



中国贸促会专利商标事务所  
CCPIT PATENT & TRADEMARK LAW OFFICE

60 Jun. 2023

# Newsletter

INTELLECTUAL PROPERTY



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# Our firm ranked Tier 1 in the Patent and Copyright / Trademark Rankings (2023) by ALB

**O**n May 22nd, 2023, Asian Legal Business (ALB) released the 2023

China IP Rankings. Our firm ranked Tier 1 in both the Patent and Copyright/Trademark areas due to our high-quality legal services and outstanding business performance.

Asian Legal Business (ALB) is a professional legal magazine under Thomson Reuters. Its intellectual property ranking is mainly based on the overall strength of the law firm, including workload, complexity and scale of cases, as well as indicators such as customers, teams, year-

## ASIAN LEGAL BUSINESS

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on-year development and growth momentum. Its intellectual property ranking is evaluated based on two parts: patent and trademark/copyright. ALB China's annual intellectual property list selects the most skilled and outstanding law firms in China engaged in patent, trademark, and copyright business.

CCPIT Patent and Trademark Law Office, with a history dated back to 1957, is one of the largest full-service Chinese intellectual

property law firms. We have 320 patent and trademark attorneys, more than 100 of whom have Chinese Lawyer's Qualification or passed bar examination of other jurisdictions. We provide one-stop professional services, including consultation, prosecution, mediation, administrative enforcement and litigation services, in relation to patents, trademarks, copyrights, domain names, trade secrets, unfair competition and other intellectual property-related matters.

# Winner of 2023 China IP Awards - IP Firm of the Year by Asia IP



Asia IP's editorial team revealed the winners of the 2023 China IP Awards recently. According to Asia IP, "The winner of our 2023 China IP Awards IP Firm of the Year firm comes as no surprise: Beijing-based CCPIT Patent and Trademark Law Office takes the award home for the fourth consecutive year." The firm also ranked top in the trademark prosecution, trademark litigation, and patent prosecution at the same time. According to Asia IP, "CCPIT Patent and Trademark Law Office is the oldest and one of the largest full-service IP law firms in China, and it continues to provide strong results in litigation and prosecution." "The firm, which boasts senior lawyers including president Chuanhong Long and

vice presidents Zhongqi Zhou and Shaohui Yuan among its leadership, and some 322 patent and trademark attorneys and 96 qualified attorneys at law, is the recipient of many honours and awards, and was a clear winner in this category."

Competition for the awards was extremely fierce, and the winners do represent the very best IP firms in China. In determining the winners, law firms were asked to submit details of cases they had worked on, which were combined with the research by Asia IP's editorial team. Corporate counsel from around the world then voted on the shortlist, which means that the firm awarded is one of the top choices for corporate counsels looking for IP advice in China.



# VANS successfully enforces its stripe marks

By Rui Song

On September 27, 2022, the Shanghai Intellectual Property Court issued the final judgment in a trademark infringement dispute in which it confirmed that the use of a logo similar to the VANS stripe marks on shoes was trademark infringement and imposed a damages award of RMB 1 million (approximately US \$145,750) on the infringer.

The appellee (plaintiff in the first instance), Vans, Inc. (Vans), owns trademark registrations for the following:

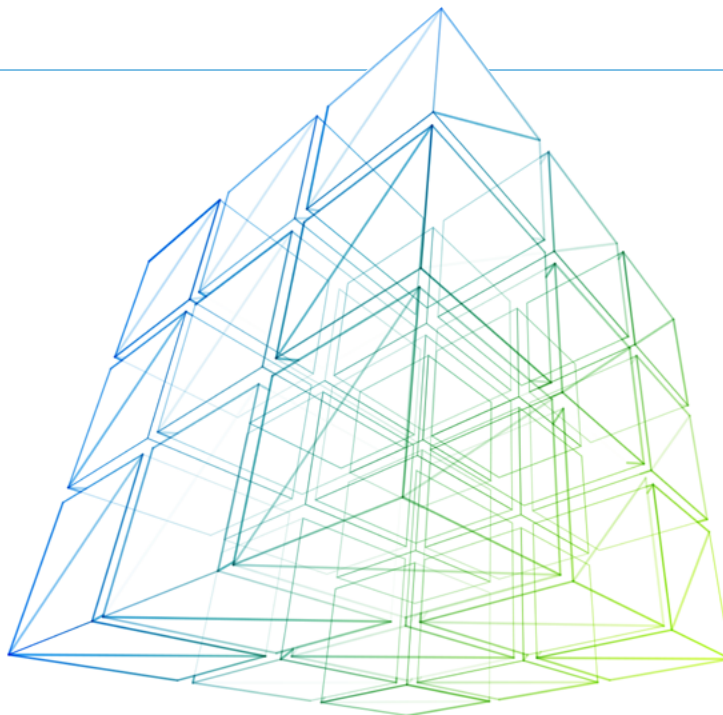


Reg. No. 8606383



Reg. No. 10347758

Vans submitted evidence that shoes bearing said marks have been widely sold in China. Having noticed that the appellant (defendant in the first instance), XUE Shengbo, a natural person, sold shoes bearing a logo similar to the VANS stripe marks on Pinduoduo (a Chinese e-commerce platform), Vans filed a trademark infringement lawsuit and requested the court to order



the appellant to immediately stop infringing its exclusive trademark rights and to award compensation.

The appellant claimed that the use of the accused infringing logo (pictured below) was not trademark use because the logo does not function to identify the source of goods. Besides, the appellant argued that the appellee's trademarks were weak in distinctiveness and their ability to function as trademarks was limited. He further claimed that the opening part of the contested logo made the entire logo different from the appellee's registered

trademarks; thus, their coexistence did not cause confusion among consumers.



The first and second instance courts both held that the appellant's use of the accused infringing logo, which is similar to the appellee's registered trademarks on the accused infringing canvas shoes, constituted trademark use and therefore such use was trademark infringement. Besides, the

appellant did not submit sufficient evidence to substantiate his claim that Vans' stripe marks did not function as source identifiers. The courts ruled that the appellant should pay Vans RMB 1 million (approximately US \$145,750) to compensate it for its economic losses and reasonable expenses.

In the present case, the product description on the appellant's online shop and the accused infringing logo used in the shoes' appearance played a role in identifying the source of the goods.

# Applying the ‘exception to loss of novelty’ to design patents in China

By Xiaojun Guo

Article 24(4) of the Chinese Patent Law provides that a patent application will not lose its novelty if, within six months before the filing date, the subject matter of the application is disclosed by another

person without the consent of the applicant. In Beijing Qihoo Technology, Beijing Qizhi Business Consulting (collectively ‘Qihoo’) v China National Intellectual Property Administration (CNIPA) and third party Beijing Jiangmin New Science & Technology, the

Supreme Court of China clarified the application of the above “exception to loss of novelty” provision when a design patent is disclosed in an unusual way before the filing date.

At issue is design patent No.

201430324283.6 titled “computer with graphic user interface (GUI)”, issued to Qihoo. Jiangmin requested for invalidation of the design patent with the Patent Reexamination Board (PRB, now Reexamination and Invalidation Department of the Patent Office, CNIPA) claiming the design patent was, among other factors, obvious over a prior design. The PRB sided with Jiangmin, deciding that the design patent was invalid as obvious. The decision was affirmed by the Beijing IP Court. Qihoo appealed to the Supreme Court.

Two issues were raised in the proceedings: first, whether the graphic user interface disclosed in Exhibit 1 constitutes a prior design to the design patent; second, whether the disclosure belongs to the exception to loss of novelty as provided in Article 24(4) of the Patent Law.

