enter into force when “*... at the expiration of the legal time limit, no party concerned has applied for a review or has instituted legal proceedings with the people's court*”.

6. Assignment of Trademarks

The New Law upgrades the provisions of Article 25.2 and Article 25.3 of the Current “*Implementing Regulations*” into Articles 42.2 and Article 42.3 and imposes the assignment of all other identical or similar trademarks:

“When applying for the assignment of a registered trademark, the registrant shall, at the same time, do the same assignment in respect of all his other registered trademarks, those are similar to the said registered trademark in respect of the same goods or those are identical with or similar to the said registered trademark in respect of the similar goods.”

“Where an application for the assignment of a registered trademark may cause confusions or exert any other unhealthy influences, the Trademark Office shall grant no approval thereof...”

WAN HUI DA comment: The New Law does not address the issue of transfer of the exclusive right to use a registered trademark due to reasons other than assignment.

7. Requirement of Trademark License Recordal

Article 43 of the New Law only provides for the recordal of the “trademark license” whereas Article 43 of the current “*Implementing Regulations*” provide for the recordal of a “*duplicate of the trademark license contract*”.

WAN HUI DA comment: For the avoidance of doubt, it would be useful to specify in the future revised “*Implementing Regulations*” that *trademark license* does refer to the main identification features of the license (names, date, description of the trademark, duration etc...) and not the entire agreement.

The New Law also adopts the provisions of Article 19.2 of the “*Interpretation of the Supreme People’s Court on Certain Issues Concerning the Application of Law in the Trial of Civil Cases Involving Trademark Disputes*” by prescribing that “*A trademark license, without being recorded, cannot be used against a third party of good faith.*”

8. Time Limits for CTMO and TRAB Procedures

The New Law imposes time limits to all procedures in an effort to shorten the whole process:

Articles	Competent Authorities	Procedure	Time Limit	Extension
28	CTMO	Preliminary Examination of Trademark Application	9 months	None
34	TRAB	Review on CTMO’s Rejection of Trademark Application	9 months	3 months
44	TRAB	Invalidation Decision based on Absolute Grounds	9 months	3 months
49	CTMO	Revocation Decision	9 months	3 months
54	TRAB	Review on CTMO’s Revocation Decision	9 months	3 months
35	CTMO	Decision on Opposition	12 months	6 months
35	TRAB	Review on CTMO’s	12 months	6 months

		Opposition Decision		
45	TRAB	Invalidation Decision based on Relative Grounds	12 months	6 months

9. Introduction of the Suspension Procedure

In order to avoid contradicting decisions, when a decision is directly dependant on the outcome of another pending procedure, the New Law provides that the TRAB or the local AIC may suspend their procedure until the other procedure is finished:

This applies to the following situations

Article 35: *“During the review procedure conducted by the Trademark Review and Adjudication Board ... of a decision made by the Trademark Office on an opposition.”*

Article 45: *“During the examination procedure of the declaration of invalidity conducted by the Trademark Review and Adjudication Board ...”*

Article 62 : *“During the investigation and application of an administrative penalty in a trademark infringement case”* by a local AIC Bureau, *“where there is dispute over the ownership of the trademark concerned or the right owner simultaneously institutes a trademark infringement suit with the people’s court...”*

V. Reinforcement of Trademark Administrative Management

1. The New Law specifies the administrative punishment over the trademark-related offences:

Article	Offence/Offender	Punishment
Article 51	Breach of Compulsory Registration of Trademark on Certain Goods (Article 6)	File an application for the registration within a specific period, and possible fine
Article 52	Passing off an unregistered trademark as a registered one or Breaching the prohibitions of Article 10	Stop the use of the trademark, order to rectify the situation within a specified period, and may, circulate a notice of

Article 53	Using WKTM as an Advertisement Tool	criticism and impose a fine Order to rectify the situation and possible fine of 100,000 yuan.
------------	-------------------------------------	--

2. Administration of Trademark Agencies

The New Law introduces new and strict rules in order to govern the activity of the trademark agencies

- expressly specifying that the trademark agencies are **subject to the good faith principle** during their representation (Article 19);
- forbidding the trademark agency to **represent the client** where it **knows or should know** the trademark to be filed for registration by such client falls under the circumstances of **malicious pre-emptive registration or infringement upon others' prior right** (Article 19);
- forbidding the trademark agency to **file in its own name the application for registration of trademarks on anything else other than its services rendered** (Article 19);
- the trademark agency association should apply disciplinary measures to its own members (Article 20) and
- specifying the punishment on the trademark agency's offences.

VI. Enforcement

1. Circumstances Constituting Trademark Infringement

In Article 57 the New Law adds a few words in the definition of the act of infringement :

- 1) *"to use a trademark that is identical with a registered trademark in respect of the same goods;*
- 2) *to use a trademark that is similar to a registered trademark in respect of the same goods or use a trademark that is identical with or similar to a registered trademark in respect of the similar goods, which is likely to cause confusion."*

WAN HUI DA comment: The New Law also introduces the concept of contributory infringement by adding a new clause in Article 57.

If the few added words mean to specify that confusion is likely to occur as a result of the degree of similarity, this is a welcome emphasis of the law, which may serve as guidance for enforcement authorities.

However, if the addition of these few words means that there is a possibility for a trademark, even though it is deemed similar, to be considered as not likely to cause confusion, there are serious causes for concern. Would this be considered as an adoption, in the law, of some recent judicial decisions rendered in OEM cases, where the goods are exported and cannot cause confusion? Or, would this be considered as the introduction, in the law, of the theory developed by the SPC about the coexistence in the market between similar trademarks, provided the second infringing trademark had reached a certain position in the market? These questions will need to be answered.

2. Administrative Enforcement

The penalties provided in Article 60 are increased:

Circumstances	Administrative Penalties
Turnover > 50,000 yuan	Penalty not more than five times
Turnover 0 to 50,000 yuan	Penalty not more than 250,000 yuan
Repeat offender within 5 years	Heavier punishment

WAN HUI DA comment: It may be noted that the figure of 50,000 yuan corresponds to the “criminal threshold”, beyond which a case should be transferred by the AIC to the competent enforcement authority for criminal cases (the Public Security Bureau).

In principle, the AIC should not be concerned with applying a penalty when the case qualifies as a crime. It should immediately transfer the case. Therefore, the future revised “*Implementing Regulations*” should specify that the calculation of the fine (for cases above the threshold) only applies to cases of *infringement* (similar trademark) and not to cases of *counterfeiting* (identical trademark).

3. Civil Enforcement

- Proof of the Infringement

The New Law prescribes in Article 63.2 that the judge may order the defendant to submit elements of evidence (such as account books) that are in his possession:

"Where the plaintiff has fulfilled his burden of proof in facilitating the people's court in determining the amount of compensation, while the account books and any other materials as connected with the infringing act were mostly in the control of the infringer, the people's court may order the infringer to provide such account books and materials. Where the infringer refuses to provide such information or provide false information, the people's court may determine the amount of compensation at its discretion by taking into account the claims and the evidence submitted by the infringed."

- Increase of Financial Compensation

The New Law specifies, in Article 63, the calculation standards for the civil compensation in trademark infringement cases.

- 1) The calculation methods are in the following order:

- *the actual damages that the right holder has suffered from the infringement;*
- *the profit that the infringer has earned through the infringement*
- a reasonable multiple of the royalty that the infringed registered trademark might have earned.

- 2) When the *circumstances are serious* an amount of compensation not more than three times but also not less than one time of the amount calculated by the preceding approaches; and
- 3) A statutory damage, when no calculation is possible, with a maximum of RMB 3 million.

- **Applicable Law in Conflicts between Trademark and Enterprise Name**

The New Law in its Article 58 specifies that when there is a conflict between trademark and an enterprise name, "Anti-Unfair Competition Law of the People's Republic of China" shall apply.

Introduction to the Amendment to the Implementing Regulations of the Trademark Law of China (2014)

Mr. Paul RANJARD

The Implementing Regulations of the Trademark Law was published on April 29, 2014 and entered into force on the same day as the New Law. This article introduces the main points of the Regulations and made some comments.

On May 1st, 2014 the newly amended “Trademark Law” (the New Law) entered into force. The Implementing Regulations of the Trademark Law needed to be revised and adjusted to the new Law. In September 2013, the China Trademark Office (CTMO) and the Trademark Review and Adjudication Board (TRAB) issued a first draft and called for comments. In November 2013, the CTMO and the TRAB issued a second Draft and, after receiving comments, transferred the draft to the State Council. The final text was published on April 29, 2014 and entered into force on the same day as the New Law.

Below are the main points of the Implementing Regulations, presented according to the Trademark Law new provision for substantial (1), procedural (2), administration (3) and enforcement (4) matters. For the sake of simplification, the articles of the Implementing Regulations are quoted with the letter R, while the articles of the Law are quoted with the letter L.

Substantial matters

Sounds

One of the main changes provided in the New Law (L.8) is the adoption of “*sounds, etc.*” as a new type of trademarks. Article R. 13.4 explains how a trademark application for a sound should be submitted : “*...(the sound) shall be described on a musical staff or through numbered musical notations, accompanied by a textual description, if the sound cannot be described on a musical staff or through numbered notation, the applicant shall describe it in words*”.

Generic trademarks

Another novelty of the New Law is the possibility, opened to any person, to file an application for revocation of a *trademark that has become the generic name of the designated goods* (L. 49.2). Article R. 65 provides the Trademark Office shall notify to the trademark owner that an application for revocation had been made, and that the trademark owner should file his response within

2 months from the notification; the absence of response does not affect the decision of the Trademark Office.

Procedural matters

Recipient for foreign trademark owners

Article R. 5 provides that foreigners need to designate a “recipient” in China, who will receive all the documents notified by the Trademark Office or the TRAB, for all administrative procedures related to the trademark. This measure, reflects the administration’s intention not to serve, any more, documents on parties located outside of China, and is simpler than what had been proposed in the earlier drafts.

