



**Year-End Special Edition
(Part B)
2014.12**

This special edition continues to review the important changes and cases in trademark, unfair competition and anti-monopoly areas in 2014, with the focus on the introduction of the new trends in the trademark area since the implementation of the amended Trademark Law as of May 1, 2014 and some hot cases involving unfair competition and anti-monopoly, and to analyze the new changes in the IP field with regard to the legislative development, judicial policy and typical cases. The cases¹ have been incorporated into corresponding parts of this edition for easy reference.

This edition was compiled basing on our long-term legal practice and research in the Chinese IP realm, and we would like to share it with you. Your comments or suggestions will be highly appreciated.

¹Some cases included in this special edition were shared with you in the previous editions of NTD IP EXPRESS, and many other cases are new.

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TRADEMARK

On August 30, 2013, the Standing Committee of the National People's Congress approved the Third Amendment to the Trademark Law, which has taken effect since May 1, 2014. The implementation of the amended Trademark Law was one of the most significant IP events of the year and has received extensive attention. This part will focus on the introduction of the major changes in the amended Trademark Law and the analysis of the new trends in respect of trademark prosecution and enforcement in China through the trademark cases of this year.

I. Trademark Laws and Regulations

In line with the amended Trademark Law, corresponding authorities issued a set of supporting regulations to further define related provisions and to clarify the jurisdiction of trademark cases and the application of law during the transition period between the old and amended Trademark Law. Such supporting regulations include:

- *The Amended Regulations on the Implementation of the Trademark Law (2014)*
- *Judicial Interpretations on Issues Relating to Applicable Laws and Jurisdiction of Trademark Cases after Implementation of the Amended Trademark Law* issued by the Supreme Court (2014)
- *Guidelines for the Trial of Administrative Cases Involving the Grant and Determination of Trademark Rights* issued by the Beijing Higher Court (2014)
- *Rules for Trademark Review and Adjudication* issued by the SAIC (2014)
- *Provisions for Recognition and Protection of Well-known Trademarks* issued by the SAIC (2014)
- *Notice regarding Several Issues about the Implementation of the Amended Trademark Law* issued by the SAIC (2014)
- *Notice regarding Several Issues of Trademark Review Cases after the Implementation of the Amended Trademark Law* issued by the TRAB of the SAIC (2014)

II. Continuous Growth in Trademark Litigation Cases, esp., Trademark Administrative Litigation Cases

In 2013, courts of all levels in China accepted a total of 2,161 trademark administrative cases at the first instance, including 2,139 cases accepted by the Beijing No. 1 Intermediate Court involving the grant and determination of trademark rights. Among the 2,139 cases, 1,051 cases involved foreign parties. These trademark administrative cases presented 3 characteristics, namely, a high ratio of complicated cases, a high ratio of cases involving foreign parties, and a high ratio of overruled administrative decisions.

From January to September of 2014, the Beijing No.1 Intermediate Court accepted 7,749 trademark administrative litigation cases at the first instance, a dramatic increase compared with the year of 2013. This increase was mainly caused by the increase of the decisions made by the Trademark Review and Adjudication Board (TRAB), which examined a backlog of 144,200 trademark review cases in order to meet the time limits provided in the amended Trademark Law. This number is equal to the total number of cases examined by the TRAB in the previous *four* years. On November 6, 2014, the Beijing IP Court began to accept first-instance administrative litigation cases concerning the grant and determination of trademark rights, while the Beijing No. 1 Intermediate Court will continue to try the unconcluded cases accepted before November 6, 2014.

III. Stronger Crackdown on Malicious Trademark Squatting to Protect Prior Rights

1. Enhancing the Crackdown of Trademark Squatting by Agents

How to define the agent or representative relationship is the key issue when Article 15 of the amended Trademark Law is applied. On this issue, courts at all levels have conducted proactive explorations. It is provided in *the Opinions on Several Issues Concerning the Trial of Administrative Cases Involving the Grant and Determination of Trademark Rights* issued by the Supreme Court that, if a trademark agent, a representative, or a sales agent or representative, files a trademark application in its own name without the authorization of the principal or the represented party, this act shall be deemed as trademark squatting by the agent or the representative. If a trademark applicant conspires with an agent or a representative in the trademark squatting, the trademark applicant can be deemed as the agent or the representative, as shown in the trademark opposition retrial case *HSIN TUNG YANG Corporation (Group) Ltd. vs. TRAB, HSIN TUNG YANG Ltd.*

● **HSIN TUNG YANG Corporation (Group) Ltd. vs. TRAB, HSIN TUNG YANG Ltd.**

【Case No.: The Supreme Court (2013) Zhi Xing Zi No. 97】



This case was included in the Supreme Court’s 2013 Annual Report of IP Cases. The focus of this dispute was whether the trademark applicant Hsin Tung Yang Corporation (Group) Ltd. should be deemed as a representative of the opposing party Hsin Tung Yang Ltd.