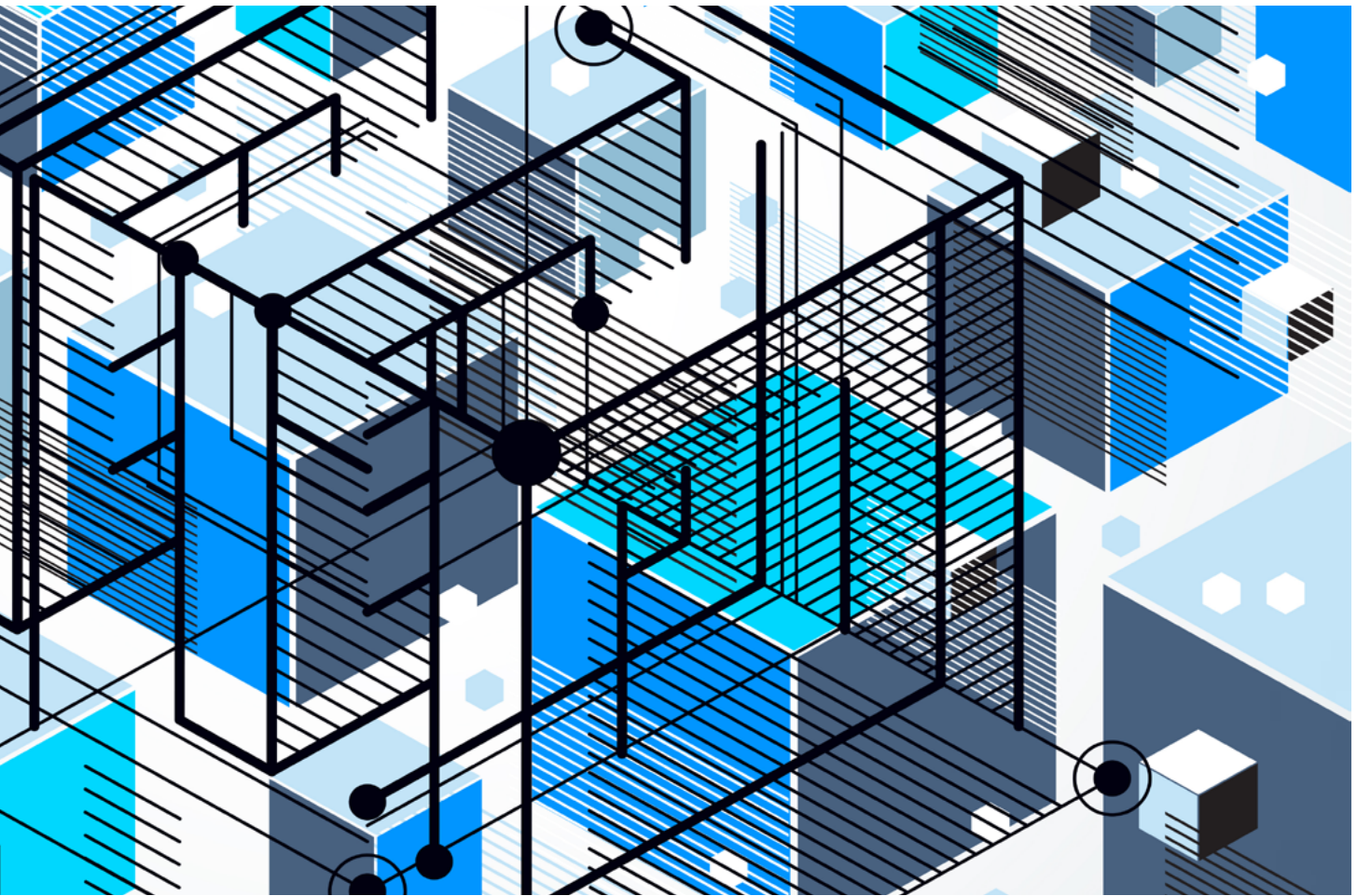
### Prior design or not?

Regarding the first issue, the present case concerns disclosure by use. The PRB, the Beijing IP Court and the Supreme Court gave the unanimous opinion that Exhibit 1 had disclosed a prior design to the design patent. The Supreme Court opined that a disclosure by use shall be examined from three aspects: first, whether the accessibility of an unspecified person to the prior design is restricted by any specific conditions (factors such as the number of persons informed, geographical scope, payment of fees, application for registration, etc. do not constitute restrictions); second, whether the unspecified public knows the prior design is under a duty of confidentiality; and third, whether the availability to the public is real. The duty of confidentiality may either be based on legal provisions or contractual agreements, or be implied in social perception or



business customs.

Exhibit 1 is a notarised, online post titled ‘360 Security Guard 10 download address’ posted on internet bulletin board system (BBS) Kafan before the filing date of the design patent. It provides a link to software ‘360 Security Guard 10.0 version’ (Security Guard), which displays Qihoo’s patented GUI. One can download,



install and run the software by obtaining a code ('experience code') or by using file compressor 7-Zip.

Kafan is well-known in China with high credibility, and imposes no restrictions on visitors. Exhibit 1 shows that although the poster restricted access to Security Guard when posting the link to the software, so that only those

who had obtained the experience code could download and install it, a follower of the post explicitly indicated that Security Guard could also be downloaded and installed by means of 7-Zip without the experience code.

Based on the above finding, the Supreme Court held that the GUI presented in Security Guard had been made available to the public

before the filing date, and is a prior design to Qihoo's design patent. Although Exhibit 1 discloses only the GUI without the contour of the computer in the design patent, the Supreme Court considers that such a difference is immaterial in the sense of novelty, since Security Guard is normally run on a computer.

Qihoo had argued that Exhibit 1



was inadmissible since download and installation of Security Guard by means of 7-Zip was illegal. The Supreme Court rejected the argument on the fact that 7-Zip is a general-purpose compression and decompression software, through which Security Guard can be installed and used without the experience code.

### Disclosure violates right holder's intention

The key point of the “exception to loss of novelty” provision, in the Supreme Court’s opinion, is that another person discloses the design against the will of the right holder, including breach of express or implied obligation of confidentiality, or by learning the design from the right holder through illegal means such as threat, fraud or espionage. In determining whether a design is disclosed against the will of the right holder, the right holder’s subjective intention and objective

behaviour can be taken into consideration, ie, whether the right holder is willing to disclose their design or to allow the disclosure to take place, and whether the applicant has taken certain secrecy measures to ensure that the design is not available to the public.

The Supreme Court found that the poster clearly stated that Security Guard was “only for users who have obtained the priority experience qualification to try” and requested the experience code before installation of the software. It is clear that they were not willing to disclose Security Guard (including the GUI); objectively, they had taken the confidentiality measure of requesting the experience code to ensure that the software was not available to the public. Therefore, the poster had already fulfilled their obligation of secrecy. The post follower should have read the poster’s intention to act in

confidentiality, and complied with their implied obligation of confidentiality. However, the follower violated their implied duty of confidentiality, disclosed an unusual way of installing Security Guard and presented the GUI of the software to the public against the will of the right holder.

### Conclusion

In summary, the Supreme Court held that the patented design had been disclosed before the filing date by a follower of the Kafan user who made the original post, who disclosed how to download and install Security Guard without the experience code. However, the disclosure by the follower is in violation of the right holder’s intention, which makes Exhibit 1 not eligible for anticipating the novelty of the design patent. The decisions of the PRB and the Beijing IP Court were therefore reversed.

# File wrapper estoppel in China

By Guoxu Yang

**F**ile wrapper estoppel is sometimes also referred to as prosecution history estoppel. It is a limitation of the doctrine of equivalents. The basic rationale is that when the patent applicant or patentee narrows down the protection

scope of the claims by certain amendments or statements in order to meet the requirements of patentability, he cannot recapture the protection territory he surrendered during patent litigations. In other words, he cannot gain benefits on both sides. The following

is a brief introduction of file wrapper estoppel practice in China.

## 1. Legal basis and a typical case

China Patent Law does not stipulate file wrapper estoppel.

The file wrapper estoppel principle was adopted based on the principle of good faith and fairness under civil law. In 2009, the Chinese Supreme Court issued an “Interpretation on Several Issues Concerning the Application of Law in the Trial of Patent Infringement Disputes (1)”, in which Art. 6 formally introduces the concept of file wrapper estoppel. “For technical solutions surrendered by the patent applicant or patentee through amendments or observation to the claims or specification during the patent prosecution or invalidation procedures, should the right holder take them back into the claims during a patent infringement dispute, this shall not be supported by the people’s courts.”

A landmark case was a Supreme Court retrial case in 2009, which was a patent infringement case between two Chinese parties.

The published claims 1 and 2 are as follows:

**Claim 1.** A medicine for preventing and treating a calcium deficiency, characterized in that: it is a medicament made of raw materials in the following parts by weight:  
soluble calcium: 4-8 parts, zinc gluconate or zinc sulfate: 0.1-0.4 parts, and glutamine or glutamate: 0.8-1.2 parts.

**Claim 2.** The medicine for preventing and treating a calcium deficiency according to claim 1, characterized in that the soluble calcium is calcium gluconate, calcium chloride, calcium lactate, calcium carbonate or active calcium.

During the prosecution process, in order to overcome the objection of not being supported by the specification, the claims were amended. Soluble calcium was amended to active calcium



and claim 2 was deleted, and the application was then granted. The granted claim 1 is as follows:

**Claim 1.** A medicine for preventing and treating a calcium deficiency, characterized in that: it is a medicament made of raw materials in the following parts by weight:  
active calcium 4-8 parts, zinc





gluconate or zinc sulfate 0.1-0.4 parts, and glutamine or glutamate 0.8-1.2 parts.

The alleged infringing product uses calcium gluconate instead of active calcium. The patentee believes active calcium includes calcium gluconate or they are at least equivalent under the doctrine of equivalents.

The court of first instance held that only when the amendments or statements made in order to make the patent granting authority believe that the patent application has novelty or inventiveness should the effect of estoppel be established, but not for all the amendments or statements made during the

patent application process. The patentee revised the claims according to the opinions of the patent examiners and changed the “soluble calcium” in independent claim 1 to “active calcium”, which is not for the purpose of overcoming novelty or inventiveness defects, but for the purpose of making the claims be supported by the description. Therefore, the amendments shall not produce the effect of estoppel.