Electronic submission of documents

Articles R. 9 and R. 10 relate to Article L.22, which stipulates that documents may be submitted to the trademark Office or TRAB in electronic format, via the Internet. They provide detailed measures to determine the exact time of service or reception of the documents, according to the manner in which they are submitted or served.

Time limits for making decisions and suspension of time

One of the main features of the New Law is to impose on the Trademark Office and the TRAB strict deadlines for examining cases and rendering their decisions (9 months for trademark examination, and 12 months or 18 months maximum, for cases according to their level of complication). In the previous drafts, the Implementing Regulations proposed that the time allotted to litigating parties to file additional arguments or evidence, should be correlative shortened (30 days instead of 3 months). However, the final text maintains the initial time limits for the parties to complete their argumentation, and provides (Article R.11) that such time shall *“not be included in the time limit for trademark examination or review”*. Likewise, the same article provides that whenever it is necessary to suspend a case in order to wait for a decision determining the existence of a prior right, such time shall also be deducted.

Unfortunately, another possibility of suspension, which was provided in the drafts, has been deleted: the possibility, for the parties, to jointly ask for suspension of time while they negotiate a settlement.

Multiclass applications and separation of applications

The possibility to file one trademark application designating goods/services in several classes is provided in the New Law, which, unfortunately, limits the possibility to divide a trademark application to the situation where the Trademark Office approves the registration of a trademark, but only for part of the designated goods/services. Article R.22 gives 15 days to the applicant to file a request for separating the application in two parts, the approved (which is, then, published) and the refused part (which will be subject to a possible review before the TRAB).

Examination notice

The New Law (Article L. 29) brings more flexibility to the registration procedure by organising the possibility to explain or amend a trademark application, following the receipt of an “examination notice”. Article R.23 specifies that the trademark applicant shall have 15 days to file such explanation or amendment.

Oppositions

One of the welcome changes brought by the New Law (Article L.33) is that an opposition based on the existence of a prior right (“relative ground of refusal”) can only be filed by the owner of such a prior right. The implementation of this new rule is given in Article R.24, which provides what document the Opponent should submit with its application to the Trademark Office: the application itself, identification documents and documents “*...certifying that it is the owner of an existing prior right*”. According to Article R. 26, the Trademark Office may refuse (to docket) an opposition if the opposition is not in compliance with Article L.33, which means that the document justifying the existence of the prior right is a pre-requisite for the acceptance and the docketing of the opposition.

This is where there is a problem, which was pointed out in the comments made on the drafts, but without result: what if the prior right is an unrecorded copyright, or the prior use of an unregistered trademark? The existence of such kind of prior right needs a whole set of evidence that cannot be provided together with the opposition. It is a substantial issue that should be subject to the decision on the merits of the case, and not a pre-condition to accept docketing the case.

The good news, however, is that the available time to file additional evidence and arguments, which had been reduced to 30 days in the previous drafts, remains three months (Article R.27). This article provides *in fine* that it is even possible to file additional evidence at a later stage, provided the evidence was generated after the expiry date of such period of time: “*...the Trademark Office may hold the evidence admissible after producing such evidence to the other party for cross-examination*”. This is, of course,

welcome, but it raises serious regrets and questions: why did the Implementing Rules drafters only provide for an exchange of evidence (and written arguments) at this specific point (additional evidence filed after the 3 month period)? Why didn't they provide for a full exchange of arguments and evidence in the entire opposition procedure? This is absolutely crucial, given the fact that, according to the New Law (article L.35.2) "*Where (in an opposition case) the Trademark Office decides to approve the registration, it shall issue a trademark registration certificate and shall make a publication*". Since there is only one chance to prevent the use of an undesired trademark, it is all the more important to ensure that the rules of procedure are transparent and fair.

International trademark applications

The New Law provisions concerning time limits (for the trademark Office or TRAB to make their decisions) do not apply to International Trademark applications (Article R.50). This is of no big consequence, ad far as the examination of the application is concerned (12 or 18 months instead of the 9 months now provided for domestic applications). However, whenever there is an opposition, this can be a quite significant difference, since the trademark Office or TRAB are not bound by any time limit (as opposed to the 12 or 18 months provided in the New Law for domestic applications).

Scope of review by the TRAB

When reviewing a decision of the Trademark Office to reject a trademark application, Article R.52 give to the TRAB the power to "re-qualify" the legal ground stated by the Trademark Office. Specifically, if the Trademark Office based its decision on other grounds than the "absolute grounds of refusal" (Article L.10 etc. of the Law) the TRAB may rectify and cite such absolute grounds, even if the Trademark Office did not. (This was already specified in the TRAB Rules of 2005.)

Concerning the review of decisions made by the TRAB, against a decision of the Trademark Office refusing a trademark in an opposition procedure, Article R. 53 is a relief! Indeed, in the previous drafts, the scope of review was restricted to "*the re-examination request (and the) facts and grounds stated in the response of the applicant*". Any argument not repeated in the TRAB procedure was to be ignored. In Article R.53, this restriction is lifted. The TRAB is to invite the Opponent to attend the review procedure and to take account of his arguments.

Furthermore, the 3 months additional period for filing evidence and arguments (which had been limited to 30 days in the drafts) is reinstated.

The draft Article R.61 allowed the TRAB to make a ruling or a decision when the parties decide to settle the case. This was a very welcome change to the practice consisting in systematically closing a case when a settlement occurs. Indeed, when a case is closed, the previous decision (of the Trademark Office) remains in force. If the parties agreed to change it, it is necessary, for the TRAB, to do it. This draft was deleted from the final Regulations, but is inserted in the New TRAB Rules which became effective from June 1, 2014.

Administration matters

Record of trademark license

According to Article L.43.3, in order to be opposed to third parties, the license (and not any more the full trademark license contract) needs to be recorded at the Trademark Office. Article R.69 provides precisions concerning what information needs to be recorded: information concerning the licensor and licensee, licensing period, goods/services concerned, "... and etc".

Enforcement matters

Article R.75 provides a useful and welcome precision concerning the act of providing services in relation to a *commodity trading platform* to an infringer, thus constituting the act of "*intentionally providing conveniences*" as stipulated in Article L.57.

Article R. 76 however, which is about the use of a sign as the *name of the goods*, or the *decoration* of the goods, is likely to create difficulties. The article refers to such act when the signs are "identical or similar" (to a registered trademark) and are used on the "same or similar goods" and specifies that such activity falls under the scope of Article L.57.2. This introduces a possible discrepancy between the Regulations and the Law. Article L.57 is divided in two parts: the first paragraph refers to the use of identical signs used on identical goods, which is considered as an act of infringement, regardless of whether there is a likelihood of confusion. The second paragraph refers to the use of a similar sign on identical goods, or the use of an identical or similar sign on similar goods, and adds the (new) condition that such use would be likely to cause confusion. Therefore, by referring to this second paragraph when an *identical* sign is used as the name or decoration of *identical* goods, Article R.76 is introducing a restriction (likelihood of confusion) which does not exist in the law (Article L. 57.1), and opens an unexpected line of defence for infringers.

Article R.78 provides details concerning the calculation of the illegal turnover, referred to in Article L.60: sales price, tag price, actual average price of the

infringing products, mid-market price of the authentic products, operating revenues of the infringer and other “helpful factors”.

Article R. 79 brings precision concerning how the seller of infringing goods can prove that he had legally obtained such goods, and should not be held liable (Article L.60): presence of a supply list bearing the seal of the supplier, existence of a purchase contract, invoices, etc.

PATENT

Introduction to the Amendment of the Guidelines for Patent Infringement Determination by the Beijing High People's Court (2017)

Mr. GAO Dong & Ms. GU Xueni

On April 20, 2017, the Beijing High People's Court issued a newly revised "Guidelines for Patent Infringement Determination" ("the Guidelines") in three languages (i.e. Chinese, English and Japanese). The Guidelines has six sections, including determination of protection scope of invention and utility model, determination of infringement of invention and utility model, determination of protection scope of design patent, determination of infringement of design patent, determination of patent infringement activities, and defense of patent infringement. In addition to the comprehensive rules on patent interpretation, determination of patent infringement and defense of patent infringement, for the first time the Guidelines provides rules on some hotly discussed issues like standard essential patent and graphical user interface (GUI) design. The revision also follows the *Supreme People's Court Interpretation on Several Issues Concerning the Application of Law in Adjudication of Patent Infringement Dispute Cases (II)* ("the Judicial Interpretation II"). This article provides a preliminary summary of the major revision in the Guidelines, with reference to an introduction by Beijing High People's Court published on Beijing Court website.

I . Exploring Rules over Claim Interpretation

1. The fairness principle

Notes: This principle is newly provided in **Article 2**. To determine the protection scope of the claims, according to the "fairness principle", it should not only consider the contribution of the patent to protect the right holder's interest, but also to consider the public's interest to avoid including prior art or technical defect to be overcome by the patent into the claims' protection scope.

2. The principle of interpretation in compliance with the objective of the invention

Notes: This principle is newly provided in **Article 4**. In the patent prosecution proceedings, the patent to be granted shall comply with the objective of the

invention and solve the technical problem of the invention. In the patent infringement proceedings, on the presumption that the patent is effective, technical solutions incapable of achieving the objective of the invention shall not be interpreted into the protection scope of the claims. This principle also accords with the fairness principle. Meanwhile, it should be noted that the Supreme People's Court also discussed this issue in the cases related to patent prosecution. Nonetheless, since the purposes of claim interpretation in patent prosecution and patent infringement proceedings are different, applications of the principle in the two proceedings are different as well.

3. The construction of different claims

Notes: This method is newly added as **Article 17**. Generally, it can be presumed that the protection scope of an independent claim is different from that of its dependent claims, unless there is contrary evidence to overturn such presumption.