Shilai Mai, the legal representative of Hsin Tung Yang Corporation (Group) Ltd., is the director and shareholder of Hsin Tung Yang Ltd. and was given full authority in its business of mainland China by the board of Hsin Tung Yang Ltd. The Beijing Higher Court ruled that the aforesaid facts are able to prove that Shilai Mai is the representative of Hsin Tung Yang Ltd. Furthermore, given that Hsin Tung Yang Corporation (Group) Ltd. was established by Shilai Mai, the act of Hsin Tung Yang Corporation (Group) Ltd. should be deemed the act of Shilai Mai.

The Supreme Court further ruled that Shilai Mai filed the trademark application in the name of Hsin Tung Yang Corporation (Group) Ltd., of which he acted as the legal representative. In accordance with Article 12 of the Supreme Court’s *Opinions on Several Issues Concerning the Trial of Administrative Cases Involving the Grant and Determination of Trademark Rights* that stipulate “if a trademark applicant conspires with an agent or a representative in trademark squatting, the trademark applicant can be deemed as the agent or the representative. The squatting act in collusion and conspiracy can be presumed based on the relationship between the trademark applicant and the above agent or representative”, Hsin Tung Yang Corporation (Group) Ltd. should be deemed the agent or representative as prescribed in Article 15 of the amended Trademark Law. Therefore, Hsin Tung Yang Corporation (Group) Ltd.’s filing of the series of “Xin Dong Yang in Chinese” trademarks without authorization in mainland China violated Article 15 of the amended Trademark Law.

2. Determination of “Bad Faith” in Trademark Squatting Cases

The second half of Article 32 of the amended Trademark Law is intended to protect unregistered marks that have been used priorly so as to deter trademark squatting and to protect the legitimate rights and interests of the prior users. A recent case clarified that “bad faith in the trademark squatting” is one of the essential prerequisites to the application of this article.

In *Beijing King Roast Duck Ltd. vs. Shanghai Huaihai King Roast Duck Ltd. and the TRAB* regarding the review on opposition to “King Roast in Chinese” trademark 【Case No.: The Supreme Court (2012) Zhi Xing Zi No. 9, one of the Top 10 Innovative IP Cases in 2013】 , the Supreme Court explicitly pointed out that unfair means stipulated in Article 31 of the Trademark Law refers to the circumstance where the unregistered trademark has achieved certain fame through prior use and the applicant that filed the trademark knew or should know the trademark and filed the trademark application in bad faith to obtain illegal gains by taking advantage of the fame of the trademark.

In *Fushun BG Company vs. TRAB, Yingkou Glass Fiber Company* regarding the review of the invalidation of “Fu Mei Si FMS” trademark registration 【Case No.: The Supreme Court (2013) Xing Ti Zi No. 11, one of the Typical IP Cases in the Supreme Court’s Annual Report of 2013】 , the Supreme Court clearly stated the exceptions for the application of this Article. Generally speaking, it can be presumed that the trademark applicant has the intention to obtain legal gains by taking advantage of the fame of the trademark that has been priorly used if it filed the trademark when knowing that the trademark has been used by others and has achieved certain fame. However, facts found in this case show that when filing the disputed trademark, Fushun BG Company did not have the intention to free-ride the goodwill of Yingkou Glass Fiber Company’s trademark and therefore did not violate the bona fide principle. Therefore, Article 31 (Article 32 in the amended Trademark Law) shall not apply in this case, and ownership of the disputed mark shall be determined under the first-to-file principle.

In addition, in a recent case concluded by the Beijing Higher Court, *Beijing Soufang Real Estate Agency Ltd. vs. TRAB, Beijing Soufun Internet Information Service Ltd.* regarding trademark opposition review dispute, bad faith was also examined by the court.