The court of the second instance also found that the amendments were not intended to overcome novelty and inventiveness defects and did not produce an estoppel effect. Active calcium and calcium gluconate are equivalent features, and therefore infringement was established.

The accused infringer filed a request for a retrial, arguing that the right holder had amended the

claims, and active calcium was different from calcium gluconate. The amendment of the right holder abandons the technical solution based on calcium gluconate, which constitutes estoppel. Based on the principle of file wrapper estoppel, the doctrine of equivalents no longer applies. Therefore, patent infringement could not be found.

The Supreme Court found that: according to the description, active calcium and calcium gluconate were explained by different embodiments. Calcium gluconate was not of active calcium. The amendments were made to overcome the problem raised by the State Intellectual Property Office that the scope of protection of soluble calcium is too broad and is not supported by the description. Moreover, in the statements, the applicant did not state that active calcium includes calcium gluconate. Therefore, the opinion

that active calcium includes calcium gluconate could not be established.

According to file wrapper estoppel, the technical solution abandoned by the patent applicant or patentee through the amendment on the claims, description or statement

of opinions in the patent application or invalidation procedure cannot be recaptured during the patent infringement proceedings. Therefore, the scope of protection of the patent at issue should not include the technical solution based on “calcium gluconate”. The patent was thus not infringed on.





The conditions used to establish estoppel in Article 6 are relatively general. As long as the amendments or statements in the patent application or invalidation procedure lead to the abandonment of any technical solutions, file wrapper estoppel shall apply. In other words, the

Judicial Interpretation does not distinguish between the types of amendments or statements, but only sets the applicable conditions for estoppel from the perspective of the results. When judging if “abandonment of technical solutions” occurs, it is not necessary to investigate the purpose of the amendments or statements in order to satisfy the substantive patentability requirements or the formality requirements. The focus should be on whether the amendment or the statement of opinion has produced a limitation or a narrowing effect on the scope of protection of the patent.

## 2. Limitations to file wrapper estoppel

In order to avoid the possible abuse of file wrapper estoppel, the Supreme Court issued a further judicial interpretation in 2016 entitled “Interpretation on Several Issues Concerning the

Application of Law in the Trial of Patent Infringement Disputes (2)”. According to Art. 13, “where the right holder proves that the restrictive amendment or statement made by the patent applicant or the patentee to the claims, description and drawings during the patent prosecution and invalidation procedure is clearly denied, the people’s court shall determine that the amendment or statement does not lead to the surrender of the technical solution.” The interpretation of this may be better understood by referring to the following case.

The issued claim 1 of the patent is as follows:

**Claim 1.** A shark fin antenna, characterized in that it has an antenna casing, a radio receiving antenna is arranged on the inner upper part of the antenna casing, one end of the radio receiving antenna is provided with an

antenna signal output end, and the antenna signal output end is connected with the signal input end of the antenna amplifier through the antenna connecting element, connect, or directly match with the coaxial cable (feature a), the bottom of the antenna housing is equipped with a mounting base plate; the radio receiving antenna is mounted on the inner upper part of the antenna housing by injection molding or fixed clips (feature b); on the inner side of the antenna housing the upper part is provided with a radio receiving antenna, the radio receiving antenna adopts a helical spring antenna or a metal antenna, which increases the effective length of the antenna to receive radio signals and realizes 360-degree omnidirectional signal reception; the radio receiving antenna is an AM/FM shared antenna (feature c).

During the patent prosecution

procedure, the examiner pointed out in both the first and second office actions that features a and b are the distinguishing features of claim 1 compared to reference 1, which involves the signal output connection method and the installation method of the upper part of the inner side of the antenna housing. Although the signal output connection method and installation method adopted in the reference document are different from those in claim 1, features a and b belong to common knowledge or conventional technical means in the field. Therefore, claim 1 does not have inventiveness. The patentee then added feature c in reply to the second office action. Subsequently, the claim was granted.

In the patent invalidation procedure brought by the alleged infringer, the patentee still believes that features a and

b are different from the prior art. In the invalidation decision, the State Intellectual Property Office determined that the patent has inventiveness. The relevant reason is that in the prior art, the AM antenna and FM antenna are separately designed, which is a different teaching away from those of the patent, in which





the “radio receiving antenna is shared by AM/FM.” That is to say, the State Intellectual Property Office believes that claim 1 has inventiveness because of feature c. In the invalidation decision, although the State Intellectual Property Office believed that features a and b were the distinguishing features of claim

1 compared to reference 1, they did not make specific comments on the contribution of features a and b to the inventiveness.

During the patent infringement proceedings, the accused infringer believed that the technical solution of the accused infringing product is different from the patent involved. The signal output connection method and installation method adopted are the technical solutions in the prior art, which are the solutions abandoned by the patentee during the prosecution and invalidation procedure. According to file wrapper estoppel, the technical solution of the accused infringing product can no longer be included in the protection scope of the patent at issue under the doctrine of equivalents.

The court of the second instance, in this case, held that since the State Intellectual Property

Office did not comment on the contribution of features a and b to the inventiveness during the patent invalidation procedure, the “clearly deny” condition was not met. According to file wrapper estoppel, the technical solution that the patentee has abandoned in the invalidation procedure can no longer be included in the scope of protection of the patent as an equivalent infringement during the infringement proceedings. Therefore, the alleged infringement is not established. In its ruling, the Supreme People’s Court pointed out that: “due to the continuity of the identification of technical features in the patent application and invalidation process, whether the statement made by the right holder is ‘clearly denied’, an objective and comprehensive judgment should be made on the examination of the technical features of the patent application and



invalidation procedures, especially focusing on whether the restrictive statement is finally recognized by the referee, and whether it leads to the patent application to be granted or the patent right to be maintained. During the procedure, the Patent Examination Department of the State Intellectual Property Office did not approve the statements regarding technical features a and b, and held a clear negative opinion. Moreover, the patent in question was not granted based on the limitations on features a and b. During the invalidation procedure, although the Reexamination Board also believed that features a and b count as distinguishing features, it did not overturn the comments on features a and b made during the prosecution procedure and maintained the validity of the patent based on the inventiveness of feature c. It cannot be concluded that the Reexamination Board held

that features a and b do not belong to common knowledge and conventional methods. The second-instance court of this case departed from the specific examination facts that the patent in question was granted, and ignored the fact that the patentee's statements had been 'clearly denied' in the substantive examination procedure, and then ... draws the erroneous conclusion regarding the application of file wrapper estoppel".

### 3. How to avoid file wrapper estoppel for a patent applicant or patentee

From the above interpretation and case analysis, any amendments or statements made in the patent prosecution and invalidation procedures may lead to possible file wrapper estoppel. The exception of file wrapper estoppel normally has very strict requirements, i.e.

the amendments or statements should be clearly denied by the authorities. In connection to this, the patent applicant or patentee should be very cautious when making amendments to or statements on the claims, description and accompanying drawings. It may not be a good idea to distinguish each and every one of the technical features in the claims from those of the prior art in order for the patent application to be granted, especially in the case where some of the features in the claims are amended. In order to overcome the inventiveness objection raised by the examiner, the patent applicants should focus more on the substantive improvements made in light of the prior art and make amendments or arguments regarding same. In some cases, a telephone interview may be a good choice to convince the examiner and is unlikely to lead to file wrapper estoppel.

# CNIPA Guidance on signs prohibited from use as trademarks

By Shufang Zhang, Ling Zhao

The China National Intellectual Property Administration (CNIPA) issued Guidance on Signs Prohibited from Use as Trademarks on 19 January 2023. The Guidance is made in

accordance with Article 10 of the China Trademark Law, which defines the “signs prohibited from use as trade marks”. The Guidance specifies the categories of “signs prohibited from use as trademarks” and the legal

liabilities of registering and using such signs.

“Signs prohibited from use as trademarks” as defined in Article 10 of the Trademark Law are forbidden from both registration

and use.

The purpose of this article is to forbid the registration and use of signs that are damaging to the dignity of the State, harmful to public interests or order, detrimental to national unity, discriminating against religion, or against socialist morality or customs, or having other unhealthy influences.

The first provision of Article 10 mainly provides protection for special signs, such as the State name, and national emblem, anthem and flag of China, military flags, emblems and songs, names and signs of state organs of China, names and emblems of foreign states, names and signs of international intergovernmental organizations, signs of official warrant or control, Red Cross and Red Crescent.

This provision prohibits the registration and use of signs that

are detrimental to public interests. The Guidance stresses that such signs are strictly forbidden from being registered or used as trade marks.

Where signs have various meanings or connotations, if there is one meaning or connotation against this provision, the sign is considered as a “trademark prohibited from use”.