4. The ways of claim interpretation are not limited to the listed

Notes: **Article 13** revises the expression of “include” to “include but not limited to”, which believes to remove the misunderstanding that claim interpretation has to be interpreted according to the rules listed only. In practice, claim interpretation can be done throughout the whole infringement analysis process, and is not limited to the three ways listed in Article 13.

5. Interpretation related to environment feature and subject title

Notes: **Article 25** newly introduces the definition of subject title, and **Article 24** revises the meaning of environment feature and further clarifies the difference between them, avoiding that subject title is improperly understood as environment feature in practice. **Article 24** provides that the infringement determination involving environment features depends on whether the environment features recited in claims are applicable to the accused technical solution, rather than whether they are actually applied in the accused technical solution. This article further details the exceptions.

6. The interpretation method for the patentee's lexicography

Notes: **Article 28** newly introduces the “lexicographer rule.” Unless the description of a patent provides no definition, a term with special definition should generally be interpreted according to the definition in the description. This article further provides that the term shall be interpreted to “best reflect the goal of the invention” when there is no definition for the lexicography in the description.

7. Interpreting claims according to drawings

Notes: Article 30 is newly added to provide how to use drawings to interpret claims, “only the technical content that can be directly and unambiguously determined from the drawings by a person with ordinary skills in the art after reading the claims and description can be used to interpret the technical features in the claim.”

8. Interpreting claims by embodiments

Notes: Article 32 is newly added to provide that apart from statutory exceptions, “the protection scope of a patent shall not be limited to the particular embodiments disclosed in the description.” Therefore, the claims should not be directly interpreted as the embodiments.

II. Interpretation of Functional Claim and the Doctrine of Equivalents

1. Interpretation of functional claim

Notes:

In Article 18, the definition of functional feature is amended according to the Judicial Interpretation II.

Articles 42 and 56 are newly added articles which respectively stipulate the determination methods of literal infringement and equivalent infringement for claims involving functional features. Nevertheless, these articles have difference with the Judicial Interpretation II regarding the specific determination rules of identical and equivalent infringement. The Judicial Interpretation II provides the literal or equivalent infringement shall be determined based on the time when infringing behavior occurs, while the above two articles provided literal infringement shall be determined based on the time of patent filing date.

2. The doctrine of equivalents

Notes:

Article 44 explicitly provides that the right holder has the burden of proof for equivalent infringement, that is, “evidence shall suffice to prove that the accused technical solution constitutes equivalent infringement.” We think this article intends to limit the application of equivalent infringement.

Articles 45-48 further improve the three elements for determining equivalent infringement, namely “basically the same means,” “basically the same function” and “basically the same effect.” Article 49 provides rules on how to determine the technical feature that “can be anticipated without inventive effort.” These articles provide guidance for judicial trial and production of evidence.

Article 57 further regulates the determination of equivalent infringement involving numerical range features following the Judicial Interpretation II.

Article 60, as a newly added article, explicitly provides that “if the right holder knows or is able to foresee the existence of alternative technical features at the time of filing or amending the patent application but doesn’t incorporate the alternative technical features into the protection scope,” the allegation that the alternative technical features constitute equivalent infringement shall not be supported in infringement determination. This article is similar to the “foreseeability limitation on the application of the doctrine of equivalents” in the US patent practice, aiming at prompting the patentee to clearly define the protection scope as early as possible. This article also reflects the rationale why Articles 42 and 56 provide different times for determining identical and equivalent infringement (the patent filing date is an important time).

III. Design Patent Rules and GUI Rules

Notes:

Article 66 emphasizes the “overall comparison principle,” which is similar to the “all elements rule” regarding invention and utility model, and it requires that in the determination of the protection scope of a design patent, it is not allowed to consider only some of the design features and ignore others. Besides, this article for the first time provides an explicit definition for the “design feature,” which is not clearly defined in the Guidelines for Patent Examination of the State Intellectual Property Office (SIPO). Therefore, it can be understood that, during the design patent prosecution proceeding, the new definition of “design feature” will be important reference for determining the validity of a design patent.

Articles 82 and 83 are newly added articles that emphasize the impact brought by “design space” on determining whether the designs are identical or similar, and further provide some detailed provisions following the Judicial Interpretation II.

Article 73 newly introduces the relevant provisions of GUI design protection. This article is the same as that in the Guidelines for Patent Examination revised by SIPO. They emphasize what’s protected is still a product’s design,

not the GUI itself independently. This article further articulates a principle that the protection scope of a dynamic GUI design shall be “jointly determined by product design views that can determine the dynamic change process.”

Articles 86 and 87 are newly added articles which provide more detailed rules on the infringement determination method of static and dynamic GUI designs.

IV. Contributory Infringement

Notes: **Articles 118-122** provides, except for those in the Interpretation II, several typical examples of abetting and aiding another's direct infringement. It should be noted that all the examples of abetting and aiding infringement require the actor “knowingly” commits the contributory behavior.

V. Abuse of Patent Right and Standard Essential Patent

Notes:

Article 126 articulates that if the patentee obtained the patent in bad faith, the court may reject the plaintiff's claim. Since the Guidelines focus on the determination of patent infringement, it doesn't provide provisions over issues of counterclaim, compensation for damages and so forth.

Article 127 supplements several typical circumstances of acquiring patent in bad faith, which will be good reference for the judicial practice.

Articles 149-153 are newly added articles. These articles mainly relate to whether injunction should be issued in the standard essential patent dispute cases. Article 149 follows the Judicial Interpretation II and provides that licensing of recommended national, local or industrial standard shall comply with the FRAND rule. It further provides that licensing of other standards drafted by international standard organizations or other organizations shall also follow the FRAND rule.

Article 150 provides that both negotiating parties shall be in good faith, namely the relevant obligations shall be performed bilaterally rather than unilaterally.

Article 151, regarding the allocation of burden of proof, articulates that the patentee shall bear the burden to prove the specific content of its fair, reasonable and non-discriminatory terms committed in formulating the standard.

Article 152 provides that the general principle is to not issue the injunction in the standard essential patent dispute cases, and it lists the circumstances under which the patentee willfully violates its obligation for licensing on fair, reasonable and non-discriminatory terms.

Article 153 provides more detailed rules on when the accused party shall be found to have clear fault.

Introduction to SIPO's Amendment to its Patent Examination Guidelines (2017)

Mr. Guangyu ZHANG

SIPO issued on March 1, a decision to amend its Patent Examination Guidelines, which will take effect on April 1, 2017. The amendments involve provisions about business method, software-related inventions, post-filing data, invalidation procedure, accessibility of patent documents and suspension procedure.

The new Patent Examination Guidelines are summarized below:

A notable amendment is the introduction of a provision concerning the protection of business models. A new paragraph is added in Chapter 1, Part II which concerns unpatentable invention creations. This new paragraph stipulates that a claim involving business models shall not be excluded from patent protection if, apart from the description of the business rule and method, it includes technical features. This provision opens a door for protecting a business method under the Patent Law.

Several amendments are introduced in Chapter 9, Part II concerning invention patent applications for computer programs. They intend to clarify that a computer program *per se* is different from an invention relating to a computer program, and thus it is allowed to draft a claim directed to a media plus computer program flow. The amendments also clarify that a claim directed to an apparatus may include a program as a component part. The expression “function module” is replaced by “program module”, in order to better reflect the technical nature and distinguish clearly from the expression “functional definition”. The amendments in this part reflect a tendency that the SIPO is becoming open to protecting computer program under the Patent Law.

The provisions about post-filing data (Chapter 10, Part II) are also amended. The current provisions that any embodiment and experimental data submitted after the filing date shall not be taken into consideration are deleted. Instead, a new section about post-filing data is introduced to specify that the examiner shall have to examine the experimental data submitted after the filing date, but the technical effect shown by the experimental data shall be obtainable based on the disclosure contained in the initial description and claims, from the viewpoint of a person skilled in the art. This amendment seems to be a sign that the SIPO has become more lenient to the applicant.

Regarding invalidation requests, Chapter 3, Part IV loosens the way to amend a patent document, specifying that it is allowed to incorporate one or

more technical features recited in other claims into a claim so as to limit the protection scope and that it is allowed to correct obvious errors in the claims. The provisions about the introduction of new invalidation grounds and new evidence are also amended to specify that new grounds concerning the claims that have been amended by incorporating technical features recited in other claims or by correcting obvious errors, shall be limited to responding to such amended contents. The provisions that the petitioner may present additional evidence within a specified time limit in response to amended claims by way of combination are deleted. As a result of such amendments, the patentee will stand in a more advantageous position in a patent invalidation procedure.

Regarding accessibility to patent application documents, Chapter 4, Part V broadens the scope of the contents accessible to the public. Anyone may consult and photocopy notifications, search reports and decisions issued during the substantive examination procedure for a patent application under examination as well as the priority documents for a patent.

Chapter 7, Part V brings the Examination Guidelines in compliance with the new Civil Procedure Law, specifying that the Patent Office shall suspend relevant procedures for the period indicated by a civil order or notification on assistance in execution issued by a people's court, in relation to property preservation.

Generally speaking, the amendments reflect an attitude of the SIPO to be more friendly to the applicants and patentees and to provide better service for the public.

ANTI-UNFAIR COMPETITION

Introduction to the 2nd Amendment to the Anti-Unfair Competition Law of China (2019)

Dr. Hui HUANG & Mr. Paul RANJARD

The revision of the Anti-Unfair Competition Law (AUCL), quickly conducted, is a new effort to enhance the IP protection of China, and another event (with the revision of the Trademark Law) in the ongoing negotiation between China and the United States, on various topics, including the protection of intellectual property.

On April 20, 2019, the State Council proposed the revision of a few articles of the AUCL related to the protection of trade secrets. After deliberation, the NPC adopted on April 23, 2019, a new version of Article 9, 17 and 21 of the law, plus a new article 32.