The TRAB pointed out in its *Summary and Analysis on Administrative Litigation Involving Trademark Review Cases in 2013* (Edition No. 2014.02 in Legal Communication) that in 2013, the TRAB only lost 2% of the cases relating to the squatting of unregistered marks that have

achieved certain fame through prior use, a gradual decrease in loss ratio over recent years. This indicated that the TRAB and the courts have basically reached consensus on the standards on the application of this article. It is important to understand and grasp the “bad faith” element when handling this type of cases in the future.

IV. Well-Known Trademark Recognition and Protection

To redefine well-known trademark protection system and prevent misuse of well-known trademark status, the amended Trademark Law made several major adjustments to the old Trademark Law, clearly providing the principles of facts finding, protection on necessity and case-by-case recognition. After the implementation of the amended Trademark Law, the well-known trademark protection system presents the following new changes and trends:

Firstly, the legal definition of a well-known trademark has been amended as “well known by the relevant public”, which suggests the Supreme Court’s attitude that requirements of evidence to prove the well-known nature of a trademark should not be too high. Before the implementation of the amended Trademark Law, the Supreme Court demonstrated its such attitude in the case *Quanyou Furniture Ltd vs. Chengdu Quanyou Electrical Ltd. and TRAB* regarding trademark opposition review 【Case No.: The Supreme Court (2013) Xing Ti Zi No. 3; See Issue No. 1 of NTD IP EXPRESS】. In this case, the Supreme Court stated that “the evidence requirement imposed by the TRAB and the first-instance and the appeal court are too high” and holds that the evidence submitted by the trademark owner is sufficient to prove that “the manufacture and sale of the goods bearing the trademark in dispute has reached a certain scale.” “the trademark owner conducted certain advertising and promotional activities, and the trademark has achieved certain fame in the market”, thus, the trademark in dispute should be deemed as “well known to the relevant public.”

Secondly, for trademarks that are widely known to the general public, the trademark owner’s burden of proof on the fame of the trademark can be lessened. The TRAB mentioned in its *Summary and Analysis on Administrative Litigations involving Trademark Review Cases in 2013* that, currently the TRAB and the courts have reached into consensus that burden of proof can be lessened to some extent in cases involving trademarks that have been protected as well-known trademarks or trademarks with a relatively high reputation that are owned by foreign entities, registered in mainland China, and have been used for a long period of time. However, the TRAB and the courts do not have a unanimous attitude towards to what extent the burden of proof shall be lessened.



Thirdly, the protection scope and strength of well-known trademarks shall be aligned with the distinctiveness and the fame of the trademark. For a well-known trademark with high distinctiveness and reputation, broader cross-class protection and stronger protection can be granted.

For example, in the “喜来登” (Sheraton in Chinese) trademark invalidation review case 【selected as one of the Typical Cases involving Grant and Determination of Patent and Trademark Rights by Beijing Courts in 2014】 , the Beijing Higher Court held that the evidence submitted by Sheraton Corporation can prove that its trademarks “喜来登”(Sheraton in Chinese) and “SHERATON” are well-known trademarks in respect of hotel services. The disputed trademark “喜来登照明 SHERATON and device”, a combination of the above two marks with simple extra design, is a copy and imitation of the two well-known trademarks, and is likely to mislead the public and damage the interests of the registrant of the well-known trademarks, thus it shall not be allowed for registration and shall be forbidden from use in accordance with Article 13.2 of the Trademark Law (Article 13.3 of the amended Trademark Law).

However, there are also some cases that the courts recognized the marks as well-known trademarks, but denied cross-class protection to the trademark considering the substantial differences between the goods/services. Take the dispute over trademark “海天” (Hai Tian in Chinese) as an example. The first-instance court held that the evidence submitted was sufficient to prove that the “海天” trademark was a well-known trademark, however, given the inherent distinctiveness of the “海天” trademark was relatively weak and the designated goods of the disputed trademark is obviously different from the goods designated by this “海天” trademark in terms of function, usage, raw materials, production process, and places of display, etc., cross-class protection could not be granted. However, in the second-instance trial, the Beijing Higher Court overruled the judgment of the first-instance court and sustained the TRAB ruling, recognizing the “海天” trademark as a well-known trademark and also granting cross-class protection to it.

