

# Key Points of The New Judicial Interpretation of The Law Against Unfair Competition



CHINA

The Supreme People's Court published on 16 March 2022 under No. 9 FASHI [2022] a new *Interpretation on several issues concerning the application of the Law Against Unfair Competition of the People's Republic of China* ("The New Interpretation") which abrogates the 2007 interpretation (No. 2 FASHI [2007]) ("The Previous Interpretation"). The New Interpretation, which became effective on 20 March 2022, introduced the following main changes:

## **I. CLARIFICATION OF THE CRITERIA FOR DETERMINING BUSINESS ETHICS**

Article 2 of the *Law Against Unfair Competition of the People's Republic of China* (the "Law"), last amended on 23 April 2019, requires business operators to follow the principles of voluntary participation, equality, fairness and integrity in their business and industrial activities and to comply with laws as well as with business ethics.

According to Article 3 of the New Interpretation, the people's court may consider generally observed and recognized ethical codes in specific business fields as business ethics. As such, in order to determine if there has been a breach of business ethics, the Chinese judge will have to consider not only the specific circumstances of each case but also different factors such as the business rules or practices applicable to the industrial sector in question, the subjective attitude of the operators, the will of the parties in the selection of the co-contractor, the impact on consumer rights and interests, on market order and public interests, etc. The judge may also refer to industry rules and standards, technical rules and the self-regulation agreements formulated by the competent authorities, industry federations or self-regulatory bodies.

For example, in the case of an unfair competition dispute between Tencent ([www.tencent.com](http://www.tencent.com)) and Qihoo ([www.360.cn](http://www.360.cn)), the Supreme People's Court clearly indicated in its final judgement in the second-level court that the industry rules and standards and other self-regulation agreements established by industry federations or self-regulatory bodies and intended to regulate competitive practices and maintain order on the market in a specific business field reflect and embody business ethics, and are one of the significant factors that must be used by courts to establish and determine the standard code of conduct and business ethics of such business field.

A key point of Article 3 of the New Interpretation is that it no longer restricts the concept of business ethics to the ethics generally accepted by the general public as part of recognized codes of conduct, but it takes various other factors into account, particularly in the absence of existing and recognized codes of conduct.

## **II. ACTS CAUSING CONFUSION**

According to Article 6 of the Law, confusion refers to the conduct adopted by the operator with the purpose of misleading third parties into thinking that its own products are in fact the products of another operator or have a specific connection with the latter. Act of confusion are some of the most frequent acts of unfair competition.

### **1. CASE WHERE CONFUSION IS NOT ACCEPTED BY THE COURT**

Article 7 of the New Interpretation provides that applications for protection based on the principle of confusion provided for in

Article 6<sup>1</sup> of the Law cannot be upheld by the judges if such applications are based on elements or on the distinctive portion of elements that cannot be registered as trademarks in China according to the provisions of the first paragraph of Article 10<sup>2</sup> of the *Trademark Law of the People's Republic of China* ("the Trademark Law"). For example, this would be the case of an element that uses part of the national flag or emblem of the People's Republic of China.

The signs specified in Article 6 of the Law in fact play a similar role to that of a trademark to the extent that their purpose is to allow the identification of the origin of the products and services. As such, it makes sense that for the protection to be recognized by the Chinese judge, these signs should not be made up of elements that cannot be registered as trademarks. Lastly, it is important to stress that this prohibition also applies where only the distinctive part of the sign falls under the list in Article 10, thus preventing operators from circumventing the prohibition by using, for instance, only one part of the national emblem.

## 2. EXTENSION OF THE SCOPE OF THE NOTION OF "SPECIFICALLY RELATED TO ANOTHER PARTY"

As indicated above, one confusion criterion is the act of misleading others into believing that one's own products/services are specifically related to the products/services of another party.

Paragraph 2 of Article 12 of the New Interpretation states that this notion of "specific relation to another party" includes, in particular, the relationships formed under a business partnership, licensed use, commercial sponsorship, advertising endorsement, etc. while The Previous Interpretation only provided for cases of licensed use and affiliated companies. The scope of application of this clause therefore becomes broader and makes it possible to strengthen the protection given to rights holders.

This extension of the scope of application had become necessary considering the emergence, during the past few years, of numerous cases of unfair competition targeting the unauthorized use of names of celebrities, entertainers or other celebrity hosts. However, in these cases, the confusion did not concern the origin of the products or services or the affiliate link between several companies, but rather took advantage of the connection between a celebrity and his or her role as a brand ambassador for a specific brand, thus creating confusion in the minds of consumers.