The second provision of Article 10 defines limitations on registering

and using geographical names as trade marks and the exceptions. The CNIPA has meanwhile issued Guidance on Registration and Using Trademarks Containing Geographical Names. The detailed information may refer to this Guidance.

The Guidance lists the categories of “signs prohibited from use as trademarks” defined in the first provision of Article 10. These are set out below








|   |   |
|---|---|
|  |  |
| Similar to “China”  | Identical to military emblem of China   |

1. Signs that are detrimental to the state dignity, public interests and/or public order of China

- Signs that are identical with or similar to the State name, national flag, national emblem, national anthem, military flag, military emblem, military anthem, or decorations of the People’s Republic of China: see the two examples pictured left.
- Signs that are identical with the names or symbol of the State Organs of China, or with the name of the particular place, or with the names or images of the iconic building, where the State Organs of China sit, such as “紫光阁” (Tower of Violet Light (ZI GUANG GE), the place where Chinese government officials meet foreign guests.

|   |   |
|---|---|
|  |   |
| Contains “Mauritius” in Chinese   |   |
|  |  |
| Similar to the US national flag   | Similar to the Italy flag   |

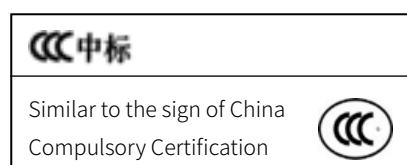
2. Signs that are detrimental to the state dignity, public interests and/or public order of foreign states

- Signs identical with or similar to the state name of a foreign country, unless consent has been given by the government of the country.
- Signs identical with or similar to the national flag, national emblem or military flag of a foreign country, etc., unless consent has been given by the government of the country.

|   |   |
|---|---|
|  |  |
| Similar to UN   | Similar to WTO  |

3. Signs that are liable to mislead the public by association with international intergovernmental organisations

- Signs identical with or similar to the name, abbreviation, flag or emblem of an international intergovernmental organisation unless consent has been given by the organisation or the
- public is not likely to be misled by such use.



#### 4. Signs that are liable to mislead the public by association with a warrant of inspection or quality control

- Signs identical with or similar to an official sign or hallmark indicating official control and warrant, unless authorisation has been given

#### 5. Signs that are identical or similar to the name or symbol of Red Cross, Red Crescent or Red Crystal



#### 6. Signs that are liable to be associated with ethnic discrimination

- For example, the sign pictured on the left, as Eskimo is often considered as an offensive term.



#### 7. Signs that are deceptive or misleading in respect of the characteristics or origin of goods/services

- Signs referring to the quality, function, usage, raw material, content, weight, quantity, price, craft, technique etc of the goods/services.
- Signs with the place of production or origin of goods/services.
- Signs with other features that are misleading.



#### 8. Signs that are against socialist morality or customs or having other unhealthy influences

- Signs against socialist morality or customs, including signs involving terror, violence, obscenity, gambling and feudal superstition.



#### 9. Signs with negative political influences

- describe objective existence, signs that refer to names of newspapers, periodicals, magazines and are in accordance with the name of the applicants, signs that refer to abbreviations of enterprises and institutions that are approved by State Council



|   |
|---|
|  |
| The map of China is incorrect   |
|  |
| The Chinese characters refer to the name of Russian President Putin               |

or authorised organs, and signs in which the name of China is independent from other distinctive components in the mark while the state name just indicates the origin country.

- Signs identical with or similar to names, aliases, elegant names, nicknames etc of leaders of China, leaders of other countries, regions, or international political organizations,
- Signs identical with or similar to political theories, national strategies, policies, and conference names of the Party and of the Country, such as “一带一路” (the Belt and Road initiative).
- Signs identical with or similar to political events, locations, numbers etc such as “长征” (the Long March).;
- Signs identical or similar to names or symbols of terrorist organisations, religious cults, underworld organisations, or names of leaders of such organisations, such as “ISIS”.
- Signs with other negative political influences, such as that pictured: 卐

10. Signs that are liable to cause negative influences on the economy, culture, nationalities, religion or society

- Signs identical or similar to names or symbols of legal currencies (pictured left). ¥
- Signs containing irregular Chinese characters or deformation of Chinese idioms.
- Signs containing words or symbols that would harm the dignity and feelings of nationalities and races (e.g. HONKY). HONKY
- Signs containing words or symbols that would harm the religious feelings, religious beliefs and/or folk beliefs, such as “Matsu” and “MECCA”.
- Signs identical or similar to names, abbreviations, emblems of party and government authorities, army, police, military institutes,

|   |   |
|---|---|
|  |  |
| Similar to the customs emblem of China  | “HZM BRIDGE” refers to the Hong Kong-Zhuhai-Macao Bridge                            |

government organs, social groups of China.

- Signs identical or similar to names or symbols of state-level new areas, state-level development zones, key state projects, and major science and technology programs.
- Signs identical or similar to names of major natural disasters, severe accidents, public health incidents and social security events, such as “非典” (refers to SARS).
- Signs identical or similar to names, images, deeds, spirits or mottos of heroes and martyrs.
- Signs identical or similar to names of public figures in the fields of politics, economics, culture, nationality, religion etc, such as “孔子” (Confucius in Chinese).
- Signs containing words or symbols that are detrimental to the economy, culture, nationality, religion, public interests and public order of China or would cause unhealthy influences, such as “MY GOD SOFT”.

Legal consequences

“Signs prohibited from use as trade marks” will be rejected if they are applied for application and will be invalidated if they are registered. If such marks are filed in bad faith, the mark holders will face punishments of warnings and fines. The punishments will be published and put in the credit records of the mark holders.

Those using unregistered

“signs prohibited from use as trademarks” will be stopped from using and ordered to make revisions. Warnings and punishments will also be imposed. The Guidance stipulates the obligations on trade mark agencies to inform the entrusting parties of the consequences of registering and using “signs prohibited from use as trade marks”.

Trade mark agencies and attorneys that are aware that the entrusting

parties are acting in bad faith yet still accept the commission to file “signs prohibited from use as trade marks” will face punishments such as warnings, making rectifications within required term, fines and suspension of trade mark businesses.

The punishments will be published and recorded in the National Enterprise Credit Information Publicity System.

# Analysis on the protection of a well-known drug trademark

## — China's court recognizes Novartis in Chinese as a well-known trademark standfirst

By Aira Apivala, Ling Zhao, Hui Gao

**R**ecently, the Beijing High People's Court issued judgements of second instance recognizing trademark registration No. 1144779 诺华 (Novartis in Chinese) owned by Novartis AG as a well-known trademark in Class 5 and granting cross-class protection to Class 3. The disputed

trademarks are registrations No. 16739466 诺华露 (Novartis LU) and No. 16739516 诺华妥飘 (Novartis TUO PIAO). The decisions were reported at 2022 JING XING ZHONG 4305 and 2022 JING XING ZHONG 4306, administrative judgments issued by the Beijing High People's Court.

### Foci of the case

One of the foci of the case is if the use of 诺华 (Novartis in Chinese) on packaging of pharmaceutical goods is considered use of trade name or use of trademark.

Novartis claimed that the use of 诺华 (Novartis in Chinese) and

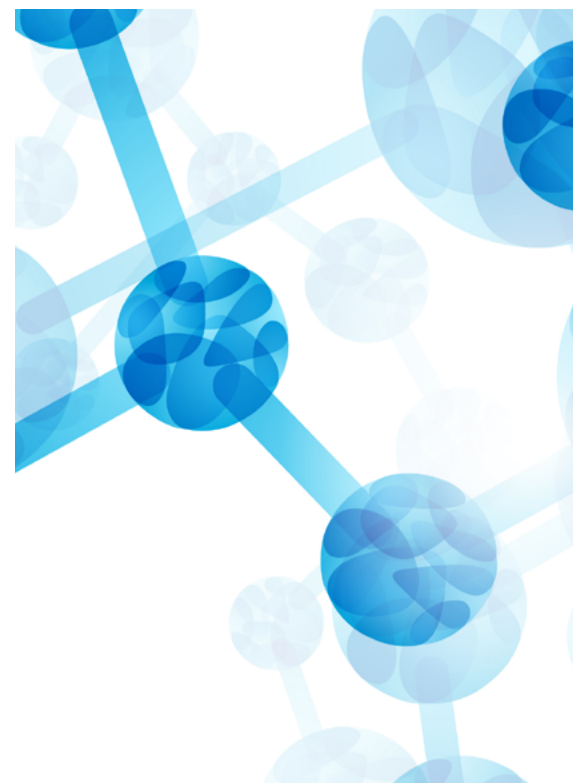
the use of product names on the packaging can both distinguish the source of the pharmaceutical goods. The product names can also identify the pharmaceutical product categories and will not affect the role of 诺华 (Novartis in Chinese) as a trademark in identifying the origin of goods.