Trade secret definition

Article 9 *in fine*, now 9.4, provides a wider definition of what is a trade secret. In addition to "technical or operational information", the words "*other business information*" are added so that the scope of secret information can cover everything of value.

Method of illegal acquisition

The method of illegally acquiring trade secret becomes more sophisticated, by inserting in article 9.1.1 the words "*electronic intrusion*".

Article 9.1.3 addresses the frequent circumstance of trade secret theft, which is breaching "*obligations of confidentiality*".

A new sub-paragraph, now 9.1.4, is added that introduces the concept of "*instigating, inducing or assisting others in violation of their obligation confidentiality ...*"

Liable persons

Finally, whereas the article 9 starts with "*A Business Operator shall not...*" an additional paragraph, now 9.2, specifies that the prohibited acts may be

committed by "*natural persons, legal persons or unincorporated organizations, other than the Business Operator*": their act shall be deemed as infringement upon trade secrets. So, employee, for example, who are not, strictly speaking, Business Operators, are now designated by the law as potentially liable.

Civil liability

The revised article 17 introduces the concept (already in the Trademark Law) of punitive damages, by providing that in cases where the circumstances are serious, the amount of damages, calculated according to the law, may be multiplied by up to 5 times.

The article also increases the maximum of statutory damages that the court may grant in cases where it is difficult to calculate the damages according to the law (illegal gains, level of prejudice). The maximum is raised to 5,000,000 RMB.

Administrative sanctions

The administrative penalties become stronger in the new article 21: *confiscation of the illegal proceeds*, the fines is increased (between 100,000 RMB to 1,000,000 RMB or even 5,000,000 to 5,000,000 RMB depending on the seriousness of the circumstances.

Burden of proof

The new article 32 introduces the inversion of the burden of proof.

Provided that the trade secret holder proves that it has taken confidentiality measures to protect its trade secret, the alleged infringer should prove that the information in question is not a trade secret, as defined by the law.

If the trade secret holder is able to bring preliminary evidence that infringement has been committed, and that *(i)* the alleged infringer had access to the information, *(ii)* the information has been disclosed or is about to be disclosed by the alleged infringer, or *(iii)* other evidence that the trade secret has been infringed: the alleged infringer should then prove that it has not been engaged in the infringement of trade secret.

Introduction to the 1st Amendment to the Anti-Unfair Competition Law of China (2017)

Mr. Paul RANJARD

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 simple 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 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 waved 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.

IP GENERAL

China's 2018 National Intellectual Property Action Plan

Mr. Gang BAI

Since China's promulgation of the landmark "Outline of the National Intellectual Property Strategy" in 2008, China's State Council has been releasing annual action plans, identifying the priorities, objectives, and approaches that various departments, state administrations, and the judiciaries are to address, deliver, and use in order to collaborate in executing the country's annual National Intellectual Property (IP) Strategy.

On November 9, 2018, the Office of the Inter-Ministerial Joint Meeting for Implementation of the National IP Strategy, which is subordinate to the State Council, released the "2018 Action Plan for Furthering the National IP Strategy and IP Rights (IPR) Powerhouse Initiative" (Action Plan).

The Action Plan does not offer many new proposals, but rather reiterates the major IP initiatives advocated by the Chinese government within the last two years, including institutional and judicial reform, a legislative plan, and various national enforcement campaigns.

Institutional Reform

The reorganization of China's newly established National Intellectual Property Administration (CNIPA), formerly known as the State Intellectual Property Office or SIPO, leads the Action Plan.

The CNIPA was sanctioned by the nation's legislature in March, and a regulation released in September that clarifies the role of the agency sheds some light on the reorganization progress. The agency is believed to be working closely with the State Commission Office for Public Sector Reform (SCOPSR), a so-called super agency that decides on the constitution and operations of other government agencies, to sort out various details including its internal organizational structure and staff size.

Reorganization will continue within the CNIPA and may possibly include merging the China Trademark Office (CTMO), the Trademark Review and Adjudication Board (TRAB), and the Trademark Examination Cooperation Center (TECC), into a unified Trademark Office under the CNIPA. Similar mergers may take place on the patent side as well.

This possible integration would align China with the practices of most IP jurisdictions in the world, like the United States Patent and Trademark Office and the German Patent Office (Deutsches Patent- und Markenamt).

It remains to be seen if the reorganization will trigger any significant change in personnel or practice in the near future.

Judicial Reform

The Action Plan proposes a few initiatives in judicial reform—some are new, some are not.

It reiterates the “establishing of a state-level IP appellate court,” which the Supreme People’s Court (SPC) has echoed with a three-year test of having its soon-to-be-established IP Tribunal to hear appeals and retrials of: (1) the first-instance judgments or verdicts of highly technical civil IPR cases, including those involving invention patents, utility models, new plant varieties, integrated circuit layout designs, technical know-how, computer software, and monopoly; (2) the first-instance judgments or verdicts of highly technical administrative IP cases, including those involving patents, new plant varieties, integrated circuit layout designs, technical know-how, computer software, and monopoly; and (3) the retrial or prosecutorial protest against a first-instance judgment, verdict, or mediation agreement that has come into effect (which the SPC may also opt to designate a lower retrial court).

The approach bypasses the high courts at the provincial level and makes the SPC’s IP Tribunal essentially China’s Federal Circuit. It leaves out design patent cases in civil cases, but does not exclude such design patents in administrative cases.

The jurisdiction of the IP criminal cases remains unchanged. The civil and administrative cases involving trademark, copyright, and unfair competition, which are not regarded as “highly technical IP cases,” will still follow their previous route of appeal and retrial to the higher courts. Furthermore, if the trial court is a high court (provincial level) or the SPC itself, the SPC will remain the appeal court or retrial court.

The Action Plan proposes to explore the possibility of granting the Beijing Intellectual Property Court extended jurisdiction over technical suits in a geographical span covering Beijing and the neighboring areas of Tianjin and Hebei.

It is also worth noting that after a two-year trial run of the SPC’s “Opinion on Promotion of the ‘Three in One’ for the Trial of Civil, Administrative and Criminal Cases Involving Intellectual Property Rights in Courts Nationwide,” the SPC is looking into the possibility of extending this practice to the three IP courts of Beijing, Shanghai, and Guangzhou. At present, these courts have jurisdiction over IPR civil and administrative proceedings. The IPR criminal

proceedings are currently decided by local courts.

The Action Plan also confirms that four more IPR Tribunals will be inaugurated—in Xi'an, Zhengzhou, and two other undisclosed locations; no further details or concrete time lines are provided.

Legislative Plan

The Action Plan unveils the legislative plan of some major IP laws and regulations, including:

- The Fourth Amendment to the Patent Law;
- The Third Amendment to the Copyright Law;
- Revision to the Regulations on the Protection of New Varieties of Plants (promulgated on March 20, 1997, and entered into force as of October 1, 1997);
- Revision to five supporting departmental rules and regulations pertaining to the newly promulgated Anti-Unfair Competition Law, including the Regulations on Prohibiting the Acts of Trade Secret Infringement, Regulations on Prohibiting the Unfair Competition Acts in Premium Sales, as well as other regulations prohibiting market confusion and commercial bribery; and
- Revision to the Regulations on the Protection of Olympic Symbols (promulgated on February 4, 2002, and entered into force as of April 1, 2002).

On September 7, the National People's Congress (NPC), China's top legislature, released its five-year legislation plan, which prioritizes legislative objectives and allocates limited resources to cover 69 Class I legislative projects and 47 Class II legislative projects, among others. The nation's Patent Law and its Copyright Law are among the Class I projects that are under overhaul and which are expected to be submitted for deliberation during the NPC term (ending in March 2023). Despite the CTMO's four-month efforts in soliciting public opinion on the Fourth Amendment to the Trademark Law in March, the NPC's legislation plan makes no mention of the Trademark Law at all.

The Action Plan also reiterates the proposed introduction of punitive damages in both the revised Patent Law and Copyright Law and of raising the ceiling of the statutory damages for IP infringement.

In addition, it proposes to “research the possibility of applying certain provisions of the Trademark Law in the cases involving granting and affirmation of trademark rights,” which could be sending a positive signal that the “good faith principle” as introduced by Article 7.1 of the law may be directly cited as a legal ground of action. It also advocates for determining

parameters of bad faith trademark filing/registration and ascertaining application of laws under different scenarios.

The SPC has been tasked with exploring the possibility of introducing discovery procedure and legal devices to address spoliation of evidence, as well as to alleviate the litigants' burden of proof by assessing (1) the admissibility of certain evidence that has already been found tenable in another legal proceeding; (2) the efficacy and credibility of judicial appraisal in different proceedings; and (3) the function of expert witnesses.

Enforcement Campaign

The Action Plan vows to further the implementation of various national enforcement campaigns, including:

1. "Convoy" and "Thunder," launched by the CNIPA to attack patent counterfeiting and infringement in e-commerce, food and drug, environmental protection, work safety, and the hi-tech industry;
2. "Sword Net," initiated by the National Copyright Administration to combat unauthorized online reprinting of copyrighted contents through news platforms and social networks; unauthorized reproduction, performance, and dissemination of copyrighted works through video clip apps; and unauthorized dissemination or using of others' cartoon images;
3. "Dragon," introduced by the General Administration of Customs to tackle IPR infringement in exportation; and
4. "Green Shield," established by the State Post Bureau to address IPR infringement in postal and courier services.

The CNIPA will promote joint patent enforcement in the Beijing-Tianjin-Hebei regions as well as in the Yangtze River Delta and Pearl River Delta area.

The Supreme People's Procuratorate and the Ministry of Public Security will prioritize their resources in prosecuting or investigating those IPR criminal cases involving prospective fundamental study, leading innovation, and disruptive technological innovation.

The General Administration of Customs will promote its portable query system of IPR Customs Protection Recordal and launch an online IPR Customs Protection Portal.

