

Issues in the Judicial Protection of Well-known Marks and Coping Strategies to Address Them

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This article is an extract from the research report on the judicial protection of well-known marks prepared by the Beijing Municipal No.1 Intermediate People's Court in 2007, with a few modifications made for smooth lexical or discourse transition. This research project started from the issues shown in practical cases encountered and has raised the coping strategies to addresses the issues in the judicial practice from the perspective of the general aim of the established system for the protection of well-known marks.

I. Law provisions on and present situation of the judicial protection of well-known marks

1. Law provisions on well-known marks

The relevant law provisions include:

The Hague version of the Paris Convention for the Protection of Industrial Property (hereinafter referred to as the Paris Convention);²

The Provisional Provisions for the Establishment and Administration of Well-known Marks issued by the State Administration for Industry and Commerce on 14 August 1996 (hereinafter referred to as the Provisional Provisions), which were abrogated in 2003;

The Provisions for the Establishment and Protection of Well-known Marks issued by the State Administration for Industry and Commerce in 2003 (with the Provisional Provisions abrogated simultaneously in 1996);

The Interpretation on Several Issues Relating to the Application of Law to Trial of Cases of Civil Dispute over Domain Names on Computer Network issued by the Supreme People's Court in July 2001 (hereinafter referred to as the Domain Name Interpretation);

The Trademark Law of the People's Republic of China promulgated by the Standing Committee of the National People's Congress in October 2001 (hereinafter referred to as the Trademark Law);

The Interpretation on Several Issues Relating to the Application of Law to Trial of Cases of Civil Dispute over Trade-

marks issued by the Supreme People's Court in December 2001 (hereinafter referred to as the Trademark Interpretation).

Articles 13 and 14 of the Trademark Law, Articles 1 (2), 2 and 22 of the Trademark Interpretation and Articles 4, 5 and 6 of the Domain Name Interpretation together constitute the system for the judicial protection of well-known marks in China, and the law bases of the courts in their judicial practice.

2. An overview of the judicial protection of well-known marks

1) Statistics of cases involving establishment of well-known marks.

From 2001 to May 2007, the courts around China accepted over 7,200 cases of civil dispute over trademarks, and established over 200 well-known marks by way of adjudication under law.³

From September 2001 to May 2007, the courts in Beijing established 6 well-known marks by way of effective judgments in civil cases of infringement,⁴ such as those involving the "ROLEX" mark used on watches⁵, the "DUPONT" mark on chemical raw material,⁶ the "SINOCHEM" mark on chemical raw material,⁷ the "TIANLISHI" mark on pharmaceuticals,⁸ the "SMART" mark on Garments⁹, and the "HSINGHUA" mark on education provision service.¹⁰

From 2001 to the end of 2006, the Beijing Municipal No.1 Intermediate People's Court closed a total of 20 civil cases of infringement of well-known marks, in which five well-known marks were established, four were deemed unnecessary to

do so, and eleven were not established as well-known marks for lack of sufficient evidence. Besides, the court closed 45 administrative cases¹¹ involving confirmation of well-known marks, in which five well-known marks in twelve cases were established by the Trademark Review and Adjudication Board (TRAB) and were maintained by the court, such as the “APPLE Brand” mark on garments,¹² the “HUI ER KANG” mark on soft drink¹³, the “21GOLDEN VITAMINE” mark on pharmaceuticals¹⁴, the mark of “ZONGSEN and the device” on motorcycles,¹⁵ and the “Caile” mark on pharmaceuticals.¹⁶ Marks this court did not establish as well-known marks were those that the public are familiar with, such as “WAL-MART”, “MENG NIU”, “DELL”, “PEPSI”, “NIKE” “PIKE”, “CROCODILE”, “VIAGRA” and “FARRAREL”.

The courts in other regions established over 50 well-known marks.

As the above statistics and the information from the courts in various regions¹⁷ show, the cases involving the establishment of well-known marks have these characteristics:

First, lower rate of appeals compared with cases of other types. In many cases, the defendants respond passively, and raise no opposition to the plaintiffs’ claim of well-known marks, which, to an extent, shows that the plaintiffs in some case resort to lawsuit to achieve their purpose to have their marks established as well-known marks.

Second, the rate of marks established as well-known marks is different among the courts in various regions, with the highest up to 80% in some regions and less than 30% in Beijing. This regional difference in the number of marks established as well-known marks shows, to an extent, the difference in the standards and benchmarks adopted by different courts in establishing well-known marks.

Third, cases involving well-known mark establishment mainly concentrated in some provinces and cities. The interested parties in some cases chose the courts in the regions where marks are easier to be established as well-known marks to sue for the purpose of having their marks established as such.

2) Main types of cases involving well-known mark establishment

In the present judicial practice, the cases involving well-known mark establishment mainly fall into two categories: civil infringement cases and administrative cases for trademark right confirmation.

The civil infringement cases are, among other things, mainly of these types: cases of dispute arising from infringe-

ment of the trademark right and unfair competition, and mainly involving the issues, such as protection of non-registered well-known marks on identical or similar goods, protection of registered well-known marks across classes of goods, conflicts arising between well-known marks and domain names, and those between well-known marks and trade names.

The administrative cases for trademark right confirmation are, among other things, mainly of these types: cases of administrative dispute over trademark refusal reexamination, administrative dispute over trademark opposition reexamination, and administrative dispute over trademarks. Cases of the kind mainly involve the main issues, such as protection of non-registered well-known marks on identical or similar goods and of registered well-known marks across classes of goods.

II. Character, principles and standards of judicial establishment of well-known marks

The judicial establishment of well-known marks is the precondition for the judicial protection thereof. While Article 14 of the Trademark Law has provided for the factors to be considered in establishing well-known marks, and the Supreme People’s Court has also developed the basic principles to be observed in the establishment of well-known marks, the specific operational norms are yet to be worked out, and many issues found in the practice need to be further studied and regulated.