● ***Shengxiang Group Ltd. vs. the TRAB and Hebei Guangtai Gypsum Mining Ltd.***

[Case No.: The Supreme Court (2013) Xing Ti Zi No.24]

	
<p>The disputed mark No.1989239</p>	<p>The cited mark No. 1002957</p>

This case was selected as one of the Top 10 IP Cases by Chinese Courts in 2013. In this case, the disputed mark, composed of the word “圣象” and a device of a standing elephant, was filed in the name of Hebei Guangtai Gypsum Mining Ltd. on October 8, 2001 and approved for registration on March 21, 2003 in respect of such goods as “gypsum, gypsum board and cement, etc”. The cited mark “圣象 & device”, owned by Shengxiang Group Ltd., was approved for registration on May 14, 1997, designated on “flooring”.

Whether the cited mark “圣象 & device” had achieved a well-known status before the filing date of the disputed mark is the key issue of this case. While the TRAB and the Beijing Higher Court held that the existing evidence was not sufficient to prove the well-known status of the cited mark before the filing date of the disputed mark, the Beijing No. 1 Intermediate Court and the Supreme Court determined it was a well-known trademark. The Supreme Court ruled in the retrial proceeding that the cited trademark “圣象 & device” mark shall be recognized as a well-known trademark given such factors as the extent of the relevant public awareness of the trademark, the duration of the use of the trademark, the extent of promotion of the trademark by Shengxiang Group and its affiliated companies, media reports and advertisements of Shengxiang Group and the trademark, etc.

Moreover, the Supreme Court held that the disputed mark was almost identical with the cited mark in overall appearance. Since both gypsum and wooden flooring are building materials, Hebei Guangtai, as a manufacturer of building materials, should have known the reputation of the cited mark. Therefore, Hebei Guangtai’s filing of the disputed mark, which constitutes an imitation of the cited trademark, violated Article 13.2 of the Trademark Law. As such, the disputed trademark registration should be cancelled.

V. Punitive Damages Adopted to Strengthen Protection of Trademarks

The amended Trademark Law adopted punitive damages for the first time, pursuant to which the court may grant up to 3 times of the infringer's illegal profits, the trademark owner's losses or trademark license fee as punitive damages, if the infringement is malicious and severe. In practice, it is rather common for the courts to grant statutory damages in trademark infringement cases. According to the statistics from the IP Research Center of Zhongnan University of Economics and Law, of the 1,097 trademark infringement cases tried by the courts at all levels since June 2008, 1,071 cases were concluded with statutory damages, accounting for 97.63%. According to the 488 effective judgments for trademark infringement cases, the average amount of damages awarded for each case is RMB 62,000. Under the amended Trademark Law, the maximum amount of statutory damages is increased from RMB 500,000 to RMB 3,000,000, which sends a clear message to trademark infringers that the courts will strengthen protection of trademarks.

In the past, the courts did award a high amount of compensation in several cases, for instance, in the following cases. We believe that after the implementation of the amended Trademark Law, the Chinese courts will make more judgments with high compensation, no matter as punitive damages or statutory damages.

CASE	AMOUNT OF COMPENSATION	COURT	INSTANCE LEVEL	YEAR
Quanyou Furniture Case	RMB14, 000, 000	Shandong Higher Court	First Instance	2013
G2000 vs. 2000	RMB12, 000, 000	Zhejiang Higher Court	Second Instance	2013
CASTEL Trademark Infringement	RMB33, 730, 000	Zhejiang Higher Court	Second Instance	2013
Jia Yu Greatwall vs. Greatwall Wine Case	RMB10, 610, 000	the Supreme Court	Second Instance	2006
Yamaha Case	RMB8, 300, 000	the Supreme Court	Second Instance	2007
“威极”Soy Sauce Trademark Infringement & Unfair Competition Dispute	RMB6, 550, 000	Guangdong Foshan Intermediate Court	First Instance	2013
“丰宝马丰” Trademark Infringement Case	RMB2, 000, 000	Beijing Higher Court	Second Instance	2012
“WOODPECKER& Device” Trademark Infringement Case	RMB1, 000, 000	Beijing No.1 Intermediate Court	First Instance	2013

● ***Foshan Hai Tian Flavoring & Food Ltd. vs. Foshan Gao Ming Weiji Seasoning Food Ltd.***

【Case No.: Guangdong Foshan Intermediate Court C (2012) Fo Zhong Fa Zhi Min Chu Zi No.352】

- **“Weiji” Soy Sauce Trademark Infringement & Unfair Competition Dispute**



This case, selected as one of the Top 10 IP Cases by Chinese Courts in 2013, is about the infringement of “威极” (Weiji in Chinese) trademark and unfair competition.