## 3. CASE WHERE CONFUSION IS ACCEPTED BY THE COURT

Article 13 of the New Interpretation states that confusion must also be recognized by the Chinese judge in the two following cases:

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1. Article 6 Business operators shall not commit one of the following acts to mislead others into believing that their goods are those of third parties or that they have a special connection with a third party:

- (1) using without authorization labels identical or similar to the description, packaging, decoration, etc. of the goods of third parties that has a certain influence;
- (2) using without authorization the corporate name of a company with a certain influence (including abbreviation, the trademark, etc.), of the name of a social organization (including the abbreviation, etc.) or last names and surnames (including pseudonyms, stage names, translated names, etc.) of a third party;
- (3) using without authorization the main part of the domain name, website name, web page, etc., of a third-party that has a certain influence;
- (4) any other action likely to create misunderstanding by leading others to identify their goods as being those of another party or associating their goods with others.

2. Article 10 The following signs cannot be used as trademarks:

- (1) a sign identical or similar to the name of the People's Republic of China, its national flag, national emblem, national anthem, military flag, military emblem, military anthem, military medal, etc. and a sign identical to the name and logo of central state organs, the name of the specific place where they are located or the name or silhouette of landmark buildings;

(1) using without authorization a sign with certain influence other than those listed by Article 6 of the Law in paragraph 1 (trade names, packaging, decoration, etc.), paragraph 2 (business names, social organizations, natural persons, etc.) and paragraph 3 (domain names, web site names). This clause provides a clearer legal basis for the protection of new types of signs such as social media accounts.

(2) using another party's registered trademark or publicly known unregistered trademark as a trade or company name in order to mislead the public. This clause mainly seeks to clarify a legal ambiguity. Article 58 of the Trademark Law already clearly provides that this type of use is considered as an act of unfair competition and is subject to the provisions of the Law Against Unfair Competition. However, this provision is not clearly included in the Law. Article 13 of the New Interpretation states that this provision must be linked to the case specified in Article 6 paragraph 4 of the Law.

#### 4. SALE OF COUNTERFEIT GOODS

Pursuant to the provisions of Article 14 of The New Interpretation, the Chinese judge must rule that unfair competition has taken place in the event of the sale of products bearing marks likely to allow the sold products to pass off as the products of third parties or to make consumers believe that there is a connection with the products of third parties. However, if the seller can prove that they did not know that their products were counterfeits, ii) that they obtained them lawfully, and iii) that they can give the name of their supplier, then they can then be exempted from their obligation of compensation.

However, even if these three conditions are met, the seller is required to put a stop to the infringement.

#### 5. JOINT AND SEVERAL LIABILITY OF SERVICE PROVIDERS

Article 15 of the New Legal Interpretation provides that when an individual deliberately provides warehousing, transportation, mailing, printing and concealment services or business premises to a third party in order for such party to engage in acts of confusion, the court may uphold any petition to rule on the case in accordance with the following principle: any person who encourages or helps another person to commit a felony accepts joint and several liability with such person<sup>1</sup>.

This principle of joint and several liability of the service provider who helps a third party commit a felony (such as infringement, unfair competition) is also provided for in similar terms in Article 57<sup>2</sup> paragraph 6 of the *Trademark Law* and in Article 75<sup>3</sup> of the *Regulation Governing the Trademark Law*.

### III. CALCULATION OF DAMAGES

In the event of a proven case of unfair competition, the judge calculates the amount of damages in accordance with the principles set out in Article 17 of the Law, namely on the basis of the actual losses incurred by the victim of the act, or failing which, on the basis

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1. Paragraph 1 of Article 1169 of the Code of Civil Procedure of the People's Republic of China

2. Article 57 The following actions are considered as a breach of the exclusive rights to use registered trademarks: (...) (6) intentionally facilitating the breach of the exclusive rights to use third-party trademarks, helping a third party to infringe the exclusive rights to use trademarks; or (...)

3. Article 75 Individuals who provide the means for storing, transporting, shipping, printing, concealing, or provide business premises, e-commerce platforms, etc. in order to breach the exclusive rights of third parties to use a trademark are considered as facilitating the infringement specified in Article 57 paragraph 6 of the Trademark Law.



of the gains made by the infringer, with, in serious cases, the possibility of applying a ratio of 1 to 5 to the amount thus obtained.

In addition, the last section of Article 17 provides that where the breach concerns Articles 6 (acts of confusion) or 9 (breach of trade secrets) of the Law, and if it is truly difficult to determine the actual losses or unlawfully acquired gains, the judge may then, depending on the seriousness of the case, impose the payment of a flat amount for damages of up to RMB 5 million (approximately EUR 705,000).

However, Article 23 of the New Interpretation now extends the judge's ability to set a flat amount of damages for the following breaches: breach of business ethics<sup>1</sup>, misleading advertising<sup>2</sup>, commercial denigration<sup>3</sup> and unlawful activities on the Internet<sup>4</sup>. These are therefore in addition to the two cases originally specified in Article 17 of the Law.

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1. Article 2 of the Law
  2. Article 8 of the Law
  3. Article 11 of the Law
  4. Article 12 of the Law



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