1. Character of judicial establishment of well-known marks

I. In the judicial practice, most plaintiffs take it as one of litigant claims to have their marks established as well-known marks for two reasons: one, since a well-known mark is established in a passive manner, interested parties misunderstand that they can explicitly claim for establishment of a well-known mark only by virtue of making their litigant claims; and two, the marks established as well-known marks in verdict have the force of judgement, produce the effect of advertisement, and would serve as the basis for them to claim or protect their trademark right in the future. When establishing plaintiffs’ claimed marks as well-known marks, the courts at various levels respond to their claims in a different fashion with following outcomes:

1) The present mainstream practice is to establish a mark as a well-known mark and states the establishment in the main text of the judgement¹⁸;

2) A plaintiff's litigant claim to establish a well-known mark is supported in the reasoning portion, but not mentioned in the main text of a judgement;¹⁹

3) A plaintiff's litigant claim to establish a well-known mark is rejected in the main text of a judgment;²⁰ or

4) A plaintiff's such litigant claim is disregarded,²¹ that is neither supported nor rejected. The court's attitude is not shown on the matter.

The above different practice lies in the unclear understanding by the interested party and court of the character of the judicial establishment of well-known marks. For that matter, correct understanding of the character of the judicial establishment of well-known marks is the key to addressing the issue of whether a well-known mark should be established in the main text of a judgement.

In the above mentioned cases, the courts define the character of judicial establishment of well-known marks as fact ascertainment when dealing with the matter of well-known mark establishment in the reasoning portion of a judgement regardless of whether the establishment is finally made or not in the main text of the judgement. The judicial establishment of well-known mark as fact ascertainment is a view widely accepted in the judicial community, and has been confirmed by the Supreme People's Court.²²

Now that the character of judicial establishment of well-known marks is defined as fact ascertainment, then it is undue to make the establishment in the main text of a judgement. In the Draft Interpretation of Several Issues Relating to Establishment and Protection of Well-known Marks in the Trial of Such Cases of Civil Dispute as Those of Trademark Right Infringement (20070900) (hereinafter referred to as the 20070900 Draft of the Well-known Mark Interpretation), the Supreme People's Court expressly provides that the court's establishment of a well-known mark is not to be stated in the main text of a judgement. Unfortunately, however, the provision fails to further clarify or specify the rejection of an interested party's litigant claim, thus rendering it still possible for the court to handle a case in the above-mentioned four manners. It is suggested that the Supreme People's Court make a positive provision on how to deal with the litigant claim for establishment of a well-known mark.

2. Principles underlying the judicial establishment of well-known marks

1) Principle of passive establishment

A well-known mark may be established actively or passively. The active establishment, also known as pre-establish-

ment, refers to the establishment of a well-known mark by a department at the request of a trademark proprietor in the absence of dispute, while the passive establishment, also known as post-establishment, refers to establishment of a well-known mark by a department at the request of a trademark proprietor in the presence of dispute over the trademark right in suit, and the latter is the universally adopted establishment principle in various countries.²³

In China the way of active establishment was adopted in the Provisional Provisions as of 1996. In 1998, the State Administration for Industry and Commerce (SAIC) amended the Provisional Provisions, changing the practice of batch establishment and concentrated administration of well-known marks, and adopting the mode of "active establishment first and passive establishment second".²⁴ In 2003, the passive establishment principle was adopted in the Provisions for the Establishment and Protection of Well-known Marks.

In the judicial procedure, owing to the neutrality and passivity of the judicial power, the Supreme People's Court has developed the passive establishment principle, that is, the court will consider establishment only at the express request made by an interested party to this effect; the court would not take an initiative to do so in the absence of such a request by an interested party. In practice, except that a few courts made establishment of well-known marks in the absence of interested parties' request to this end before, most courts have observed the passive establishment principle.

2) Principle for an establishment to be valid in one case

By the principle for an establishment to be valid or effective in one case is meant that the well-known mark establishment made by the court in its hearing of cases of civil dispute over trademark only involves the facts of a particular case, is valid in the judgement of the case, and does not naturally have impact on other cases.²⁵ This is a principle for an establishment to be valid or effective in one case only, which does not contradict with the binding force of facts ascertained in an effective judgement.²⁶ The Supreme People's Court sets forth a compromise provision in Article 22, paragraph three of the Trademark Interpretation to this end, namely, the court does not conduct its examination where an interested party requests protection of a well-known mark established by an administrative authority or court, and the other party does not object to the well-knownness of the mark in suit. The court will do so under Article 14 of the Trademark Law where objection is raised.

Additionally, under Article 14 of the Trademark Law, the

record of a mark protected as a well-known mark is taken as the factors to be considered in the establishment of a well-known mark. This provision has rendered the principle for establishment of a well-known mark to be valid in one particular case relatively valid. The establishment of a well-known mark in a prior case has somewhat impact on whether the mark will be established as such in other later cases.

3) Principle of establishment as necessary

The establishment as necessary, reflecting the necessity of well-known mark establishment, means establishing whether a mark in suit is well known or not in the course of hearing a case according to an interested party's litigant claim in the absence of relief in other legal approaches when it is necessary to resort to the expanded protection of the mark as a well-known mark. Where the system for judicial establishment of well-known marks is mostly utilised by enterprises as a means for making publicity and acquiring reputation, the establishment of well-known mark as necessary is more for preventing alienation in the nature of well-known mark establishment and trademark right abuse.

As a principle of the judicial establishment of well-known marks, the establishment as necessary has long been reflection of the Supreme People's Court's judicial spirit, and spirit shown in some meetings and leaders' speeches only. There have not been established any rules for its specific application. As a result, the principle has not been followed in practice judicially as it should have been, with relatively outstanding problems with aspect of establishment of well-known mark when it is not necessary to protect the mark across classes of goods or services. In this aspect, there are two sorts of the circumstances.

One, the legal norms on which a plaintiff makes his claim are correct, namely, protection is claimed in respect of the identical or similar goods and the establishment of a well-known mark does not mean anything in terms of the judgement on infringement as is true in the cases involving the "QI XI" mark²⁷ and "CUIWEI" mark.²⁸

Two, the legal norms on which a plaintiff makes his claim are not correct, namely, claiming protection across classes of goods or services, but it actually involves the issue of protection of goods of the identical or similar classes, so that the legal norms obviously should not apply to the cross-class protection and it is not meaningful either to establish a well-known mark as is true in the administrative case of opposition reexamination involving the "APPLE Brand" mark.²⁹

To address the issues in practice, it seems relatively

easy to find out under what circumstances it is necessary to establish a well-known mark. Under Article 13 of the Trademark Law, Articles 4 and 5 of the Domain Name Interpretation, and Articles 1 (1) and (2) and 2 of the Trademark Interpretation in the legislative spirit, now, only in cases involving protection of registered well-known marks across classes of goods or services, request for cessation of infringement of a non-registered well-known mark and conflict between a domain name or enterprise name and a well-known mark is the well-known mark establishment involved. But, this does not mean that it is necessary to establish a well-known mark in a case involving dispute of the nature. Besides, it is difficult to specify the details of these circumstances, and hard to operate.