Weiji Company, established in 1998, not only used Hai Tian Company’s registered mark “威极” (Weiji in Chinese) as its trade name but also prominently used it in its advertising board and signboards. The exposure of Weiji Company illegally using industrial salt to manufacture soy sauce exerted very severe adverse effects on Hai Tian Company’s goodwill and sales of its products. Hence, Hai Tian Company filed a lawsuit against Weiji Company before the Guangdong Foshan Intermediate Court.

The court held that Weiji Company’s activities constituted trademark infringement and unfair competition and ordered it to stop using the trade name and to change its trade name within a specified period of time, and to compensate Hai Tian Company RMB 6,550,000 for the economic loss and the reasonable expenses incurred. In this case, Hai Tian Company requested that the amount of compensation be calculated for the period from May 22, 2012 to June 6, 2012. When determining the damages, the court took into consideration Hai Tian Company’s reasonably expected profits and the decrease in the profits over the 16 days as a result of the degradation of its goodwill. Besides, the court also took into account the nature, the duration and the consequence of Weiji’s trademark infringement and unfair competition acts, and determined that the amount of Hai Tian Company’s loss of profits was RMB 3,500,000 due to the decrease in sales. In addition, the court decided the compensation of RMB 3,000,000 to Hai Tian Company for costs incurred in taking legal actions to stop the infringement and eliminating adverse influence for the infringement and the compensation of RMB50, 000 for attorney fees incurred to Hai Tian Company.

VI. Defending Arguments in Trademark Infringement Cases to Protect Legitimate Rights and Interests of Lawful Business Operators

The amended Trademark Law put more emphasis on the principles of good faith, fairness and equity when the scope of trademark right is determined so as to protect the legitimate interests of prior trademark users, to encourage trademark use and prevent using registered trademarks speculatively. For this purpose, the amended Trademark Law introduced the defense of prior use and the defense of nonuse for three consecutive years.

The provisions of “defense of prior use” are that, where, prior to the filing date of the registered trademark, a person has been using a trademark identical with or similar to the registered trademark in respect of identical or similar goods, and through such use the trademark has achieved certain fame, the owner of the registered trademark has no right to prohibit such person from continuing using the trademark within its previous scope. However, the owner of the registered trademark may ask the person to add distinguishable signs to the trademark so that the two trademarks could be differentiated. These provisions are intended to balance the interests of prior users and the registered trademark owners. When the above requirements are met, the prior user’s use of the trademark will not constitute infringement, and the prior user is entitled to continue using the mark within the previous scope.

“Defense of nonuse for three consecutive years” relates to the liability of compensation. The accused infringer can raise the nonuse counterplea that the trademark registrant has never put the registered trademark into actual use and therefore request exemption from the liability of compensation. In this circumstance, the burden of proof will be shifted to the trademark registrant, who should provide evidence of their use of the registered trademark during the last three years. If the trademark registrant fails to prove the actual use or damages caused to them by the accused infringer’s infringement, the court could decide that the accused infringer stop the infringement but not bear the liability of paying damages.

● **TAN vs. Beijing Daniel Studio**



This case is the first case in which the court accepted prior-use defense since the implementation of the amended Trademark Law

The defendant Beijing Daniel Studio has been using “尚·丹尼造型” on its signboard since its establishment in 2008, and now it has four chain stores in Beijing. The plaintiff TAN is the wife of a former employee of Beijing Daniel Studio. TAN filed the trademark application “尚丹尼” in 2012 in respect of services in Class 44, such as “beauty salons and hairdressing salons”. After the mark was approved for registration in January 2014, TAN filed a lawsuit with the Beijing Chaoyang District Court, alleging that Beijing Daniel Studio infringed her trademark and claimed for a compensation of 200,000RMB.