The court decided that although 诺华 (Novartis in Chinese) is the company's trade name, it is also registered as a trademark (under Nice Class 05) and its use on packaging of the pharmaceutical goods in a predominant way can distinguish the source of the goods and this is use as a trademark.

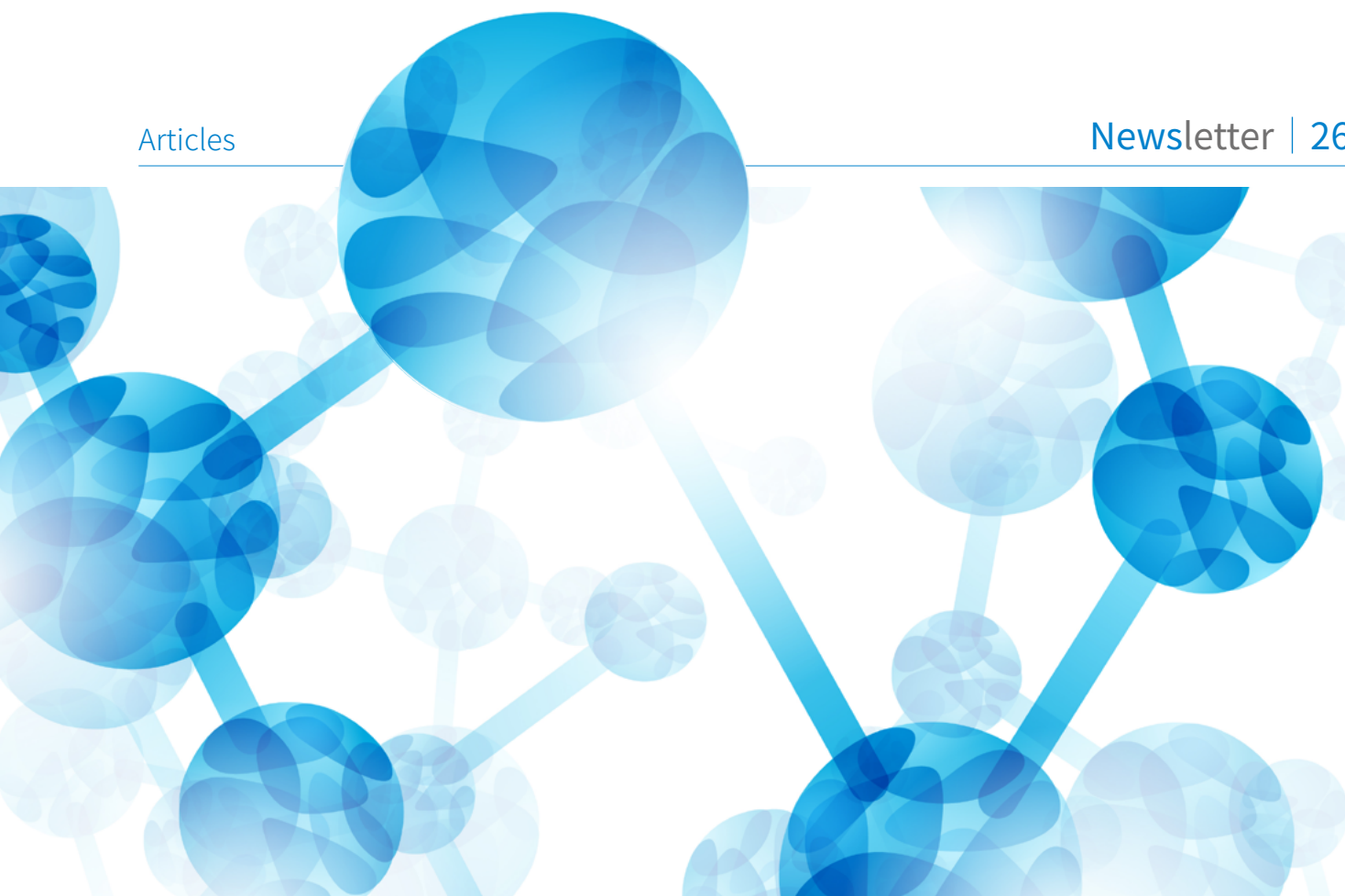
Another focus of the case is whether the well-known trademark on pharmaceutical preparations in Class 5 can obtain cross-class protection to goods in Class 3 covered by the disputed marks.

With strong evidence and reasoning, Novartis claimed that the goods covered by both parties' marks overlapped in distribution channels and consumer scope. "Medical shampoo" and "cosmetics for medical use" are common commodities in the market, and in other valid judgements, protection of well-known mark in Class 5 has been extended to Class 3.

Finally, the court does not only support the claim that 诺华 (Novartis in Chinese) should be recognized as a well-known trademark because of its extremely high popularity and influence based on long-term and extensive use, but also recognizes that the use of the disputed marks on "cosmetics, etc." in Class 3 is likely to mislead the relevant public and to damage the interests of Novartis as owner of the well-known mark.



This is the first time that the trademark 诺华 (Novartis in Chinese) has been recognized as a well-known trademark in China and obtained cross-class protection. This is Novartis' landmark achievement in brand protection in China. This recognition helps Novartis to better protect its house mark in China. It will increase its chance of success for opposition/invalidation actions against same or similar marks regarding dissimilar goods and service classes and will help Novartis to



better enforce its rights against bad faith trademark filings, which in China has been very problematic.

Well-known trademarks in China will receive more attention and stronger protection in enforcement proceedings against infringers either before the Chinese administrative authorities or the Chinese courts across the country and invalidation actions are not limited to 5-year term for such trademark proprietors. This is a very positive outcome to the reputation of Novartis in China and

will be of advantage to maximize the market value of the brand and supports continuous business development in China.

#### **Protection of well-known trademarks in the pharmaceutical industry in China**

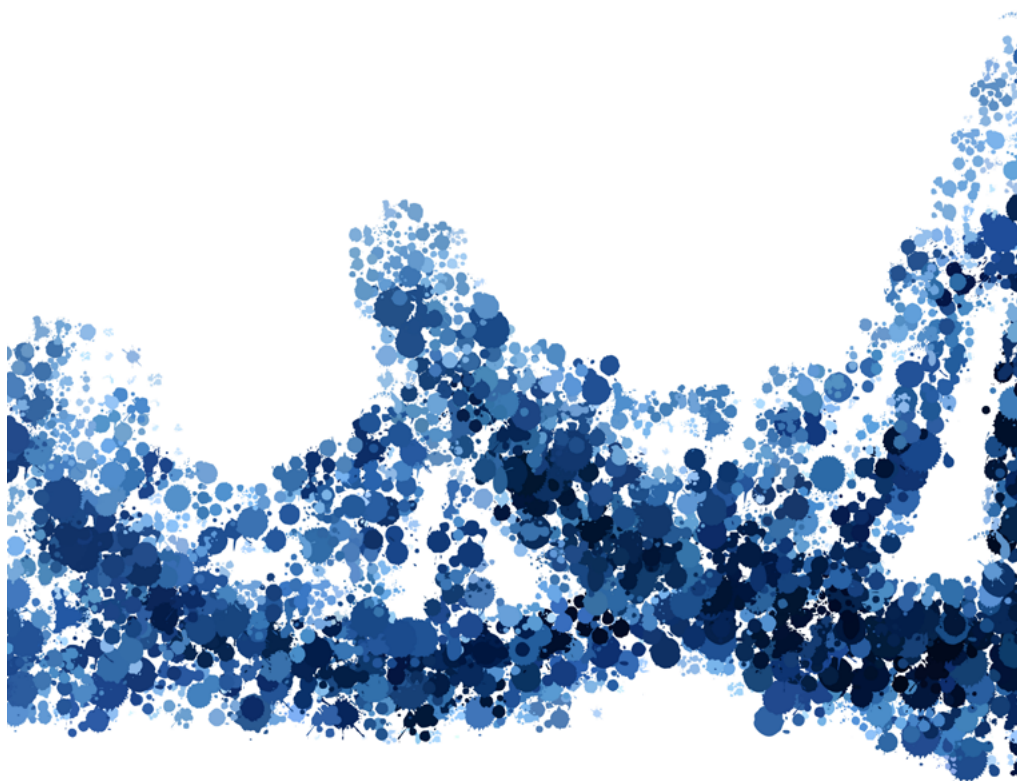
If a trademark of pharmaceutical goods has obtained well-known status through long-term and extensive market use, it should be recognized and protected as a well-known trademark under

provisions of Article 13 of the current trademark law. According to the statistics from the MOZLEN data platform, in the list of well-known trademarks published by the former State Administration for Industry and Commerce in 2017, 570 pharmaceutical trademarks in Class 5 were recognized as well-known trademarks, accounting for 6.3 percent of the total number of 9,027. Among the owners of the 570 published well-known trademarks for pharmaceutical goods, 547 are from China, 12 from the United States, four from



Switzerland, two from Germany, two from the United Kingdom, one from Denmark, one from the Virgin Islands and one from South Korea. Among all of the recognized well-known marks in the 45 classes, the number of well-known trademarks in Class 5 ranks sixth, only second to that identified in Class 25. The number of well-known marks in Class 30 is at the top of the list.