Since establishment of a well-known mark is part of ascertaining the basic facts of a case, the establishment is not made if it is not necessary for the resolution of a case. From this aspect, it is of practical significance to rule out or enumerate the circumstances where it is unnecessary for the resolution of a case. As the analysis of the relevant law provisions and study of practical case show, it is unnecessary to establish a well-known mark under the following circumstances:

(1) Where the goods in respect of which the registered mark is claimed by a plaintiff and approved to be used and the defendant's products are of the identical or similar goods and the legal norms the plaintiff requests to apply are not provisions for cross-class protection;

(2) Where other elements constituting an infringement are absent and the infringement is not constituted regardless of whether a well-known mark is established or not;

(3) Where, with the exception to a registered trademark which it is requested to be established as a well-known mark, a plaintiff has a mark registered in respect of the goods or services involving an accused infringing act, the registered trademark may serve as the basis for his claim for the trademark right in suit, and it is unnecessary to accord cross-class protection thereto as is true in the cases involving the marks of "BANDAOJING"³⁰ and "WANGWANG".³¹

However, where the plaintiff refuses to change his litigant claim, how the court should act requires further study.

(4) Where a dispute may be resolved and the plaintiff's lawful right protected by request for applying other law provisions, it is unnecessary to establish a well-known mark. The well-known mark establishment is legally useful for resolution of conflict between a mark and a domain name or an enter-

prise name, and protection of a non-registered trademark. But, this does not mean that once a dispute of the kind arises, it can only be resolved by way of establishment of well-known mark. The relevant case is one involving the “FK” mark.³²

(5) Where the plaintiff requests to establish several marks as well-known marks and establishment of one of them as a well-known mark will make it possible to protect his rights and interests, it is unnecessary to establish whether other marks are well-known or not. The relevant case is one involving the “SCUD” mark.³³

4) Principle of protecting the public interest

The establishment of a well-known mark not only involves the interest of a trademark proprietor, but also has impact on that of other players of the market and the consumers at large. In practice, it has been discovered that interested parties resort to lawsuit to reach the objective of well-known mark establishment. For that reason, the court should follow its due function in its well-known mark establishment to avert the drawbacks of the interested party-oriented practice and weaken the function of the defendant's direct acceptance of facts and the plaintiffs' evidence. When in favour of the plaintiff, the defendant's defence and evidence cross-examination should not have decisive impact on the establishment of the well-known mark because the defendant's view not only involves disposal of his private right but also has impact on the interest of interested parties involved in cases of establishment of the same well-known mark and that of the public at large. Even if a defendant accepts a trademark proprietor's claim and evidence and the well-knownness of the mark in suit, the court should make its discovery, *ex officio*. As for the evidence from a plaintiff, the court should check the original regardless of whether the defendant raises opposition or not, and should not accept the data of production and sales prepared and the advertisement made, by an interested party on his own in the absence of supporting evidence even if the other party raises no objection thereto.

3. Standards for judicial establishment of well-known marks

1) Concept of well-known mark

The standards for judicial establishment of well-known marks are the substantive requirements for the establishment of well-known marks. To determine them, it is necessary to define the well-known mark according to the need for protection. The major international conventions, such as the Paris Convention and the TRIPS Agreement and the relevant Chinese laws and judicial interpretations, do not offer any explicit

definition of the well-known mark. In the Provisional Provisions as of 1996, a well-known mark is defined as a registered trademark relatively highly reputable in the marketplace and known to the relevant sector of the public, and in the Provisions for the Establishment and Protection of Well-known Marks as of 2003, it is defined as a mark widely known to the public and relatively highly reputable in China. Comparatively, the later definition is more preferable because, first, it more explicitly stresses the principle of territoriality, namely, it is well known within the territory of China; next, it changes the “well known” into “known”, with emphasis on the scope of wideness; then, it no longer stresses that only a registered trademark can be a well-known mark, which is required under the international conventions, and, as well, complies with the provisions of the Chinese Trademark Law; hence this definition is applicable to the establishment of well-known marks.

2) Point of time and territorial scope of well-known mark establishment

(1) Point of time

The point of time for establishing a well-known mark should be the time when a factual dispute arises. Take the dispute over a trademark registration, the date of filing the application for registration of the mark in suit should be the point of time for determining whether the rightholder's mark is well known or not. As for a dispute arising from trademark infringement or unfair competition, the time when the accused infringement takes place, the time when an accused domain name or an enterprise name is approved for registration should be the point of time for establishing a well-known mark.

(2) Territorial scope

The Paris Convention has clearly defined that the territorial scope of a well-known mark is the country where a mark has been registered or used. The Joint Recommendations expressly require that the country of protection be the place where a mark becomes well known. The judicial practice in China conforms to these. Therefore, to be protected as a well-known mark under the Chinese Trademark Law, a rightholder's mark must be well-known within the territory of China. The fact that his mark is well-known outside the territory of China should not automatically be the basis or evidence for establishing it as well-known within the territory of China.

How large the scope within the territory of China in which the wide knownness is constituted is an issue that should be specified. Since the width is required for the scope within which a well-known mark is known, it should be at least

known in the most regions in China. The territory of China is vast, the population large, and the market huge; hence establishment of a well-known mark does not require coverage of all the regions, which is one-sided, but should be made by taking account of all the factors, such as the population, region, industry of and market for the goods or services in respect of which the mark is used. As for the ordinary consumer goods and industrial products the manufacture, market and use of which are not regionally limited, the width of the regional scope should be stressed, basing the well-knownness of a mark on most regions in China. For the production and use of products in particular regions, we should not over-emphasise the scope of most regions in China, but consider only the industry and the key regions in which the products are marketed and used.

A mark reputable only within a particular region should not be established as a well-known mark. A proprietor may resort to the protection under the Unfair Competition Law.