The court held that, first of all, the defendant has been using “尚丹尼” on its signboard since its establishment in 2008. The defendant began to use the sign “尚丹尼” far earlier than the filing date of TAN’s registered trademark. Secondly, the defendant used “尚丹尼” trademark in respect of hairdressing services, identical to services covered by the plaintiff’s trademark registration. Thirdly, the “尚丹尼” trademark used by the defendant has achieved certain fame through promotion on the Internet, although no trademark application was filed for this trademark. Fourthly, the plaintiff’s registered trademark “尚丹尼” had not been put into use. Based on the above facts found, the court concluded that Beijing Daniel Studio’s uses of the trademark are in compliance with Article 59.3 of the amended Trademark Law and that the plaintiff has no right to prohibit Beijing Daniel Studio from using the “尚丹尼” trademark within the original scope. The court pointed out Beijing Daniel Studio should not use the trademark beyond the original scope and TAN might request Daniel Studio to put additional signs to for consumers to distinguish the origin of services. Ultimately, the court overruled all the claims of TAN.

Unfair Competition & Anti-monopoly

I. 2014 Unfair Competition Cases

● *Anti-unfair Competition Law is to be amended*

The amendment of *Anti-unfair Competition Law* is a major task of the SAIC in 2015, set to be finished by the end of 2015. The amended *Anti-unfair Competition Law* will provide applicable regulations on unfair competition in the Internet field, and the provisions will be more clear and practical.

● *Traditional Unfair competition Cases*

The unfair competition cases in 2014 still concentrated on such traditional fields as domain name squatting, using the unique name of famous goods, misleading propaganda, business secrets and business reputation discrediting, etc., some of which attracted great public attention. For example,

“Lost on Journey” vs. “Lost on Journey in Thailand” regarding unauthorized use of the unique name of a famous product.

“Lost on Journey” is a film produced by Wuhan Huaqi Film & TV Production Ltd., and *“Lost on Journey in Thailand”* is a film produced by Beijing Enlight Media Ltd. later. The Wuhan company sued the Beijing company against the latter’s unfair competition acts of using “Lost on Journey”, the unique name of their famous film name. In September 2014, the Beijing Higher Court made a judgment that the defendant stop the unfair competition acts immediately and compensate the plaintiff RMB 5,000,000 for its economic losses and other reasonable expenses. The court held that the film “Lost on Journey” has obtained high reputation and popularity in the audience sine it was released in 2010, so it has become goods, and the name of the film has become a unique name of the famous goods. The defendant’s use “Lost on Journey in Thailand” as the name of their film is the unauthorized use of the unique name of the plaintiff’s famous goods and is a free ride on the reputation and goodwill of “Lost on Journey”, thus having caused confusion among the public.

Wong Lo Kat vs. JDB regarding false advertisements

In December 2014, the Beijing No.3 Intermediate Court made a judgment on the dispute between the herbal tea brands Wong Lo Kat and JDB, ruling that JDB's advertising slogans "JDB herbal tea won 'China's First Tin of Beverage' for 7 years in a row", "JDB won 'China's First Tin of Beverage' for 7 years in a row" and "JDB herbal tea won the '7th Conservative Winner' in China's canned beverage market", etc., are untrue and inappropriate in expression, with some important information left out, and JDB's use of these slogans infringed Wong Lo Kat's rights and interests. The court ruled that JDB stop the infringing acts immediately and compensate Wong Lo Kat RMB 3,000,000.

Wong Lo Kat vs. JDB regarding the use of the unique red tin packaging and decoration of herbal tea

This case was dubbed as "China's First Packaging & Decoration Case". The Guangdong Higher Court publicly made the judgment on the packaging & decoration dispute between Wong Lo Kat and JDB on December 19, 2014 ruling that JDB's use of the unique red tin packaging and decoration of Wong Lo Kat herbal tea constituted unfair competition against the latter and that JDB compensate Wong Lo Kat RMB 150,000,000 as damages plus RMB 260,000 for its economic losses and reasonable expenses respectively. JDB stated in court that it would appeal to the Supreme Court.

● **Internet-related unfair competition cases**

Internet-related unfair competition cases are frequent given the competition in the cyber space is more fierce. On June 18, 2014, the Beijing No.1 Intermediate Court issued the 10 Typical Cases regarding Internet-related unfair competition from 2000 to 2014, mostly involving domain name squatting, forced change of other's search page, search engine ranking, vertical search, business discrediting, malicious labeling on malicious websites, etc.

Regarding Internet-related unfair competition, the courts have determined the natures of some new types of unfair competition and established adjudication rules and standards, which can be referenced in solving similar disputes.