Other Miscellaneous Matters

The CNIPA will continue its effort in facilitating trademark registration procedure and expediting examination of trademark registration. While the revised law (2013) provides a time limit of nine months, the plan called for reducing this period to six months in 2018 (it was further reduced to slightly

more than five months), then five months in 2019, and four months in 2020.

The Action Plan envisages to progressively encourage local governments to abandon the recognition of and the financial incentive to the owners of a “famous trademark,” a concept that has created lots of confusion with the “well-known trademark,” as provided in the Trademark Law.

In the coming years, China’s IP system will continue the process of reforms across judicial, administrative, and enforcement bodies. INTA looks forward to engaging in opportunities to weigh in on this transformation and to keeping members informed of developments.

Regulations Clarify Role of New Agencies Following China's IP Institutional Reform^①

Mr. Gang BAI

Since the Chinese government announced its plan to reorganize various government agencies in March, foreign brand owners have been wondering how it will affect the intellectual property (IP) sector and practice.

In August 2018, China's State Intellectual Property Office (SIPO) was renamed the National Intellectual Property Administration (CNIPA). Shen Changyu, ex-SIPO Commissioner, was appointed as CNIPA Commissioner. Liu Junchen, ex-Vice Commissioner for the State Administration for Industry and Commerce (SAIC) was appointed as one of the six vice Commissioners of the CNIPA.

At the same time, the activities of the SAIC (trademarks and competition); SIPO (patents); the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) (product quality); and food and drugs regulation were regrouped under one central administration, the State Administration for Market Regulation (SAMR). Zhang Mao, ex-Commissioner of the SAIC was appointed as Commissioner of the SAMR.

In September, two regulations were released by China's State Commission Office for Public Sector Reform (SCOPSR). The SCOPSR is the executive organ of the Central Institutional Organization Commission, a governmental agency specializing in policymaking on administrative reform, central reorganization plans, staffing, quotas, and administrative regulations for state institutions. In a nutshell, the Commission is a super agency that decides on the constitution and running of other government agencies.

On September 10, 2018, the "Regulations on the Function, Organisational Structure and Staffing of the State Administration for Market Regulation" (SAMR Regulations) were released and came into force retroactively on July 30. On September 11, 2018, the "Regulations on the Function, Organisational Structure and Staffing of the National Intellectual Property Administration" (CNIPA Regulations) were released and came into force retroactively on August 1.

SAMR Regulations

The SAMR Regulations outline the following IP rights (IPR)-related functions:

^① This article is first published in INTA Bulletin Vol. 73 No. 19, November 1, 2018.

Market Regulation Enforcement: overseeing the integration and building of enforcement teams at local Administration for Market Regulation (AMR) offices; promoting integrated market supervision; and orchestrating *major* enforcement programs;

1. **Anti-Monopoly Enforcement:** coordinating and promoting the execution of competition policy; overseeing fair competition probe; conducting anti-monopoly probe against concentration of operators, as well as anti-monopoly enforcement against monopoly agreement, abuse of market dominance position, and abuse of administrative power in eliminating or restricting competition; and coaching Chinese businesses in coping with overseas anti-monopoly suits; and
2. **Administration of Market Order:** supervising and regulating market transactions, Internet commodity trading and the services thereof; organizing and overseeing the enforcement against pricing offenses or violations, unfair competition, illegitimate pyramid scheme or multi-level marketing, trademark or patent infringement, manufacturing or sale of counterfeits or shoddy goods; and supervising advertising industry and advertising activities.

These functions are expected to be fulfilled by the agency's bureaus: the Enforcement Inspection Bureau, the Anti-Monopoly Bureau, the Internet Transaction Administration Bureau, the Price Probe & Anti-Unfair Competition Bureau, and the Advertising Administration Bureau.

According to the regulation, the Enforcement Inspection Bureau is tasked to organize and oversee investigations and enforcement against major cases of national implication or which have trans-provincial/municipal geographical reaching. Brand owners are advised to approach the Bureau if they seek to initiate nationwide or trans-provincial/municipal enforcement actions.

IPR enforcement against trademark or patent infringement, counterfeiting, and unfair competition also falls under the jurisdiction of the Enforcement Inspection Bureau, but given the top-down nature of the institutional reorganization, a nationwide AMR network has not yet been formed. For instance, there is no Beijing AMR yet. This could be problematic. The IPR enforcement function of the CNIPA and local IP offices (IPOs) has been *de facto* transferred to the SAMR and its local offices. However, in the regions where there is no local AMR, brand owners will need to resort to the local IPO and the Market Supervision and Administration Office (equivalent to the local Administration of Industry and Commerce) with respect to functions) to enforce their IPRs.

The Anti-Monopoly Bureau, integrating the Anti-monopoly Bureau of the Ministry of Commerce (MOC), the Price Supervision and Inspection and Anti-monopoly Bureau of the National Development and Reform Commission (NDRC), and the SAIC's Anti-monopoly and Anti-unfair Competition Enforcement Bureau, will be the nation's anti-monopoly watchdog, acting as the executive organ of the Anti-monopoly Committee of the State Council.

CNIPA Regulations

The CNIPA Regulations outline, *inter alia*, the following functions, among others:

1. **Drafting and Execution of National IPR Strategy:** formulating major policies, initiatives, and developing plans for building China into an IP powerhouse; and developing and executing administrative policies and mechanism to promote IP innovation, protection, and utilization;
2. **IPR Protection:** devising and implementing protection mechanisms for trademark, patent, geographical indications (GIs), and layout design of integrated circuits; drafting laws, regulations, and departmental rules, and overseeing the execution thereof; and overseeing trademark and patent enforcement and supervising IP dispute resolution, enforcement aid, and dispute mediation at local levels; and
3. **Examination, Registration, and Administrative Adjudication of IPR:** trademark registration, patent examination, and registration of layout design of integrated circuits; re-examination, invalidation, and other administrative adjudication of trademarks, patents, and layout design of integrated circuits; as well as the drafting and execution of integrated GI assessment mechanisms.

The CNIPA Regulations explicitly task the agency to shorten the IP registration cycle and to enhance examination quality and efficiency, as well as to focus on trademark bad faith filings and unproductive patent applications.

Given that the China Trademark Office (CTMO) and the Trademark Review and Adjudication Board (TRAB) have been incorporated into the CNIPA, the application and granting of trademarks, patents, layout designs of integrated circuits, and GIs is under the independent governance of the CNIPA.

Most importantly, the documents address the division of labor between the SAMR and the CNIPA with respect to IPR enforcement:

The SAMR organises and oversees trademark and patent enforcement.

The CNIPA coaches the trademark and patent enforcement practice, sets criteria for the affirmation of trademark and patent rights and for the ascertaining of trademark and patent infringement and oversees the execution thereof, as well as sets parameters for the inspection, authentication and other practices in trademark and patent enforcement.

It seems that the CNIPA is expected to devise a set of criteria and practice manuals on IP infringement, which the SAMR will be executing in its enforcement actions.

The CNIPA Regulations also contain a brief and very vague mention of copyright, which reads, “Copyright administration shall be in compliance with the regulations on the division of labor promulgated by the Central Committee of China Communist Party and the State Council.” It remains to be seen whether the SCOPSR will release a similar document on the National Copyright Administration in the near future.

The Outlook for IP and Brand Owners in the Context of China's Institutional Reform

Mr. Gang BAI & Ms. Luna Lu^①

On 13 March 2018, China's State Council proposed a seismic cabinet reshuffle plan to the National People's Congress (NPC) for deliberation. Also known as the "*Institutional Reform Plan of the State Council*", the reshuffle plan unveils a drastic government overhaul to streamline governance. On 17 March, the plan was adopted by the NPC. On 21 March, the Central Committee of the Communist Party of China (CPC) released the "*Plan on Deepening Reform of Party and State Institutions*", providing a peek into how the Chinese government will be run in a medium-to-long term.

As part of the overhaul, China's IP sector is undergoing a radical reshaping that will change the nation's IP landscape for the better.

To start with, the restructuring will be top-down. On 10 April, 2018, the State Administration for Market Regulation (SAMR) was inaugurated, which will integrate the following agencies or certain functions thereof:

1. The State Administration for Industry and Commerce (SAIC) (to be dismantled);
2. The General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) (to be dismantled);
3. The China Food and Drug Administration (CFDA) (to be dismantled);
4. The pricing regulation probe and anti-monopoly enforcement function of the National Development and Reform Commission (NDRC);
5. The anti-monopoly enforcement function against concentration of business operators that was originally undertaken by the Ministry of Commerce (MOC); and
6. The Office of the Anti-monopoly Committee under the State Council.

^① This article is co-authored by Mr. Bai Gang from Wanhuida Peksung IP Group & Ms. Luna Lu from Simmons & Simmons, and is first published in INTA Bulletin Vol. 73 No. 8, May 1, 2018.

The State Intellectual Property Office (SIPO), positioned as a subordinate agency of the SAMR, will be restructured to integrate the registration and administrative adjudication responsibility for patents (which was already its function), trademarks and geographical indications (GIs). Previously, the SIPO was not responsible for trademarks and GIs.

Surprisingly, the copyright sector has been removed from the governance of the State Council and put under the direct watch of the Communist Party of China (CPC). The State Administration of Press, Publication, Radio, Film and Television of China (SAPPRFT) will be dismantled and its responsibilities in censoring news and publication will come under the Publicity Department of the CPC. As part of the SAPPRFT, the General Administration of Press and Publication and the National Copyright Administration (which are actually one agency with two identities) will be kept and incorporated in the CPC's Publicity Department. The CPC's Publicity Department, which is becoming the governing agency over copyright registration, importation of publications, supervision and administration of the contents and quality of publications, etc., will no doubt have more control over content. As to the administrative enforcement of copyrights, the issue will probably still be left to the cultural market administrative enforcement teams nationwide.