3) Factors to be considered in establishment of well-known marks

Article 14 of the Trademark Law, in which the factors to be considered for the establishment of a well-known mark are specified, is the law based on which the court establishes well-known marks. In practice, views are divided on the role and position of these factors set forth in Article 14 of the Trademark Law in the establishment of well-known marks. One view is represented by that from the case involving the “KANGLI” mark³⁴. The judge in the case believes that according to the wording of “in determining whether a mark is well-known or not the following factors should be considered in establishing a well-known mark. To be established as a well-known mark, a mark must meet all the requirements set forth in this Article. The other view is represented by that derived from the case involving the mark of “BOSHAN Brand and the device”³⁵, in which it is believed that the role of Article 14 of the Trademark Law is only a guiding provision helping the court reason and judge in individual cases. A well-known mark should not be established under the condition that all factors in the provisions should be present, which is now the mainstream view.

Besides, while Article 14 of the Trademark Law provides for all the factors to be considered in establishing well-known marks, the specific establishment standards are missing, so they need to be further elaborated.

(1) Degree of knownness of a mark to the relevant section of the public

How to define the relevant sector of the public. The Supreme People's Court provides in the Trademark Interpretation that the relevant sector of the public refer to consumers of the goods or services bearing the mark, and other operators closely related to the marketing of said goods or services. Under this provision, the scope of the relevant sector of the public of the goods or services different in nature, use and industry is different as is the case with articles for daily consumption and products for use in a particular field.

The existing issue is the conception of the relations between the “degree of knownness of a mark to the relevant sector of the public” and other factors: one view is that the burden of proof on plaintiffs under Article 14 (1), (2), and (3) of the Trademark Law is on a par, not optional. Only when a plaintiff is unable to meet his burden of proof in respect of one item is it impossible to establish the well-known mark.³⁶ While the other view is that, in nature, the factors under Article 14 (2) to (4) of the Trademark Law are to prove the knownness of a mark; hence it is not necessary to separately prove the factor of the degree of knownness.³⁷ As the provision for the factors under Article 14 (2) to (4) show, the duration of a mark in use, the duration, extent and geographical area of any publicity of the mark and records of a mark protected as a well-known mark may indeed be used to infer the degree of knownness of said mark to the relevant sector of the public. It is unnecessary for an interested party to present separate evidence to show the degree of knownness of the mark to the relevant sector of the public, a view which is more rational. But, if a plaintiff has separate evidence to this effect, for example, presenting evidence, such as a market survey report, he should be allowed to do so.

In practice, interested parties request the court to appoint an investigation institution to make investigation or survey, and prepare or present an investigation report to prove the degree of knownness to the relevant sector of the public, and the court makes its evaluation of the knownness according to the report. For us, factors, such as the choice of the group to be investigated, mode of investigation, and design of the questionnaire, all have impact on the objectivity and accuracy of the conclusion reached in the report. Besides, problems do exist in practice that the investigation reports fall into a fixed model with conclusions drawn in favour of those entrusting the investigation; hence, such investigation reports should be treated with caution. It is proper to use them as a factor of reference or support to evidence. Where it cannot be concluded that a mark is well known under Article 14 (2)

to (4) of the Trademark Law, it should not be determined that said mark is relatively well known, or reputable merely on the basis of the investigation reports.

(2) Duration of a mark in use

An issue is encountered in practice, namely whether a mark must be used in respect of particular goods in distribution for it to be established as a well-known mark. Take the case involving the “VIAGRA” mark³⁸ for example, the plaintiff Pfizer claims that “VIAGRA” is a non-registered well-known mark, but it has never actually used the mark. The defendant argues against the plaintiff’s claim on the ground of non-use. An answer has already been given to this question in the TRIPS Agreement, in which Article 16, (2) expressly requires all members consider the degree of reputation from the trademark promotion (not necessarily the use of it) in their country³⁹ when deciding on whether the mark is well-known or not. However, the views of the courts are divided on this issue. For example, the Beijing Higher People’s Court holds that only a used mark can be established as a well-known mark,⁴⁰ while the Henan Provincial Higher People’s Court holds an opposite view.⁴¹ In discussing which view is more reasonable or justifiable, the key lies in whether the mark that is not actually used is widely known to, and relatively reputable among, the relevant sector of the public. Today when the modern advertising industry is so developed, there are so many mass media in operation, and so many means are available, a mark may be made widely known to the relevant sector of the public merely through advertisement. Therefore, a mark that is not actually used can also become highly reputable. The Lenovo Group’s use of “LENOVO” mark in place of its former “LEGEND” mark is a typical example. If a non-used mark is not protected, it is detrimental to checking the acts of unfair competition, and likely to impair consumers’ interest as well.

Not stressing the actual use of a mark does not mean that it is not necessary to consider the duration of a mark in use in well-known mark establishment. In general, a mark becomes known to a relevant sector of the public and acquires reputation as a mark through a relatively continued use in a period of time. For that reason, in practice, when evidence to other factors is inadequate, a mark may be required to have been in use for at least three consecutive years.

(3) Duration of time, extent, and geographic range of any publicity done for a mark

Advertisement has the most extensive impact on the degree of repute of a mark. In practice, what should be con-

sidered are the form, volume, coverage, duration of time and the media thereof. The establishment of a well-known mark generally requires that the advertisement covers most regions in China, lasts for an extended period of time, in varied forms in a volume unrivaled in the industry.

(4) Records of a mark protected as a well-known mark

While establishment of a well-known mark follows the principle of effectiveness in an individual case, which is not naturally extended to other cases, the records of its being established as a well-known mark may serve as a reference for the mark to be established as a well-known mark in the present case.

(5) Degree of good-will in establishment of a mark

The degree of repute and good-will of a mark should be consistent, and, as a rule, mutually complementary. The goods bearing the mark enjoying a relatively high repute often have relatively high good-will. Repute without good-will will naturally be ruled out from the market, and will not last long. While the factors of the degree of good-will is not expressly mentioned in Article 14 of the Trademark Law a well-known mark should be relatively highly reputable, so the degree of good-will should be taken into account in establishment of a well-known mark. An interested party, in practice, would often submit all sorts of honour, title or prize certificates issued by competent government departments of the various levels, industrial associations, or social bodies. With so many prizes awarded unchecked without public trust or confidence in the absence of supervision, the court should identify them, rule out false repute, and consider all other objective factors.

(6) Other factors for the establishment of well-known marks

These factors may include, among other things, volume of production and sales revenue, profit, regions of sales, and market share of the goods in respect of which a mark is used. For the circumstances in which a mark is counterfeited or infringed, we may reversely infer the repute of the mark in the marketplace and the range of its knownness to the relevant sector of the public.