The above statistic does not include the well-known trademarks recognized by China National Intellectual Property Administration (CNIPA) and the courts at all levels in various cases after 2017, and is far less than the number of recognized well-known trademarks for pharmaceutical goods to this day. However, to a certain extent, it can prove that many trademarks for pharmaceutical goods are protected as well-known trademarks, and the market entities in this industry are relatively active.



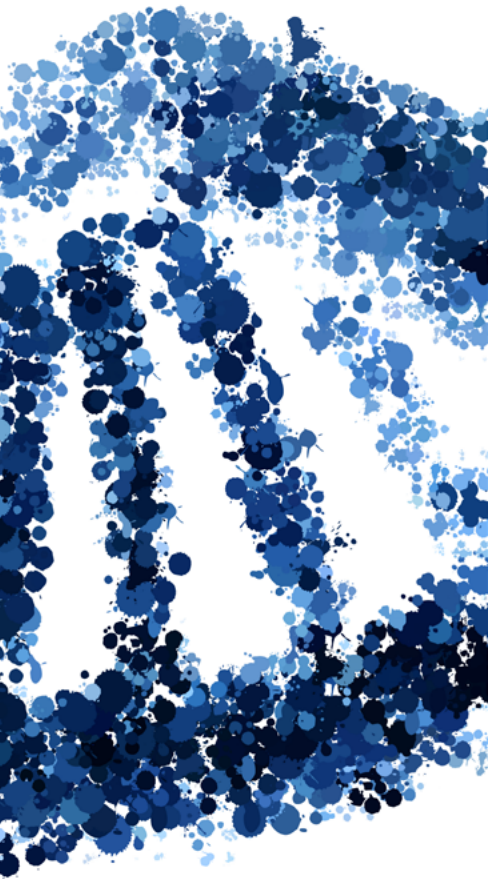
### **Strengthening of well-known trademark protection by the Draft for Comments on the Revision of the Trademark Law**

#### *Enhancement of protection of unregistered well-known trademark*

The Draft for Comments on the Revision of the Trademark Law recently issued by the CNIPA revised Article 13.2 and Article 13.3 of the current trademark law.

The current trademark law is based on registration system and first-to-file principle. Use is not a prerequisite for obtaining trademark registration. However, prior use is the pre-condition for protection of unregistered trademarks. In the procedure of authorization and determination of trademark rights, the protection of unregistered and prior used trademarks is mainly reflected in protection of unregistered well-





known trademarks and prior used trademarks with certain influence, which both take prior use and reputation as key requirements. The criteria for reputation for well-known trademarks are more demanding than that for prior used trademarks with some influence. According to the current trademark law, where the trademark on identical or similar goods is a reproduction, imitation, or translation of unregistered well-known trademark in China and

is liable to cause confusion, its registration should be refused, and its use should be prohibited. Therefore, an unregistered well-known trademark can only be protected on same or similar goods, and they cannot be protected on cross-class dissimilar goods as registered well-known trademarks.

Article 18 of the Draft for Comments stipulates that if a trademark used or applied for registration on the same or similar goods is a copy, imitation or translation of unregistered well-known trademark in China and is liable to cause confusion, it should be refused for registration and be prohibited for being used. If a trademark used or applied for registration on dissimilar goods is a copy, imitation or translation of well-known trademark and is likely to mislead the publics and to cause damage to the interests of owner of well-known trademark, its use should be prohibited and

its registration should be refused.

In accordance with the above provisions in the Draft for Comments, well-known trademark, no matter if it is registered in China, should be protected on dissimilar goods. This substantially strengthens the protection for unregistered well-known trademark in China and represents the transformation of China's trademark law from a system of preferring registration to use into a system of emphasizing use. Although it is only a draft for comment at present, it presents the important thinking and direction of the revision of the trademark law.

For unregistered well-known trademarks, to obtain protection, the precondition is their use. The Annual Report of the Supreme People's Court on Intellectual Property Cases (2009) pointed out that for an unregistered trademark sign, the person claiming rights

to the sign must have actual use of the sign and the intention to use the sign as a trademark. In the civil ruling of the retrial for the trademark infringement dispute and unfair competition dispute between Pfizer Co., Ltd., Pfizer Pharmaceutical Co., Ltd. and Shanghai Oriental Pharmaceutical Co., Ltd. Bankruptcy Liquidation Group (2009 MIN SHEN ZI 313 civil ruling issued by Supreme People's Court), the Supreme People's Court held that, under the condition that the applicant for retrial clearly recognized that he had never used the sign in China, the sign cannot be recognized as an unregistered mark, let alone an unregistered well-known trademark. Others' promotion of the sign cannot represent true willing of the retrial applicant.

For unregistered well-known trademarks with reputation and popularity obtained through use, in judicial procedures related to infringement of trademark rights,

protection of them should include compensation for damages. In the case of trademark infringement and unfair competition dispute between Commercial Press Co., Ltd. and the Sinolingua Co., Ltd. (2016 JING 72 XING CHU 277 civil judgment issued by Beijing Intellectual Property Court), the Beijing Intellectual Property Court held that "Xinhua Dictionary" constituted an unregistered well-known trademark, and ruled that the defendant should immediately stop the infringement, eliminate the impact and compensate the plaintiff for economic losses of Rmb3 million (US\$435,000) and reasonable expenses of more than Rmb270,000 (US\$39,000). The "Xinhua Dictionary" case was selected as one of the Top 10 intellectual property cases of Chinese courts in 2017.

In the subsequent case of trademark infringement disputes between Nanshe Branz Co., Ltd. and Huai'an Huaxia Manor Brewery Co., Ltd. (2018 SU 01

MIN CHU 3435 civil judgment issued by Nanjing Intermediate People's Court), the Nanjing Intermediate People's Court determined that "奔富" (BEN FU) was an unregistered well-known trademark, and decided that the defendant should compensate the plaintiff for economic losses of Rmb1 million (including reasonable expenses) (US\$145,000).

### *Addition of provisions related to "misleading"*

When determining the scope of cross-class protection of trademarks for pharmaceutical goods, the possibility of misleading should be judged in combination with the characteristics of the products.

For example, in the retrial of opposition review of NOVO NORDISK A/S v. CNIPA (2018 XING ZAI 87 administrative judgment issued by the Supreme People's

Court), the focus of the case is to determine whether the registration of the opposed trademark violates Article 13.2 of the Trademark Law of 2001. The Supreme People's Court held that "The opposed trademark is designated on clothing, etc. in Class 25, which are far from 'medicine for human use' in Class 5 covered by the cited mark. However, there is almost no difference between the opposed mark and the cited mark in their visual effects. 诺和诺德 (Novo Nordisk in Chinese) is a coined word with strong distinctiveness. The opposed mark is used by its applicant in promotion of products claiming function of preventing diabetic foot. It is displayed at diabetes academic conferences, hospitals and other places. In actual use, the goods bearing the opposed mark and those covered by the cited mark are highly related in terms of marketing channels, consumer groups, etc. When the relevant public see the above goods bearing the opposed

mark, it is likely that they will think these goods are provided by Novo Nordisk or have specific connection with Novo Nordisk, thus damaging the legitimate interests of Novo Nordisk".

In the above-mentioned case of recognition of Novartis in Chinese as well-known trademark, the court's judgment also states that "Registration and use of the disputed trademark are likely to mislead the relevant public to think there is relationship of considerable degree between the disputed mark and the cited mark and to damage the interests of the plaintiff."

The provision of "misleading" was added to the Draft of Comments. It means "as for a sign being liable to make relevant public to think there is relationship of considerable degree between the disputed mark and the well-known mark and to weaken distinctiveness of the well-known mark, to derogate market

reputation of the well-known mark, or to improperly make use of the market reputation of the well-known mark, its use should be prohibited and its registration should be refused". This makes the provisions of the trademark law on recognition and protection of the well-known trademark more comprehensive and complete.

Another highlight of the Draft for Comment is the addition of Chapter 9 "Promoting Use of Trademarks and Construction of Brand", which emphasizes the need for the country to implement trademark brand strategy, promote trademark brand building, advancing the cultivation of famous trademark brands, and accelerate the development of brand economy. Strengthening the protection of well-known drug trademarks will be powerful driving force for economic development.

# Strategy for drugs and foods trademarks to overcome deceptive clause

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By Hui Gao

Article 10. 1. 7 of Trademark Law stipulates that signs that are deceptive and likely to cause the public to misrecognize the quality or origin of the goods shall not be registered and used as trademarks. Drugs and foods are closely related to human health. Enterprises hope

that their trademarks can convey positive meaning of health and good taste to the public. However, such trademarks are likely to constitute signs prescribed in Art. 10. 1. 7.