In the appeal of *Baidu Online Network Technology (Beijing) Ltd. vs. Beijing Qihu Science & Technology Ltd.* regarding unfair competition dispute【Case No.: The Beijing Higher Court (2013) Gao Min Zhong Zi No.2352, selected as one of the Top 10 Innovative IP Cases of Chinese Courts in 2013 and one of the Top 10 Innovative IP Cases of Beijing Courts in 2013】 , the court introduced the non-interference principle, i.e., as a general principle, Internet products and services should not interfere with each other, unless it is for the sake of public interests and within the necessary and reasonable boundaries.

Recently, browser and router setting “page advertisement filtering” function is a new type of unfair competition which had not been foreseen back to the legislation. The court, by citing the principle of good faith and the acknowledged business ethics, ruled that such act constituted unfair competition. Filtering video advertisements that are legally put on the video websites through technical measures has sabotaged the normal business mode and relevant interests that are eligible for protection by law. It is unfair competition and should be stopped. 【*Heyi Information & Technology Ltd. vs. Kingsoft Corporation* regarding unfair competition; *IQIYI vs. Beijing Hiwifi Ltd.* regarding unfair competition】

The 3Q vs. QQ Safeguard case 【Case No.: the Supreme Court (2013) Min San Zhong Zi No.5; Please refer to NTD IP CASE EXPRESS Issue No 1 for details】 , which attracted broad public attention, has ascertained the boundaries between technical innovation, free competition and unfair competition.

In addition, of the Internet-related unfair competition cases this year, many were concluded with high amount of compensation. This indicated that the courts have strengthened the protection of IP rights. In 3Q vs. QQ Safeguard case, the Supreme Court, based on the facts of case, took the nature of the infringement, bad faith and influence into consideration, and decided the compensation of RMB 5,000,000. In Baidu vs. 360 Robots agreement case, the Beijing No.1 Intermediate Court ruled that 360 compensate Baidu RMB 700,000. In June 2013, the Beijing No.1 Intermediate Court announced its decision publicly on Baidu vs. 360 and 360 vs. Baidu regarding unfair completion, ruling that 360 and Baidu compensate each other RMB 500,000 for both parties’ economic losses.

● **The importance of industry practice and self-discipline pact**

Due to the hysteretic nature of law, established rules and self-discipline pact in Internet industry are playing very important roles in maintaining the market order and fair competition, and are

helpful for promoting a healthy development of the Internet industry. In practice, the Internet industry has realized the importance of self-discipline pact. There is self-discipline pact in almost every field in the Internet industry, which performs a very good guiding function to the members, such as *Chinese Internet Industry Self-discipline Pact* in 2004, *Chinese Game Industry Self-discipline Pact* and *Chinese Mobile Game Industry Self-discipline Pact* in 2005, *Internet Terminal Software Service Industry Self-discipline Pact* in 2011, *Internet Search Engine Service Self-discipline Pact* in 2012, and *Internet Financial Industry Self-discipline Pact* and *Internet Terminal Security Service Self-discipline Pact* in 2013.

The courts also hold a positive attitude to the function of Internet self-discipline pacts. The Robots Protocol dispute led to the birth of *Internet Search Engine Service Self-discipline Pact*. When trying the Robots Protocol case, the Court pointed out that, although *Internet Search Engine Service Self-discipline Pact* is not law, administrative regulations or departmental rules that can be directly applied or cited, it is necessary to fully consider and respect the spirit reflected from the Pact.

● **Baidu vs. 360 Robots Protocol regarding unfair competition**

【Case No.: The Beijing No.1 Intermediate Court (2013) Min Chu Zi No.2688】



This case, defining the nature of Robots Protocol and bringing out the “negotiation-notification” processing program for the first time, is a landmark case regarding Chinese Internet search engine Robots Protocol. The court analyzed the nature of Robots Protocol and brought out the “negotiation-notification” processing program for the first time by referring to *Search Engine Service Self-discipline Pact*, which provided ideas and means for solving similar Internet search engine disputes to maintain fair competition.

Based on the origin and the development of Robots Protocol, the court affirmed after hearing the case that, Robots Protocol is a technical specification written by the website owner or service provider itself when writing the web programs, the purpose of which is to, by marking program code, determine whether to grant permission to search engine crawlers or permit which ones to

access. It is a unilateral declaration and will not take advice from the search engine service provider or network user in advance. As a technical specification, though Robots Protocol is generally followed in the Internet industry, it is not a technical measure and cannot prohibit robot crawlers from accessing. Robots Protocol has no legal force.