III. Judicial protection of well-known marks

1. Legal character of well-known marks

A phenomenon is found from case studies, that is, where a plaintiff’s well-known mark is infringed, the court’s statements on the nature of the right or interest infringed by the

defendant are different in the reasoning portion and the main text portion of a judgment in these ways:

1) Doctrine of well-known mark right. Many courts see a well-known mark as a subject matter of an independent right, as in the cases involving the “QI BREAND” mark⁴², “JIAXUE” mark⁴³, “XILIN” mark,⁴⁴ “ZISHAN” mark⁴⁵, and “AOPU” mark⁴⁶;

2) Doctrine of the exclusive right to use a registered trademark. According to this doctrine, in cases involving infringement of well-known marks, the defendants infringe the exclusive right to use registered trademarks, as in the cases involving the “KANGLI” mark⁴⁷, “LV” mark,⁴⁸ and “LITTLE SWAN” mark;⁴⁹ and

3) Doctrine of the trademark right. According to this doctrine, the expression of well-known mark right is not used, nor that of the exclusive right to use a registered trademark expressly provided for in the Trademark Law. Rather, it is deemed that what an defendant infringes is the plaintiff's trademark right as in the cases involving the “XUEQING” marks,⁵⁰ and the “DOUBLE WHEELS” mark.⁵¹

We believe that establishment of a well-known mark does not generate an independent right, nor there exists any right like the well-known mark right or the exclusive right to use a well-known mark. Its legal outcome is a protection more extended than that of the average marks. Therefore, it is undue to use the expression like the well-known mark right or the exclusive right to use a well-known mark right in judgments. Since the extended protection of a well-known mark is limited to the scope of right of prohibition, although use of the expression of infringement of the exclusive right to use a registered trademark conforms to the law provisions, it is jurisprudentially contradictory. It is relatively due to use the uniform concept of the trademark right in terms of jurisprudence and the law provision. As for a non-registered mark, it is proper to use the right of prohibition since the law merely gives the right of prohibition thereto.

2. Determination of the extent of protection for well-known marks

1) Subject matter of the well-known mark protection

According the well-known mark protection to a registered mark is not controversial in practice. What is at issue is whether to give special protection to a non-registered well-known mark. Some courts suggest not establishing a non-registered mark as well-known mark, nor protecting it as such.⁵² This practice is open to discussion.

In the judicial practice, some courts have already pro-

tested some non-registered marks under the law provisions as in the case involving the mark “HUI ER KANG”. Both the TRAB and the court prohibited the act of pre-emptive registration of the mark “HUI ER KANG” to have protected the interest of the prior user. In the case involving the mark “SUAN SUAN RU”, the court determined that the plaintiff Mengniu Group's non-registered mark “SUAN SUAN RU” used in respect of milk drink was a well-known mark, and prohibited the defendant from using it in identical goods accordingly.⁵³ This shows that there exists no barrier to the protection of non-registered well-known marks in practice.

2) Extent of protection of well-known marks

The extent of protection for well-known mark is governed by Article 13 of the Trademark Law. That is, a non-registered well-known mark is prohibited from being used in goods of identical or similar class, and the protection for registered well-known trademarks may be extended to non-identical or dissimilar goods. Controversy exists on to what extent the right of prohibition in a registered trademark may be extended. For details, see the cases involving the marks of “SNOWWHITE”⁵⁴, “JIN”⁵⁵, and “LV”⁵⁶.

As is shown in Article 13 of the Trademark Law and the Supreme People's Court's relevant judicial interpretation, in terms of the protection for registered well-known marks, misleading the public is taken as an element of infringement. Thus, the protection of well-known marks in China is a relative protection; it is not unconditionally extended to all non-identical and dissimilar goods.

3) Whether expansion of the right of prohibition in a registered well-known mark should be limited by marks other parties register in other classes.

On the basis of the relative protection, it is also suggested in practice that the expansion of the right of prohibition in a well-known mark be limited by marks other parties register in the class, and it should not be extended to the classes of goods or services in respect of which others registered their marks. This view has been reflected in the case involving the mark “WAL-MART”. The mark “WAL-MART” is a well-known service mark the plaintiff the US Wal-Mart Inc. has registered. It requested to prohibit the defendant from using said mark in respect of the goods of “lights and fluorescent lamp frames” in class 11. When finding out that the “WAL-MART” mark was registered by someone in respect of “lights and fluorescent lamp frames”, the court held that the defendant's use of said mark did not infringe the plaintiff's trademark right.

For this case, the well-known “WAL-MART” mark the US

Wal-Mart Inc. has registered does not possess the exclusive right in the goods of lights in class 11, and it only generates the effect of expanded right of prohibition, and in respect of said class of goods, it can not preclude other parties' existing exclusive right. Besides, the effect of the right of prohibition generated by the well-known "WAL-MART" mark across classes of goods does not conflict, nor contradict, with the right of prohibition in the registered mark of any party outside the case. For former comes from the effect of well-known mark for cross-class protection; the latter from the effect of the registered trademark itself. The two are mutually independent. On the matter of prohibition of another party from infringement, the former does not infringe the latter. For that matter, the expansion of the right of prohibition in a well-known mark should not be constrained or restricted by a mark registered in respect of the goods in other classes of goods or services, but it cannot be posed against the right of the mark registered in respect of the goods or services of the class.

3. Determination of the element of the well-known mark protection: "misleading the public and the interests of well-known mark registrant are likely to be damaged"

The doctrine of relative protection of well-known mark is adopted in China, with restrictive conditions imposed on the extended or expanded protection thereof, namely, with the element of "misleading" imposed on the protection. In practice, "misleading" is understood differently, many problems exist, and clarification is highly necessary.

1) Relations between "misleading the public" and "the interests of well-known mark registrant are likely to be damaged"

The element of "misleading the public" and "the interests of well-known mark registrant are likely to be damaged" is provided for in both Article 13, paragraph two of the Trademark Law and Article 1 (2) of the Trademark Interpretation with regard to the protection of registered trademarks. Fuzzy understandings of this provision in the judicial operation are mainly as follows:

(1) In judgment, it is only decided on the constitution of "misleading the public", without mentioning the likelihood of damage. From the above cases involving the "QIPAIWANG" and "LV" marks, two concepts of the likelihood may be inferred: one, "misleading" and "damage" are one single element, namely with "misleading", there is the likelihood of damage, and it is not necessary to elaborate on "damage"; and two, "misleading" and "damage" are optional or alter-

native elements, and presence of one is enough.