Drugs and foods have characteristics closely related to the consumers' life and health.

This is different from other ordinary commodities. As a result, China National Intellectual Property Administration (hereinafter referred to as CNIPA) has applied stricter standards for trademark applications covering drugs and foods. In 2021, there are a total of 12,707 applications refused based on Art. 10.1.7 of

Trademark Law. Among them 3,947 applications are in Classes 5, 29, 30, 31, 32 and 33 covering foods and drugs<sup>1</sup>, accounting for 31%. It can be seen that drugs and foods trademarks are likely to meet refusal caused by deceptive clause, namely Art. 10. 1. 7. Therefore, it is necessary to have analysis on how to overcome deceptive clause and obtain registration for drugs and foods trademarks.

### **I. No description, no deception.**

If a trademark does not have any relationship with its designated drugs or foods, and does not indicate any characteristics of these goods, it is not descriptive, let alone deceptive.

#### **Case 1: (2022) JING XING**

### **ZHONG No. 1210**

Trademark application No. 46991208 红旗 (red flag in Chinese<sup>2</sup>) covers “mint wine; fruit wine containing alcohol, etc.” in Class 33. The CNIPA and the Court of first instance both found that the use of the trademark is likely to cause the public to misrecognize the origin of the goods. However, the Court of second instance held that the trademark “Red Flag” is not deceptive, when it is used on goods in Class 33.

In this case, the Appellant argued that “Red Flag” is neither production base nor transportation channel for liquor products, and its use in Class 33 is not descriptive, let alone deceptive. This case shows that at first it should be decided

whether the trademark is related to the origin, quality, function and other characteristics of its designated drugs and foods. Once it is determined that there is no connection between the mark and the goods, we should fully claim that the trademark is not descriptive on the designated goods, which fundamentally excludes the possibility that the trademark is deceptive.

### **II. If a trademark is not deceptively descriptive, it is not a deceptive mark.**

For a descriptive trademark, if it is not a description exceeding the inherent level of the goods and is not a description inconsistent with factual natures, such as quality and origin of the designated drugs and foods, the trademark is not

<sup>1</sup> Classes related to foods and drugs are Class 5 drugs, etc., Class 29 meat, fish, etc., Class 30 coffee, etc., Class 31 fresh fruits, etc., Class 32 beer, etc. and Class 33 alcoholic beverages, etc.

<sup>2</sup> Red Flag in Chinese is brand for China's first domestic luxury sedan officially born in 1958.

deceptive.

**A. If a trademark does not describe the characteristics of the designated drugs and foods beyond their inherent level, the mark is not deceptive.**

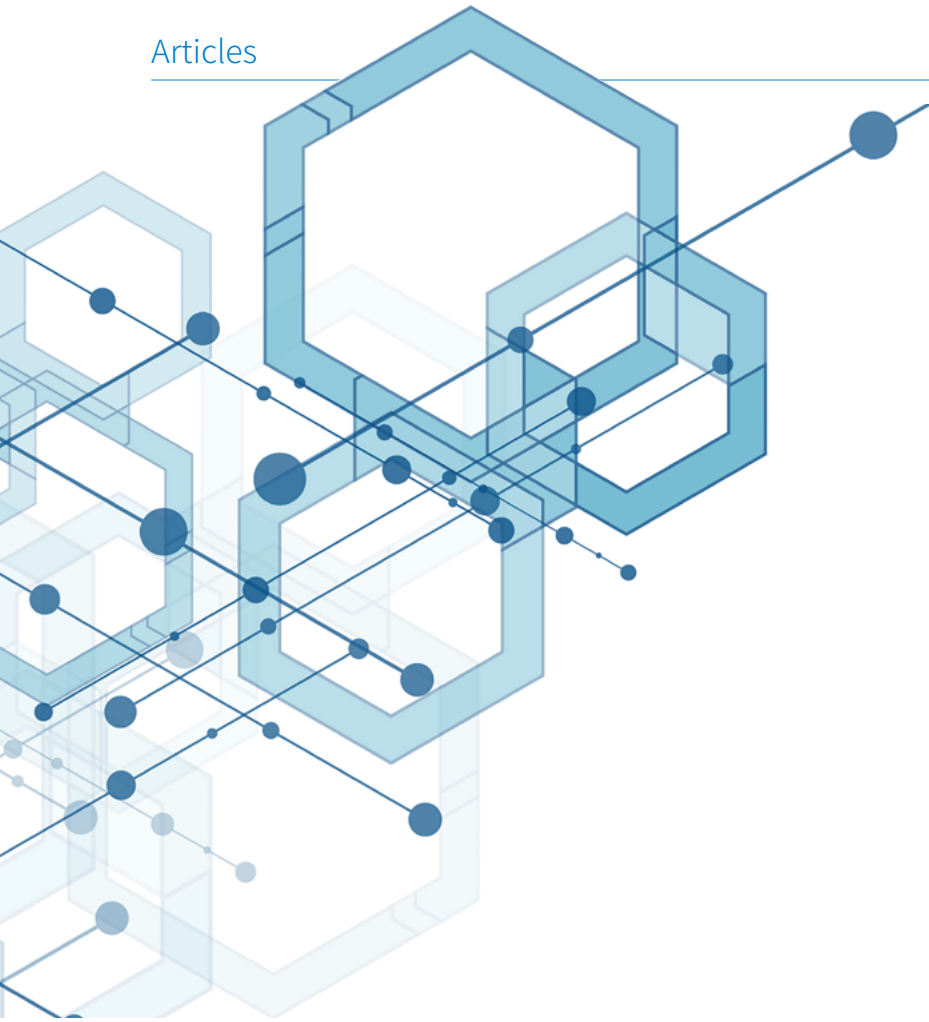
**Case 2: (2022) JING XING  
ZHONG No. 1576**

Trademark application No. 43557496 肉联帮 (ROU LIAN BANG<sup>3</sup>) covers “meat; canned meat; pickled fruits; eggs; edible oil; processed nuts; jelly; winter mushrooms; tofu” in Class 29. The CNIPA and the Court of first instance both held that the trademark is deceptive and is likely to cause the public to misrecognize the raw materials, ingredients and quality of its designated goods. The Court of second instance corrected this, and found that on its designated goods “meat; canned meat”, the trademark does not give any deceptive description on raw

materials or any characteristics of these goods and is not likely to cause any misunderstanding among the public. However, the use of the trademark on other goods, such as “pickled fruits” is likely to lead to the public to misrecognize the raw materials and ingredients of the goods and thus should be refused on these goods based on Art. 10. 1. 7 of Trademark Law.

This case shows that to overcome deceptive clause, it is necessary to analyze whether there is connection between the meaning of the trademark and its designated goods. As for drugs and foods trademarks, it should be specifically analyzed if its mark is deceptive on each item of goods considering the nature of different goods. If there is descriptive indication, it should be proved that it is only an objective





description, which does not exceed the inherent characteristics of drugs and foods. Thus, to draw the conclusion that the mark does not violate deceptive clause.

### **B. If a trademark does not give any indication or description**

**inconsistent with the factual characteristics of the designated drugs and foods, the mark is not deceptive.**

### **Case 3: (2021) JING XING ZHONG No. 7854**

Trademark application No. 44050872 纡糖膳底 (SHU TANG SHAN DI<sup>4</sup>) covers “meat; goat milk powder and etc.” in Class 29. The CNIPA and the Court of first instance found that “SHU” has the meaning of “postpone; delay”. The use of “SHU TANG SHAN DI” as a trademark is likely to cause the public to misunderstand the functions, uses and other characteristics of the designated goods. Thus, the mark constitutes the situation specified in Art. 10.1.7 of Trademark Law. The Court of second instance corrected this and held that according to the evidence submitted by the Appellant, Yili Company<sup>5</sup>, the formula milk powder bearing the trademark SHU TANG SHAN DI can better control blood sugar, so the trademark is not deceptive on its designated goods “milk

<sup>3</sup> ROU means “meat”. LIAN means “unite”. BANG means “gang; help”.

<sup>4</sup> SHU means “postpone; delay”. TANG means “sugar”.

<sup>5</sup> Yili is a famous dairy product company in China.



powder; goat milk powder; milk; milk products; goat milk; solid milk; buttermilk”. The registration of the trademark on the above-mentioned goods shall be approved. The trademark shall not be approved for registration on the remaining goods “meat and etc.”, because of its deceptive description on these goods.

In this case, the Appellant submitted pieces of evidence such as certification issued by industrial association and product evaluation report made by professional institutions, which prove that milk powder bearing the trademark SHU TANG SHAN DI produced and sold by the Appellant have the function of controlling blood sugar. Therefore, although the mark SHU TANG SHAN DI has the meaning of delaying sugar content, it is a factual description of its designated “milk powder; goat milk powder; milk; milk products; goat milk; solid milk; buttermilk”

rather than deceptive indication.