Meanwhile, the court, for the first time, stated that the “negotiation-notification” processing program should be followed when Robots Protocol disputes occur. Firstly, when the search engine service provider believes the Robots Protocol setting is unreasonable, it should request the website owner or service provider to revise the Robots Protocol in writing and ask for permission to access by its robot crawler. Secondly, after receiving the request, the website owner or the service provider, if refusing to revise Robots Protocol, should give clear and reasonable reasons for such refusal in writing within a reasonable period of time, and notify the search engine service provider. Thirdly, where the search engine service provider believes that the reasons given by the website owner or the service provider are unjustifiable, both parties can submit their opinions to the executive organ of the self-discipline pact or the industry association for mediation or verdict. Fourthly, where the website service provider did not give clear and reasonable reasons for refusing to revise the Robots Protocol in writing within a reasonable period of time, or if the search engine service provider believes that the reasons given by the website owner or the service provider are unjustified and that it will severely impact its operation if not revising the Robots Protocol immediately, the search engine service provider can take legal actions such as litigation and applying for preliminary injunction in accordance with relevant laws.

II. 2014 Anti-monopoly Cases

● New regulations on anti-monopoly

The Ministry of Commerce issued matching regulations on the simple cases regarding concentration of business operators this year, such as *Temporary Provisions on the Applicable Standards on Concentration of Business Operators Easy Cases*, the *Guidance on Reporting Concentration of Business Operators Easy Cases (on trial)*, and the amended *Guidance on Reporting Concentration of Business Operators*. Currently, the number of anti-monopoly cases regarding concentration of business operators in China has been increasing continuously, so said regulations issued by the Ministry of Commerce are helpful to improve the efficiency in the handling of the cases since summary procedure will be applied to cases that do not exclude or restrict competition.

In addition, the SAIC issued *Regulations on the AIC Prohibiting the Abuse of IP Rights to Exclude*

or *Restrict Competition (Draft for public opinions)*, clearly defining acts of abusing IP rights to exclude or restrict competition. The Regulations prohibit business operators from reaching monopoly agreement when enforcing their IP rights, and prohibit business operators that have dominant market positions from abusing dominance to exclude or restrict competition when enforcing their IP rights.

● **Increasing anti-monopoly litigation cases**

Following the case *Huawei vs. IDC* regarding abuse of market dominant position in 2013, anti-monopoly cases were still hot issues in 2014. With regards the 3Q monopoly case, the Supreme Court, affirming the judgment made by the Guangdong Higher Court, held that Tencent's acts did not constitute monopoly. The judgment of this case set up new standards on the anti-monopoly cases in China, especially for cases relating to the Internet 【Case No.: The Supreme Court (2013) Min San Zhong Zi No.4; The Guangdong Higher Court (2011) Min San Chu Zi No.2. Please refer to NTD IP CASE EXPRESS Issue No. 8 for details】

Following the 3Q case was another case regarding the abuse of market dominant position and unfair competition in the mobile Internet field, i.e., *Mishi Science & Technology vs. Qihu Mobile Internet* regarding anti-monopoly, which was the first anti-monopoly lawsuit brought against mobile phone security software in China. The Beijing No. 2 Intermediate Court rendered the decision on December 31, 2014 and held that the 360 mobile phone security software of Qihu Company did not constitute market dominance, thus rejecting Mishi Company's claims.

● **Strengthening Investigation and Law Enforcement regarding Anti-monopoly Cases**

In 2014, the law enforcement authorities of China strengthened the investigation and the law enforcement of anti-monopoly cases. Many enterprises were investigated and punished, and the industries involved are various, including electronic communication and automotive, etc. In 2014, the AICs put on file and investigated 13 monopoly cases, two of which involved Microsoft Corporation and Beijing Shengkai Sports Development Ltd. and nationwide influences.

The anti-monopoly cases of 2014 provided new materials for the further study on the market definition, the determination on horizontal and vertical monopoly agreements, and the determination of abuse of market dominance and also indicated that the courts and the anti-monopoly law enforcement authorities are improving in and accumulating experience in the adjudication of anti-monopoly cases.

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