(2) The possibilities of whether "misleading the public" and "damage" are stated in judgments, as is the case with most judgments, which shows this view: "misleading" and "damage" are one single element.

(3) Both determining "misleading the public" and explicating dilution of the distinctive character of a mark would damage the interests of a plaintiff. Take the case involving the mark "BOSHAN BRAND and the device", the defendant used the plaintiff's well-known mark in pumps in respect of foodstuff. The judge clearly pointed out that misleading or dilution would create damage. But in said case, while the average consumers generally would not believe that the defendant's products were made by the plaintiff, since the plaintiff's mark was highly known, reputable and distinctive, the defendant's action would dilute the distinctive character of the plaintiff's mark, or make people believe that the defendant and the plaintiff were somewhat related to each other. In essence, the case shows the view that "misleading" and "damage" are optional.

This divided view in practice results from lack of consistent understanding of the relations between "misleading the public" and "the interests of well-known mark registrant are likely to be damaged". A law should generally be literally understood by the literal expression thereof. In the relevant law provisions, the word used to connect "misleading the public" and "the interests of well-known mark registrant are likely to be damaged" is the word "cause" in Chinese. As their semantic and logical relations show, the former causes the latter, namely "misleading the public" is the cause, and "the interests of well-known mark registrant are likely to be damaged" the effect. They are not in an "either ... or" relationship. "The interests of a mark registrant are likely to be damaged" is not an independent element. The "likelihood of damage" is due to the presence of "misleading", not anything else. Therefore, in determining the existence of "misleading", we should not merely start from the consequence of "damage", we should find out whether the consequence of "damage" results from "misleading". If "damage" does not result from "misleading", then there is no "misleading" involved.

2) How to define "misleading"

In practical cases, statements on "misleading" and consequence of "damage" are varied, which shows absence of uniformity of views. On the whole, there are these views on how to understand "misleading":

(1) Doctrine of association: it is believed that a defen-

dant's use of a plaintiff's well-known mark in non-identical and dissimilar goods would make the relevant sector of the public associate the defendant with the plaintiff. As in the cases involving the marks of "XILIN",⁵⁷ and "HONG JI TANG"⁵⁸, the court held that the defendant's action would make the relevant sector of the public associate the defendant with the plaintiff in one way or another.

(2) Doctrine of confusion: it is believed that a defendant's use of a plaintiff's well-known mark in non-identical and dissimilar goods would make the relevant sector of the public confuse the origin of products. As in the cases involving the mark "MEIKE",⁵⁹ the court held that the defendant's action was apt to mislead the consumers in their identification and purchase, and sufficient to make the relevant sector of the public confuse the origin of products.

(3) Doctrine of confusion and association: it is believed that a defendant's use of a plaintiff's well-known mark in non-identical and dissimilar goods would make the relevant sector of the public confuse the origin of products or associate the defendant with the plaintiff. This is a rather typical view. As in the case involving the mark "GENERAL"⁶⁰, the court defined the "misleading" as a defendant's infringement resulting in the public's confusion about the origin of the goods, so they wrongly believed that the infringing products were made by the plaintiff, or the defendant's mark was somewhat associated with the plaintiff's mark. In the case involving the mark "BAOTUSpring"⁶¹, the judge pointed out misleading the public here meant that defendant's infringement resulted in the public's confusion about the origin of the goods, so they wrongly believed that the infringing products were made by the plaintiff, or that the defendant used the mark with authorisation of the plaintiff, or that the infringer and the well-known mark proprietor were somewhat associated.

The Supreme People's Court provides that "confusion" is one of the circumstances of "misleading" in the Well-known Mark Interpretation (20070900 Draft).⁶² To correctly define "misleading", the relations between "confusion" and "misleading" should be first correctly understood. According to the Trademark Law, the two are different in meaning. For a well-known mark, confusion is an element for the protection of non-registered well-known marks, while misleading is one for the protection of registered well-known marks. The requirement for the former should be more stringent. Confusion is an extreme manifestation of misleading, and misleading, which does not necessarily result in confusion, exists in the absence of confusion. Using another party's well-known mark in

dissimilar goods usually would not result in confusion about the origin of goods. Mostly, the relevant sector of the public, on seeing a defendant's products, would not believe they are made by the plaintiff, but associate them with the plaintiff's well-known mark, and wrongly think that the two are somewhat related or associated, or that the defendant's use of the mark is authorised by the plaintiff, who would ensure the quality of the products provided by the defendant.

Under the legislation and in the judicial practice in China, the cross-class protection of well-known marks is defined as the extended protection, and based on the differentiation of identical or similar goods, and complementary to the confusion doctrine for preventing confusion about the origin of goods. A line of demarcation should be clearly drawn between the confusion doctrine and the cross-class protection of well-known marks: the former prohibits confusion about the origin of goods while the latter prohibits any party from utilising the goodwill of the well-known mark proprietor in connection with dissimilar goods. The well-known mark infringement determination should protect well-known marks by going beyond the basis of confusion or the likelihood of confusion about origin of goods. Accordingly, misleading the public, as one of the elements in the well-known mark infringement determination, should not cover anything about confusion of the origin of goods. The said doctrine of association is more in line with the legislative purposes.

Besides, the Supreme People's Court provides that dilution is one of the circumstances of misleading in the Well-known Mark Interpretation (20070900 Draft). This provision is positively significant, but has its own drawbacks.

Dilution is a standard for according special protection to well-known marks against reduced capability for famous marks of distinguishing goods or services in the U.S. regardless of the likelihood of confusion and existence of relationship of competition.⁶³ In other words, regardless of classes of goods or services, a well-known mark proprietor is entitled to the protection against dilution. Any registration of another party's well-known mark in different goods will dilute the distinctive character of said mark; hence it is not necessary to take account of the element of confusion or misleading. This is an absolute protection. The doctrine of dilution is of positive significance in preventing the weakening of the distinctive character of a mark. But incorporating it in the judicial interpretation will render the element of "misleading the public" useless, and make absolute the protection for registered well-known marks in China, which conflicts with the provisions

of the Trademark Law. Besides, from the US dilution doctrine one gathers that dilution does not presuppose confusion or misleading. Dilution is possible even in the absence of misleading. Misleading and confusion are by no means mutually inclusive. It is improper to incorporate dilution to the scope of misleading.