Given the above, in a review, to support the claim that the trademark is not deceptive, it can be proved that the descriptive words in the trademark are objective descriptions of quality, function and other characteristics of its designated drugs and foods, and there is no discrepancy with the facts.

### **III. To judge whether a trademark is deceptive, the public's general cognition level and ability should be considered.**

If with their ordinary knowledge, the public will not associate a trademark with features of its designated drugs and foods, and will not misunderstand the characteristics of these goods and to make a wrong purchase decision, the trademark should not be recognized as deceptive sign stipulated by Art. 10. 1. 7 of

Trademark Law.

### **A. To decide if a trademark is deceptive and will cause misrecognition and mistaken purchase, public's daily life experience and common knowledge level should be considered.**

#### **Case 4: (2022) JING XING ZHONG No. 1898**

Trademark application No. 44824177 国窖班 (GUO JIAO BAN) covering “wine, soju, Baijiu and etc.” in Class 33 was refused by the CNIPA and the Court of first instance in accordance with Art. 10. 1. 7 of Trademark Law. The Court of second instance changed the decision and held this trademark is not deceptive. The verdict of second instance reads that the trademark is composed of Chinese characters with meaning of “national cellar class”. Its overall meaning is not description on the quality of the





goods and is not likely to cause the public to misunderstand the quality and other characteristics of “wine, Baijiu and etc.” In addition, the trademark GUO JIAO, namely “national cellar in Chinese” registered by the Appellant in Class 33 has gained high popularity after long-term use and was once recognized as a well-known trademark. Given the above, the Appellant did not intend to exaggerate the function and quality of the goods in filing


the application for the trademark GUO JIAO BAN. Based on their own ordinary knowledge level and life experience, the public will not misrecognize the quality of the goods and will not make wrong purchase decision because of the mark GUO JIAO BAN. In conclusion, the trademark application is not deceptive and does not constitute the situation specified in Art. 10. 1. 7 of Trademark Law.

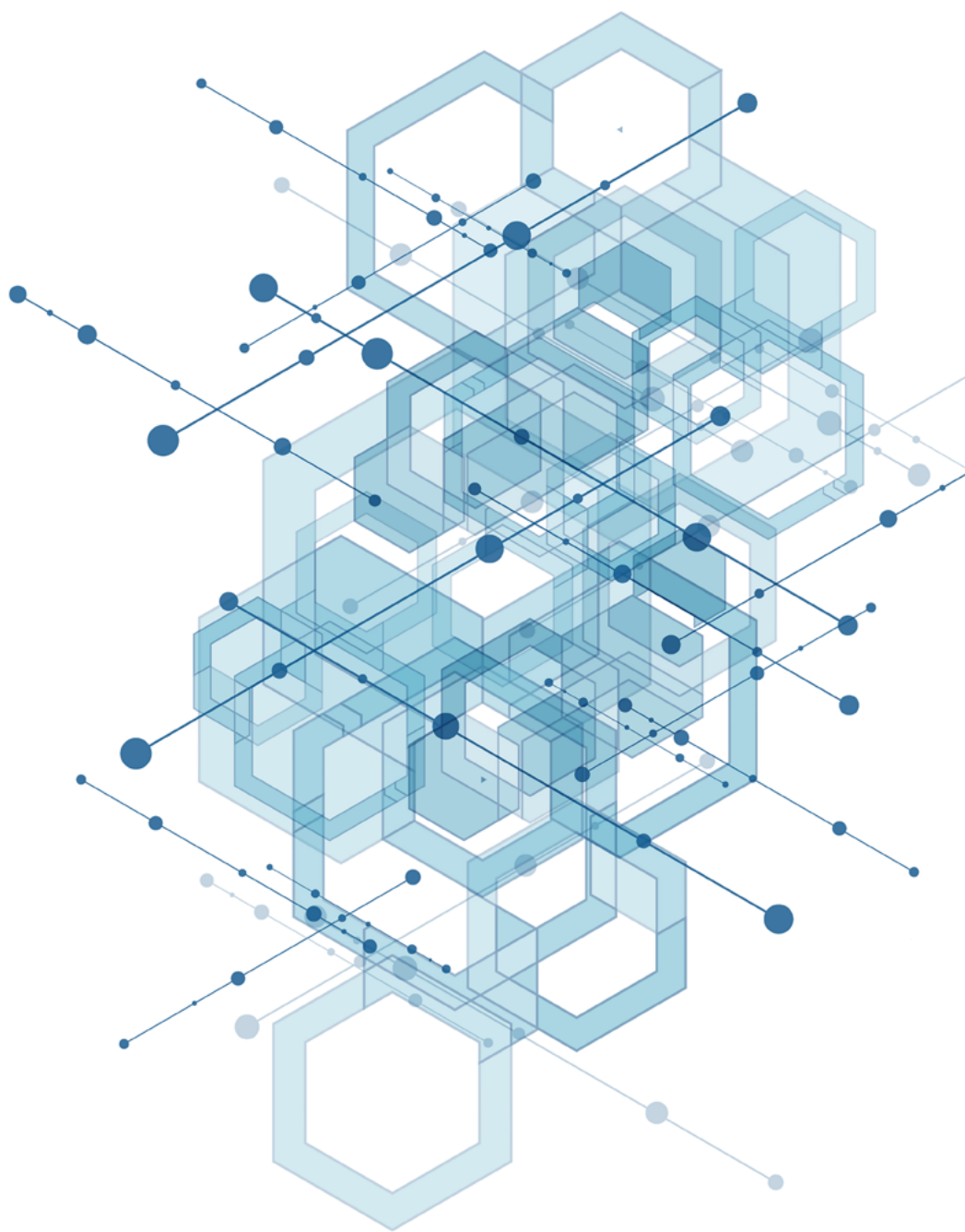
This case shows that to decide


if a trademark is deceptive, the decision should be made based on the public’s general knowledge level and cognitive ability, and in combination with the nature of the goods covered by the mark. It is advised to prove that the public, as consumers with common sense and daily experience, will not make wrong purchase decision because of the trademark, thus to draw the conclusion that the mark is not deceptive.

**B. Whether a trademark in foreign language is deceptive shall be decided on the basis of the their meaning in Chinese in publicly published dictionary.**

**Case 5: (2020) JING XING ZHONG No. 2878**

The trademark application No. 28053967  covers “pharmaceutical preparations” in Class 5. The CNIPA decided that “ENTASIS” in the trademark means “shape of protruding belly” and “THERAPEUTICS” means “therapy”. The use of the trademark on pharmaceutical preparations is likely to cause consumers to misunderstand the functions, uses and other characteristics of the goods. Therefore, as a deceptive mark, it should be refused under Art. 10. 1. 7 of Trademark Law. The Court of second instance made different conclusion and held that the word “ENTASIS” is not included in official English-Chinese dictionaries and professional





medical and scientific dictionaries submitted by the Appellant, such as Dorland's Illustrated Medical Dictionary, Longman Medical Dictionary and English-Chinese Dictionary of Standardized Medical Terms. In New Oxford English-Chinese Dictionary, "ENTASIS", is interpreted as "[architecture] cylinder division line; convex line in the column", but not as meaning mentioned in the CNIPA's review decision. Moreover, "ENTASIS THERAPEUTICS" is not a fixed English combination. Even though "THERAPEUTICS" has the meaning of "therapy", the use of the trademark on pharmaceutical preparations will not make the public to misunderstand the function and use of these goods. The trademark does not violate Art. 10. 1. 7 of Trademark Law.

This case shows that in review for trademark composed of foreign language, the applicant is advised to submit sufficient publicly published dictionaries. Based on

the meaning of the foreign words in these dictionaries, it should be decided whether the use of the trademark on drugs and foods is deceptive, and whether such use is likely to mislead the public to make wrong purchase decision. The officially published dictionary is the basis to decide the public's understanding of the meaning of the foreign letters. The public cannot be defined as a group with high foreign language proficiency, or a group specialized in professional foreign languages in a certain field. A mark should not be decided to be a deceptive mark prescribed in Art. 10. 1. 7 based on any obscure meaning not included in the published dictionary.

#### IV. Conclusion

Due to their special functions, uses and natures of drugs and foods, it is necessary to constantly explore the balance between the market value of trademarks and the prohibitive legal provisions

of trademarks. If a trademark application covering drugs and foods is rejected because of deceptive clause, firstly it should be proved that the mark itself is not descriptive, namely is not related to function, raw materials and etc. of the goods; secondly if the mark is descriptive, it should be proved that the description is not deceptive description; thirdly it is to prove that with ordinary knowledge level and life experiences, the public will not misrecognize or make wrong purchase decision because of the mark. In preparing review arguments for drugs and foods trademark, it is recommended to consider and find appropriate breakthrough points for each case in line with the above three steps, so as to improve the chance of success for the review. In this way, enterprises may obtain highly empowered trademarks, which do not only satisfy the requirements in Trademark Law, but also have strong market competitiveness.

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