This reshaping is generally viewed as positive one. Unification of the administration and enforcement of patents, trademarks and GIs under one single governmental agency will be beneficial to brand owners.

1. Streamlined Governance over Trademark & Patent Matters

The most prominent change in the restructuring of the SIPO is the integration of registration and administrative adjudication of patents and trademarks under one roof, which will align China with most other IP jurisdictions. The new SIPO will also oversee the trademark and patent enforcement matters, which are to be undertaken by a Market Supervision Comprehensive Enforcement Team under the SAMR.

The move will allow the administration to see the bigger picture and to better allocate its resources and manpower in improving efficiency and creating a consistent adjudication and enforcement mechanism. Brand owner will also benefit from the alleviation of procedural burden.

The SIPO has already incorporated online portals of patent e-filing, patent search and analysis database, the patent examination inquiry system, trademark e-filing, the trademark search database, and the geographical indication database on its homepage. Though visitors to these portals are still being directed to the same pages as before, it is expected that the databases could be integrated so that information can be made more publicly accessible in a more user-friendly way.

It is also notable that, since November 2017, the SAIC has vowed to facilitate trademark registration procedures and improve trademark registration efficiency. In its three year plan for 2018 – 2020, the agency further shortens the deadlines for trademark prosecution procedures (see chart).

Procedure	Previous Practice	Objective by April 1, 2018	Objective by Yearend 2018	Objective by 2020
Modification of registrant's name, address and agent of trademark application/registration	3 months	1 month	-	-
National trademark registration examination	9 months	8 months	6 months	4 months
Cancellation based on non-use/genericness	9 – 12 months	9 months	8 months	6 months
Review of provisional refusal	9 – 12 months	8 months	7 months	-

2. Integrated Registration Procedure for Geographical Indications

Before the restructuring of the SIPO, China offered three independent systems of protection for GIs, which were managed by three different governmental agencies: (1) GI certification mark or collective mark under the SAIC; (2) GI products under the AQSIQ; and (3) GI agricultural products under the Ministry of Agriculture and Rural Affairs (previously known as the Ministry of Agriculture). The three systems are governed by laws and regulations at different levels, which give rise to certain overlaps and conflicts that have increased the cost of brand owner to register and enforce their GIs.

Although protection for GI agricultural products remains under the scrutiny of the Ministry of Agriculture and Rural Affairs, in practice, brand owners often resort to the SAIC and AQSIQ routes to register their GIs.

With the restructuring of the SIPO, the SAIC route and the AQSIQ route will be integrated under the framework of the new SIPO. It is highly likely that, for the sake of lowering administrative costs and streamlining administration, the two routes will eventually become one. If that becomes the case, the registration and protection of GIs will be simplified in China. It will also effectively alleviate the procedural and financial burden for brand owners seeking to register GIs.

3. Integrated IP Enforcement Team

Brand owners should be aware that the Market Supervision Comprehensive Enforcement Team, which answers directly to the SAMR, will take over the administrative enforcement responsibilities of the previous SAIC, AQSIC and CFDA.

For example, in an enforcement case against a product that counterfeits both a trademark and a patent, under the previous system, the complaint needed to be filed separately with the AIC and the Intellectual Property Office. Such practice increased the burden and costs of IP owners and often resulted in inconsistent administrative penalties.

With the restructured SIPO and the integrated enforcement team, IP owners will need to resort to only one governmental agency to enforce their trademark and/or patent rights. Under SIPO's guidance, the Market Supervision Comprehensive Enforcement Team will be well placed to unify the criteria for establishing infringement and the administrative penalty to be imposed on infringers.

Though it may take some time for the team to get up to speed, in the long run, this new approach will work to the advantage of brand owners in providing enhanced and consistent enforcement programs.

4. Integrated Resource for Anti-Monopoly Enforcement

Before the institutional reform, the enforcement of anti-monopoly matters, placed under the guidance of the Anti-Monopoly Committee of the State Council, was handled by (1) the Ministry of Commerce (MOC) (Anti-Monopoly Bureau), (2) the National Development and Reform Commission (NDRC) (Price Supervision and Inspection and Anti-monopoly Bureau) and (3) the SAIC (Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau).

In the future, even though the Anti-Monopoly Committee of the State Council will not be dismantled, the above divided duties will be consolidated under the SAMR, including the anti-monopoly law enforcement duties of the SAIC, the pricing regulation probe and anti-monopoly law enforcement duties of the NDRC, and the anti-monopoly law enforcement duties against concentration of business operators under the MOC.

The establishment of a unified anti-monopoly law enforcement team will solve the problems of multi-sectoral enforcement, form a joint force for anti-monopoly administrative enforcement, and increase the consistency, professionalism, authority and stability of enforcement involving IP anti-monopoly and unfair competition. Such measures will also be conducive to the protection of IP rights.

Provisions on Several Issues Concerning the SPC IP Court

Mr. Paul RANJARD & Mr. Zhu Zhigang

On 26 October 2018, the China's National People's Congress decided that all appeals of judgments rendered by lower courts, in cases involving a technological aspect, should be submitted to the Supreme People's Court (SPC). Following this decision, the SPC created the "Intellectual Property Court, a Detached Tribunal of the SPC" (hereinafter referred as "the SPC IP Court"). This new court started to operate, for a trial period of three years, on January 1st, 2019. The SPC promulgated on 27 December 2018, the Provisions on Several Issues Concerning the Intellectual Property Court (the Provisions), which defines, in more details, how the new court will function and what are the boundaries of its jurisdiction.

The judicial authorities that, in China, deal with IP matters have different names, according to their particular status. This can be a little confusing.

In China, People's Courts contain several divisions. Some of these divisions are, sometimes, officially entrusted with certain matters, like intellectual property. And, in practice, these divisions are sometimes referred to as the "IP Tribunal" of the court. In Chinese, the denomination is "Zhishi Chanquan Shenpan Ting", where the character "Ting" indicates that this so called tribunal is an integral part of the Court.

The above applies to the SPC, which contains the Adjudicating Division No.3 specialised in IP matters, sometimes called the "IP Tribunal of the SPC".

Besides, since 2015, three "IP Courts" have been operating in Beijing, Shanghai and Guangzhou. These three courts are completely independent jurisdictions. They are not the division of another larger entity. They are called "Zhishi Chanquan Fa Yuan", where the words Fa Yuan indicates that they are independent.

The new jurisdiction recently created by the SPC is a special kind. It is called "Zhishi Chanquan Fa Ting", where the word "Fa" inserted before the word "Ting" indicates that this court is still a part of the SPC but enjoys a certain degree of independence. In fact, technically, it should be called a "detached tribunal", but the use of the word "tribunal" could create some confusion with the "IP tribunal", or division, mentioned above. So, the SPC itself decided to use the English word "court" ("SPC IP Court"), in order to avoid any confusion.

Article 1 of the Provisions emphasizes the above by specifying that the SPC IP Court is a permanent entity physically detached from the SPC (its

premises are located in the south of Beijing), but that its judgments are judgements of the SPC.

Article 2 defines in detail the boundaries of the SPC IP Court's jurisdiction:

- (1) all appeals against judgments and rulings rendered by High Courts, Intermediate Courts and IP Courts (Beijing, Shanghai and Guangzhou), in civil cases, involving invention patents, utility models (not designs), new plant varieties, technical secrets, computer software, electronic integrated circuits and anti-trust ;
- (2) all appeals against judgments and rulings rendered by the Beijing IP Court, in administrative cases, involving invention patents, utility models, designs, new plant varieties and integrated circuits (but not anti-trust, computer software or technical secrets);
- (3) all appeal against judgements and rulings rendered by High Courts, Intermediate Courts and the IP Courts (Beijing, Shanghai and Guangzhou), in administrative cases involving all the types of IP rights mentioned under (1) above, plus the designs;

This article 2 adds a few more provisions of jurisdictional nature:

- (4) the SPC IP Court may accept, at first instance level, cases that are very important or complex on a national scale;
- (5) where judgments, rulings and mediation decisions made by lower jurisdictions mentioned in the above sub-articles 1 to 3 have become effective (no appeal before SPC IP Court), it is still possible to file (within 6 months) a re-trial application before the SPC IP Court;
- (6) the SPC IP Court shall also take the appeals filed against lower courts judgments (in cases mentioned under the above sub-articles 1 to 3) that are based on jurisdiction issues, or imposing fines or detention or deciding the prolongation of procedural time limits; and finally,
- (7) any other cases that the court may deem necessary to accept.

The SPC IP Court will resolutely use modern technologies in the procedural processes. Subject to the litigating parties' agreement, the IP Court may serve all documents related to the case (summons to appear, evidence, judgments, etc.) via the electronic platform (internal to the case and only accessible to the court and to the litigants), or via the website of China Judicial Process Information Online (accessible to the public), or via fax or

email (article 4). More specifically the court may organize the exchange of evidence or the pre-trial meetings on the electronic platform or via video conferences (article 5).

Regarding the physical location of the hearing, the IP Court is also quite flexible and may adjust to the circumstances of the case. This means that the panel of judges may decide to hold the hearing where the first instance judgment was made, or on the scene, which, one may assume, could be the place where the alleged infringing heavy machinery is located (article 6).

All information concerning a case shall be published (case filing, composition of the panel of judges, identity of the parties, procedure and judgment), on the website of China Judicial Process Information Online (article 8).

For very important, controversial or difficult cases, the decision will be made after internal consultation between the president, the vice president and several experienced judges of the SPC IP Court, constituting the judges council (article 9).

The SPC IP Court is in charge of conducting research and establishing criteria and rules so as to guide the practice of the lower people's courts (article 10).

As provided by Chinese Law, the Procuratorate may request the revision of judgments; for judgments made by IP Courts and intermediate courts, the request should be made by the Supreme Procuratorate (not at the provincial level), before the Supreme People's Court (article 11).