Although there are barriers in the law provisions if introducing the dilution doctrine to judicial interpretation, we may consider amending the Trademark Law by addition of protection of well-known mark against dilution. Since a well-known mark is established by low standards in China, and the requirement for the distinctive character of well-known mark not high, for the relevant sector of the public, there is no special, unique relations between some well-known marks and goods, it is improper to protect all well-known marks against dilution. Under these circumstances, we may refer to the protection model adopted in Germany, where only those well-known marks having the highest level of repute and most extensively known in the marketplace are protected as famous marks against dilution.⁶⁴ In China we may also further define the scope of well-known marks that are entitled to such protection.

3) Defining the scope of public

The element of “misleading the public” is present in Article 13, paragraph two of the Trademark Law and Article 1 (2) of the Trademark Interpretation, but neither has clearly defined the scope of the public. Only when the scope of the public is correctly defined, as the object of misleading, is it possible to correctly determine the consequence of damage resulting from misleading.

First of all, the public in the “misleading the public” are those misled, specifically, the public misled by an accused infringing act, namely a defendant’s use of another party’s well-known mark in non-identical or dissimilar goods or services.

Next, the public as those misled are different from the relevant sector of the public in relation to the well-known mark establishment in that the former are the group misled by a defendant’s act of infringement, and the latter are those who know about a plaintiff’s well-known mark to an extent.

Then, in terms of scope, the public, as people misled, are not the general public in its common sense. They should be determined in relation to the specific goods or services involved in an accused infringing action. The actual misleading is the wrong belief that the defendant’s goods or services are somewhat related to the plaintiff’s. Accordingly, the public

misled should be determined from the perspective of the accused infringing goods or services.

Finally, the public, as those misled, may be defined as consumers related to the goods or services involved in an accused infringing act, and other business operators closely related to the marketing of said goods or services.

4) Determination of misleading

Misleading may be determined from:

(1) analysis of the relations of the relevant sector of the public of the accused infringing goods and the relevant sector of the public of the plaintiff’s products.

The consequence of the likelihood to mislead the public should be determined on the premise that the relevant sector of the public of the defendant’s products know about the well-known mark involved, or there is no misleading to talk about. Therefore, the relations of the relevant sector of the public of the accused infringing goods and the relevant sector of the public of the plaintiff’s products should be an important factor to be considered. In practice, between the relevant sector of the public of an accused infringing product and those of the plaintiff’s products generally exist the following types of relationship:

Type 1: The relevant sector of the public of a plaintiff’s products and accused infringing products are the average consumers of the same group. For example, the relevant sector of the public of wine and frozen pork, are of the same consumers group, without any requirement regarding their special identity, occupation, or profession. They possibly have the access to both types of products.

Type 2: The relevant sector of the public of a plaintiff’s products and accused infringing products are of the same group in identical industry and field. For example, the relevant sector of the public of the products of pumps and air-pressure water tanks are of the same consumer group in the service industries, such as construction and hotel.⁶⁵ Take for another example, the relevant sector of the public of a plaintiff’s products of air-conditioner and their end equipment and a defendant’s products of the temperature and wind volume adjusters of air-conditioner.⁶⁶

Type 3: The relevant sector of the public of a plaintiff’s products and accused infringing products are of the same group in identical industry and field, and the former cover the latter. For example, the plaintiff’s products are cigarettes, and their relevant sector of the public are cigarette consumers. The defendant’s products are the seal-opening strings, and the relevant sector of the public are cigarettes

manufacturers. Since the seal-opening strings always enter the channel of distribution and reach consumers as part of the package, the sellers and consumers of cigarettes are not relevant sector of the public of the product the seal-opening strings. The relevant sector of the public of the said products overlap, and it is possible for the relevant sector of the public of the two products to access the products of both the plaintiff and defendant.⁶⁷

Type 4: The relevant sector of the public of a plaintiff's products are average consumers, and those of the defendant's products are those working in a particular industry and field. The two overlap in that the former include the latter. As in said case involving the "WANGWANG" mark, the plaintiff's mark is used in foodstuff, and the defendant's mark in lubricant.

Type 5: The relevant sector of the public of a plaintiff's products are those working in a particular industry and field, and those of the defendant's products are the average consumers. The two overlap in that the latter include the former. For example, the plaintiff's products are distribution boxes, and those of the defendant are towels;⁶⁸ the plaintiff's products are pumps and oil pumps, and the defendant's products are preserved cabbage;⁶⁹ the plaintiff's products are elevators and lifts, and the defendant's products are stainless steel kitchenware;⁷⁰ the plaintiff's products are hand hydraulic carts, and the defendant's products are type-writers and copy machines.⁷¹

Type 6: The relevant sector of the public of a plaintiff's products and those of the defendant's products belong to different industry and field. They do not overlap. For example, a plaintiff's registered trademark is used in stone material for industrial use, and the defendant is a printing enterprise.⁷²

For the first four types, the relevant sector of the public of the defendant's products are also those of the plaintiff's. In this case, it is possible for the relevant sector of the public of the defendant's products to have access to the plaintiff's products and marks, where the mark the plaintiff uses in its product, is relatively highly reputable, the relevant sector of the public of the defendant's products should know about the existence of the plaintiff's mark, and the defendant's use of the plaintiff's well-known mark in its products is highly possible to mislead the relevant sector of the public of the defendant's products. The opposite is Type 5. The mark the plaintiff uses in distribution boxes is reputable among the special group in a particular industry, and the relevant sector of the public of the defendant's products usually do not have con-

tact with the plaintiff's products, so they have no way to get to know about the existence of the plaintiff's trademark. That is, even if they see the defendant's towels bearing the plaintiff's mark, they would not be misled. The extreme case is Type 6 the relevant sector of the public of a plaintiff's products and those of the defendant's products belong to different industry and field. They do not overlap. It is impossible for the relevant sector of the public to be misled.