The Provisions provides for some transitory measures: for all judgments issued before January 1st, 2019, the appeals shall follow the rules before the creation of the SPC IP Court (article 12); The same principle applies to judgments that became effective before January 1st, 2019 (article 13); Some local (basic level) courts may have received jurisdiction to accept cases involving technical aspects. After this date, they will not have this capacity any more. However, for cases still pending on January 1st, 2019, the previous rules governing appeal against judgments (therefore rendered after January 1st, 2019) shall continue to apply.

Right after the NPC's adoption of the Decision, one question came immediately to mind: since the new IP Court is part of the SPC, who will review applications for retrial filed against its judgments?

In October 2018, the SPC verbally confirmed, during a press conference, that retrial applications filed against the judgements rendered by the SPC IP Court shall be adjudicated by the IPR Tribunal of the SPC. This gave rise to

speculation that, whenever a case is adjudicated by the SPC Tribunal acting as second instance (when the case started, at first instance, at the High Court level), the SPC IP Court might serve as retrial court. So, the SPC IP Tribunal and the SPC IP Court might serve as retrial court for each other's cases.

INDEX

Note:

The INDEX part provides the readers with IP key words and their corresponding references to articles and cases which are included in this book.

Sorted alphabetically, the **KEY WORDS** cover the selected terminology in the field of trademark, patent, copyright, anti-unfair competition and anti-monopoly.

The **REFERENCE** provides the exact place of the IP laws and of the cases included in this book, where the KEY WORDS are used.

The full names of the IP laws are replaced by code names (to be found in Part 1). For instance, the Trademark Law of the People's Republic of China is referred to as "A1". The Implementing Regulations of the Trademark Law is referred to as "A2". The Articles listed in the **REFERENCE** column are therefore presented according to the following order "Code name of the law - Article No.".

Cases mentioned in the **REFERENCE** column are presented as follows: "Abbreviation of the law - Article No. - Case name". "Abbreviation of a law" includes TML (Trademark Law), AUCL (Anti-Unfair Competition Law) and PTL (Patent Law). "Case name" can be found in Part II of the book.

KEY WORDS	REFERENCE
A	
abbreviation of enterprise name	D1-6.1.2
abuse administrative powers	E1-8, 32~37, 51
abuse intellectual property rights	E1-55
abuse of dominant market positions	E1-3.2, 6, 17, 47; E2-8~11
acceptance	B2-38, 39
administrative and criminal liability for copyright infringement	C1-48; C2-36
adverse influences	A1-10.1.8; A6-5; A7-8.6~9
agent (patent)	B1-18, 19
agent (trademark)	A1-18~20, 68; A2-5, 43, 45, 83~86, 91; A2-5; A7-14
annual fees	B1-43

INDEX

application date (patent)	B1-28; B2-11, 40
application date (trademark)	A1-31; A2-18~19
application filed anew	A1-24, 49, 56; A4-1
application on the same date	A1-31; A2-19
application withdrawal	B1-32; B2-36,
assessment report (patent)	B1-61.2; B2-56, 57; B4-8
assignment (copyright)	C1-10.3, 25; C2-24
assignment (patent)	B1-10; B2-14.1
assignment (trademark)	A1-42, 47; A2-17, 31, 32; A3-20; A7-1.4~6, 7.4
author	C1-11; C2-13, 18; C3-7, 13~15
B	
bad/good faith (anti-unfair competition)	D1-2.1, 6; D2-5, 7.1; D3-1.2 AUCL 2.1-Coppertone
bad/good faith (trademark)	A1-4, 7, 15, 16, 19, 32, 36.2, 43.3, 44.1, 45, 47.2, 49.1, 57.6, 59, 60, 63, 64; A2-96.3; A6-12, 14~17, 23~25; A7-7.1, 7.2, 11.7~8, 12, 14, 15.4, 15.14, 16.21~26, 17, 18.3~4 TML 7-UL, ELLASSAY, 44.1-AmCham
brief description	B1-27.1; B2-28
broadcasting by a radio station or television station	C1-43~45
burden of proof in trade secrets case	D1-9, 32; D3-14
business use	D1-6; D3-7
C	
certification trademark	A1-3, 10.2; A2-4, 13.6, 43
change of trademark	A1-41, 49; A2-17.1, 30
cinematographic work	C1-15; C2-4.11, 10
civil liability for copyright infringement	C1-47~48; C2-36; C3-29
civil sanction	C1-52
claims	B1-26.4; B2-19~22
clientele list	D1-9; D3-13
co-existence agreement	A1-30, 31; A7-15.10~12 TML 30-Crocodile Device

INDEX

collective copyright administration	C1-8; C3-6
collective trademark	A1-3, 10.2; A2-4, 13.6, 43
color combination trademark	A1-8; A2-13.4, 43; A7-9.5 TML 8-Red Sole
commercial bribery	D1-7, 19
commercial slander	D1-11, 23
commissioned work	C1-17; C3-12
compilation work	C1-14
composite work/work of coauthorship	C1-13; C2-9
computer software	C1-3.8; C3-21
concentration of business operators	E1-3.3, 12.1, 20~22, 25~31, 48
confidential patent	B1-4; B2-7
conflicting application	B1-22.2
continued use of a priorly used trademark	A1-59.3
co-ownership	A1-5; A2-16; B1-15
copyright	C1-10
copyright owner	C1-9
correction to application	A1-27; A2-18; B1-33; B2-51, 52
creativity (patent)	B1-22.3, 23.2
credit record	D1-26
criminal liability for trademark counterfeiting	A1-67
D	
damages (anti-monopoly)	E1-50; E2-14, 16.1
damages (anti-unfair competition)	D1-17.3~4; D3-17; AUCL 17.3-Gold Mantis
damages (copyright)	C1-49; C3-24~26
damages (exemption)	A1-64; B1-70; C1-53
damages (patent)	B1-65; B3-16; B4-18, 20~22; B5-26~28 PTL 65-Guowei
damages (punitive ~)	A1-63.1 TML 63.1-FILA
damages (statutory ~)	A1-63.3; A3-16; B1-65.1; C1-49.1

INDEX

damages (trademark)	A1-63, 64; A3-13~17 TML 63.1-FILA, Xinhua Dictionary
deception	A1-10.1.7; A6-4; A7-8.4, 8.8
defence (existing technologies and designs)	B1-62; B3-14; B5-22
defence of legal source	A1-64.1; B1-70; B5-25; C1-53
degree of market concentration	E1-27
deposit of the biological material	B2-24, 25
derivative acquisition of copyright	C1-19
derivative work	C1-12
descriptiveness	A1-11.1, 44; A5-12; A6-7, 11
design	B1-2.4
designer	B1-17.1; B2-13
discrimination	A1-10.1.6
disputes resolution	B1-60; B2-85; B4-1, 3, 4 PTL 60-Yulin IP Office
distinctiveness	A1-8, 9.1, 10.2, 11, 48, 49.2, 59.1; A3-10.3; A5-9.2; A6-6~11; A7-9, 11.4, 15.2, 19.1~2; D1-6.1.1; D3-2.1.1-2, 4 TML 8- Red Sole
distinctiveness acquired through use	A1-10.2, 11.2, 59.1; A6-6, 9.3; A7-9.7; D1-6.1.1; D3-2.2 TML 11.2-QQ Beeping Sound, Color Combination "Orange and Grey"
divisional application	A2-22.2~3; B2-42, 43
domain name for E-commerce	A1-57.1.7; A3-1.1
dominant market positions	E1-3.2, 6, 17, 18, 19, 47
double patenting prohibition	B1-9.1; B2-41
drawings or pictures (design)	B1-27.2; B2-27
duration of patent rights	B1-42
duration of trademark rights	A1-39; A2-28
duty of confidentiality	B1-20, 71; B2-8, 9
E	
earlier publication	B2-46
enterprise name	D1-6.1.2; D3-6.1: A3-1.1; A6-21
evidence hindering	A1-63.2

INDEX

evidence preservation	A1-66; B1-67; B4-13; C1-51; C3-30
existing designs	B1-23.4
existing technologies	B1-22.5
extension of trademark registration	A1-30, 31; A7-15.1 TML 30-Spider, Montagut
F	
fair use	A1-59.1~2; B1-69; B3-15; C1-22; C2-21; C3-18; D1-6.1.1; D3-2.3
false publicity	D1-8, 20; D3-8
first to file	A1-30
first to file (patent)	B1-9.2
first to file (trademark)	A1-31, 33, 45; A2-18~20
first to use (trademark)	A1-31, 33, 45; A2-19
formal requirements	B2-2, 3, 15, 45, 119~121
fraudulent means	A1-44; A7-17.1
fraudulent transactions	D1-8.2, 20
functionality	A1-12, 33, 44, 59.2; A5-12; A7-10; D1-6.1.1; D3-2.1.3
generic name	A1-11.1, 33, 44, 49.2, 59.1; A5-12; A6-10
G	
geographical indication	A1-16, 30, 33, 45, 59.1; A2-4, 43; A6-17; A7-13
goods requiring a registered trademark	A1-6, 51
grace period for novelty	B1-24; B2-30
granting of invention patent right	B1-39; B2-54, 55
I	
identical goods	A1-30, 31, 57.1.1
identical trademark	A1-30, 31, 57.1.1; A3-9.1, 10
illegal use of patent sign	B1-63, 64; B2-84; B4-19
illegal use of trademark registration sign	A1-9.2, 52
improper use (cancelation for ~)	A1-49.1, 54, 55, 64; A2-68
industrial application	B1-22.4
infringement (contributory ~)	A1-57.1.6

INDEX

infringement (trademark)	A1-57, 60~62; A2-75~82; A3-1, 9~12; A5-2 TML 57-DOMINO, DONG FENG, PEAK, MOBIL, PRETUL
injunction prior to litigation	C1-50; C3-30
intent to use	A1-4; A7-7.1
interested parties	A1-33, 45, 53; A3-4, 5; A7-1.2~3
interim injunction	A1-65; B1-66
international application	B1-18; B2-101~117
international registration	A1-21; A2-34~50
internet signs	D1-6.1.3; D2-4, 5; A3-1.3
internet unfair competition	D1-12, 24
invalidation (patent)	B1-45~47; B2-65~72; B5-29~30
invalidation (trademark)	A1-44~47; A2-11, 47, 51, 54, 55, 57~62, 68; A6-3; A7-17~18; TML 44.1-AmCham
invention	B1-2.2
inventor	B1-17.1; B2-13
J	
jurisdiction (copyright)	C1-55.2; C3-2, 4, 5; C4-15
jurisdiction (patent)	B4-2, 5, 6, 7
L	
legislative purpose	A1-1; B1-1; C1-1; D1-1; E1-1
licence (compulsory ~)	B1-48~58; B2-73~75
licensing (copyright)	C1-10.2, 24, 28; C2-23
licensing (patent)	B1-12; B2-14.2
licensing (trademark)	A1-43, 47; A2-66.1, 69, 71; A3-3, 19, 20
likelihood of confusion (anti-unfair competition)	D1-6, 18; D3-1.2, 4 AUCL 6-TIANRONG
likelihood of confusion (trademark)	A1-13.2, 16, 30, 31, 57.1.2; A3-2; A5-9; A6-12; A7-13.5, 15 TML30-YEMA, Apple Man, XILIU FU, SUPOR; TML 57-DOMINO, DONG FENG, PEAK, MOBIL, PRETUL

M	
measures to ensure confidentiality	D1-9.4; D3-11
method of manufacturing a new product	B1-61.1; B3-17
monopoly agreements	E1-3.1, 13, 14, 15, 46; E2-7
N	
name (geographical ~)	A1-10.2, 59.1; A6-6; A7-8.10~11
name (personal ~)	D1-6.1.2; D3-6.2
name of a social organization	D1-6.1.2
Name, packaging or decoration of the commodity	D1-6.1.1; D3-2, 3, 5
national security examination	E1-31
neighboring rights	C1-30~46; C2-26~27; C3-17
new application	A1-23, 56; A4-1
non-infringement lawsuit	B3-18
non-obviousness(patent)	B1-22.3, 23.2
non-use cancelation	A1-49.2, 54, 55, 64; A2-11, 65~68; A7-19
novelty (patent)	B1-22.2, 23.1
O	
obligation of a performer	C1-37
observations	B2-48
opposition (trademark)	A1-33, 35, 36; A2-24~27, 45, 94~96; A7-1.8
other business signs	D1-6.1.4
other improper means	A1-44; A7-17.2~5
P	
patent fees	B2-93~100
patent gazette	B2-90
patent information publication	B2-91, 92, 118
patent reexamination board	B2-59
patent register	B2-89
patent review	B1-41; B2-61~64
patentability	B1-5, 25; B2-10, 26
pledge	B2-14.3; C1-26
preemptive registration by agent/representative	A1-15.1, 19, 33, 45; A6-15; A7-12.1~4

INDEX

preemptive registration by person with other relation	A1-15.2; A6-16; A7-12.4~7 TML15.2-CHOPPIES
preemptively register others' trademarks in a massive scale	A1-44; A6-3; A7-17
preliminary examination	B1-34, 40; B2-44
premium sale	D1-10, 22
prior rights	A1-32, 33, 45, 59.3; A4-1.1; A6-14~17; A7-1.1, 16.1~20; B1-23.3; B4-15~16 TML 32-Jordan I, Jordan II, Kui Hua Bao Dian
priority (exhibition ~)	A1-26
priority (patent)	B1-29~30; B2-31~33
priority (trademark)	A1-9.1, 13, 15, 16, 30, 31, 32, 57, 59.3
priority based on prior application	A1-25; A2-20
procedure suspension	B2-86~88; B4-9~12
pseudonym	D1-6.1.2; D3-6.2
publication	C1-2, 30~36, 58
publication after preliminary examination	A1-28; A2-11, 21, 44, 50
R	
reasonable expense	A1-63, 64; A3-17; B1-65.1; C1-49.1
rectification (patent)	B2-58
rectification (trademark)	A1-38; A2-29
refusal of invention application	B1-38; B2-53
refusal of trademark application	A1-34, 36; A2-11, 51, 52, 57~62
relevant market	E1-12.2, 15, 17~19, 23, 27
relevant public	A1-14; A3-8; A6-7~10; A7-9.1
reverse engineering	D1-9; D3-12
reverse passing-off	A1-57.1.5
right of a performer	C1-38; C2-5.6
right of adaptation	C1-10.1.14
right of alteration	C1-10.1.3
right of authorship	C1-10.1.2; C2-19; C3-11
right of broadcasting	C1-10.1.11
right of communication through information network	C1-10.1.12; C4-1~15
right of compilation	C1-10.1.16

right of distribution	C1-10.1.6
right of exhibition	C1-10.1.8
right of integrity	C1-10.1.4
right of making cinematographic works	C1-10.1.13
right of performance	C1-10.1.9
right of publication	C1-10.1.1; C2-17, 20; C3-9
right of rental	C1-10.1.7
right of reproduction	C1-10.1.5
right of showing	C1-10.1.10
right of translation	C1-10.1.15
right related to copyright	C1-30~46; C2-26~27; C3-17
right to affix patent sign	B1-17.2; B2-83
S	
samples or models (design)	B2-29
scope of protection (invention and utility model)	B1-11.1, 59.1; B3-1~7; B4-17; B5-1~13; B1-11.1, 59.1; B3-1~7; B4-17; B5-1~13 PTL 11-Huawei; 59-VALEO, Lifan Co., Dyson
scope of protection (design)	B1-11.2, 59.2; B2-47; B3-8~11; B5-14~17
scope of protection (patent)	B1-11; B3-12, 13; B4-24; B5-19~21
secondary meanings	A1-10.2, 11.2, 59.1; A6-6, 9.3; A7-9.7
service invention-creation	B1-6.1, 6.3, 16; B2-12, 76~78; B4-14
service invention-creation (non ~)	B1-6.2, 72
service mark	A1-3.1, 4.2; A2-2; A3-23
similar goods/services	A1-30, 31, 32, 57.1.2; A3-11~12; A6-12; A7-15.13
similar trademark	A1-30, 31, 32, 45.1, 57.1.2; A3-9.2, 10; A6-12; A7-15
sound and video recording	C1-40~42; C2-5.4~5
sound trademark	A1-8; A2-13.5, 43; A7-9.5
stage name	D1-6.1.2; D3-6.2
statutory permission (copyright)	C1-23
subject matter not protectable (copyright)	C1-5; C3-16

INDEX

substantial examination (patent)	B1-35~37; B2-49, 50
T	
temporary protection (patent)	B1-13; B5-18 PTL 13-Zhongnan Shuanglv Co.
termination of patent right	B1-44
time limit (to sue)	B1-68; B4-23
time limit (prosecution)	B2-4~6
time limit for copyright protection	C1-20~21
time limit for right of performer	C1-39
trade association	E1-11, 16, 46.3
trade name	D1-6.1.2; D3-6.1
trade secrets	D1-9.4, 15
trade secrets infringement	D1-9, 21
trademark degeneration	A1-49.2, 55, 64; A2-65, 68; A7-19.1~2
trademark for goods	A1-3.1, 4.2; A2-2; A3-23
trademark refusal review	A1-34, 36; A2-11, 51, 52, 57~62
trademark renewal	A1-40, 50; A2-33
trademark that has been registered remains valid	A1-10.2, 16.1, 73
trademark use	A1-48, 49.2, 57 TML 48-USAPRO, MANGO
trademark used with certain influence	A1-32, 33, 45, 59.3; A4-1.1; A6-18; A7-16.21~25
translation of a name	D1-6.1.2; D3-6.2
U	
unfair competition by using trademark	A1-58
unknown to the public	D1-9.4; D3-9
use (prominent ~) of trade name	A1-57.1.7; A3-1.1
utility model	B1-2.3
utility of patent	B1-31; B2-34, 35
W	
well-known trademark (dilution)	A1-13; A3-1.2; A5-9.2; A7-11.4 TML 13-MOBIL
well-known trademarks (tarnishment)	A1-13; A3-1.2; A5-9.2; A7-11.4

INDEX

well-known trademark (free-riding)	A1-13; A3-1.2; A5-9.2; A7-11.4
well-known trademark (registered ~)	A1-13.3, 14, 33, 45, 53, 57.1.7; A2-3, 72; A3-1.2, 22; A5-1~14; A6-13; A7-11 TML14-MIGUMIGU, Meituxiuxiu, Suo Fei Ya
well-known trademark (unregistered ~)	A1-13.2, 14, 33, 45, 53, 58; A2-3, 72; A3-2, 22; A5-1~14; A6-12; A7-11 TML 13.2-Lafite, KuGou
work (cinematographic ~)	C1-15; C2-4.11, 10
work (commissioned ~)	C1-17; C3-12
work (derivative ~)	C1-12
work created by a process analogous to cinematography	C1-15; C2-4.11, 10
work for hire	C1-16; C2-11~12
work of the fine arts	C1-18; C2-4.8
works	C1-3; C2-2, 4
written description and its abstract	B1-26.3; B2-17~18, 23
written request	B1-26.2; B2-16

Beijing

Shanghai

Guangzhou

Shenzhen

Hong Kong

Ningbo

Suzhou

Hangzhou

Kunming

Xiamen

Head Office

Yiyuan Office Building,
Friendship Hotel,
Haidian District, Beijing,
P.R. China 100873
T +86 10 6892 1000
F +86 10 6894 8030
E whd@wanhuida.com

Facebook: Wanhuida Peksung

Twitter: Wanhuida Peksung

Linkedin: WAN HUI DA

2019 ©WANHUIDA | All rights reserved.