(2) Analysing the difference between the plaintiff's goods or services and the defendant's

The factors, such as industrial difference between the plaintiff's products and defendant's products and their technical relevance, determine the difference thereof in classes, and are those for us to determine whether they would mislead the public or not. The overlap of the relevant sector of the public of the plaintiff's products and the defendant's products shows, to an extent, the degree to which the relevant sector of the public of the defendant's products know about the plaintiff's products and mark, and it may be a pre-condition to determine whether it would mislead the public. However, even if the relevant sector of the public of the plaintiff's products and those of the defendant's products overlap, in many cases, the defendant's products and the plaintiff's products are so different in industry and technology that their products are not different enough to mislead the relevant sector of the public. For example, the plaintiff's "YUTONG" mark is a well-known mark registered and used in buses or passengers vehicles, and the accused defendant's products are bamboo products.⁷³ Since the products of the plaintiff and defendant are considerably different, only a small part of the relevant sector of the public overlap, and the relevant sector of the public are not easily misled to believe that the plaintiff and the defendant are related. The same is true with the plaintiff's "DUKANG" liquor and the defendant's paper cups,⁷⁴ and the "TAISHAN" liquor and defendant's artificial silk flower.⁷⁵

(3) Taking account of the distinctive character and degree of repute of marks

In many cases judges, in determining misleading, would take account of the distinctive character and degree of repute of marks. In the case involving the mark of "XUEQING"⁷⁶, the court believes that said mark of the plaintiff is not composed of a simple combination of a common device or lexical items people are familiar with. It is arbitrarily coined by the plaintiff, so it was obviously distinctive. In other words, the coined mark has a strong distinctive character. The stronger

the distinctive character a mark has, the more impressive it is, the more possible it is to mislead the public if used by another party in other goods.

Besides, the better known a mark is, the better the relevant sector of the public know about it, the more possible it is to mislead the public if used by another party in respect of other goods.

To sum up, in determining “misleading the public”, the judges should arrive at their conclusions by taking account of all these factors.

IV. Recommended Coping strategies to address the issues involved in judicial protection of well-known marks

1. Judicial coping strategies

1) If it is necessary to establish a plaintiff's mark as well-known mark at his request, the establishment is made only in the reasoning position of a judgment, and the plaintiff's such litigant claim is rejected in the main text of the judgment.

2) The principles of passive establishment, establishment valid or effective in one particular case only, made according to need or as necessary, and protection of public interests are constantly followed in establishment of well-known marks.

3) The standard of well-known mark establishment is that the mark should widely known to, and relatively highly reputable among, the relevant sector of the public within the territory of China.

4) When it is necessary to state an infringed right for extended protection for a well-known mark, the concept of the right to use a mark should be adopted; it is undue to use the expressions of the exclusive right to use a well-known mark, or the right of prohibition in a well-known mark.

5) A non-registered mark that constitutes a well-known mark should be accorded the judicial protection under the relevant law provisions.

6) The protection of a well-known mark may be extended to non-identical or dissimilar goods, but it may not be extended to all classes of goods without restriction. Consideration should be taken of whether there exist the other elements provided for in the relevant laws and judicial interpretations.

7) The expansion of the right of prohibition in a well-known mark should not be restricted by the existence of another party's registered trademark in the classes it is to cover.

8) Misleading the public does not cover the circum-

stances of confusion and dilution; it is determined by the principle of the presence of association.

2. Recommended judicial interpretation

In the presence of unclear basic concepts in the judicial protection of well-known marks, inconsistent standards for the establishment and protection of well-known marks, and the phenomenon of abuse of the system for the protection of well-known marks, it is recommended that the Supreme People's Court issue a judicial interpretation on the protection of well-known marks at an earliest possible date. The current Draft of the Well-known Mark Interpretation (20070900) is relatively comprehensive, but it is yet to be improved or amplified in these aspects:

1) by adding interpretation of the factors to be considered in the establishment of well-known marks as mentioned in Article 14 of the Trademark Law;

2) by making it clear whether a mark that is actually used in the channel of commerce may be established and protected as a well-known mark;

3) by specifying the circumstances in which establishment of well-known mark should not be made;

4) by considering the justifiability of the provision of the Draft to incorporate confusion and dilution in the scope of misleading, and by defining the concepts of confusion, misleading, and dilution, and the relations thereof;

5) by explicating a standard with respect to the provision clearly made in the Draft that any lawsuit in which an interested party fabricates the facts of the case in order to has his mark established as a well-known mark should be rejected,⁷⁷ that is, under what circumstances where an interested party fabricates the facts of the case in order to has his mark established as a well-known mark. Furthermore, it is difficult for the four circumstances where lawsuit may be rejected as provided for in Article 108 of the Civil Procedure Law to apply to cases of the nature, and there exist some barriers to the law application, so further studies should be conducted in this regard;

6) by directly applying the Civil Procedure Law to acts of fabricating evidence, which is not an issue involved only in case of well-known marks. It is unnecessary to make the provision on the treatment of fabrication of evidence in the Draft.⁸

7) by adding the provisions that interested party's requests concerning well-known mark should be rejected in the main text of judgments. It is provided in the Draft that the establishment of a well-known mark should not be stated in the main text of a civil judgment,⁷⁹ which has corrected, to an ex-

tent, the current undue practice of establishing well-known marks in the main text of a judgment, but it fails to give a positive view on how to treat requests raised by interested parties concerning well-known marks.

8) By not publicising by the Supreme People's Court established well-known marks. Since such establishment is part of ascertaining the facts of a case, and it is made to resolve dispute. The nature of the facts ascertainment is not different from that of any other cases. The provision in the Draft that the Supreme People's Court publicise, in a proper form, the established well-known mark⁸⁰ is unnecessary. Besides, now the abnormal phenomenon has arisen in which interested parties utilise the system of judicial establishment of well-known marks for the purpose of advertisement and for seeking reputation. The Supreme People's Court's publicising established well-known marks on a regular basis would promote the practice of abuse of the system for the protection of well-known marks.

3. Legislative recommendations

It is recommended that the legislators take account of the following points when amending the Trademark Law:

1) Making distinction between the exclusive right to use a mark and the right of prohibition in a mark to clarify the confusion arising from the concept of the exclusive right to use a mark consistently used in the current Trademark Law;

2) Providing for the standards for the establishment of well-known marks; and

3) According the absolute protection to well-known marks of high repute and goodwill, that is, introducing the dilution doctrine, and extending the right of prohibition in a registered well-known mark to all the classes of goods. ■

¹ The project group leader: Su Chi; the authors: Jiang Ying and Qiao Ping.

² Cui Lihong, Trademark Right and Expansion of Its Private Interest, the Shandong People's Publishing House, 2003, P.55.

³ Chen Yonghui, the Supreme People's Court Intellectual Property Tribunal's answer to news reporters' questions about the protection of well-known marks, the Chinacourt.net, 31 May 2007.

⁴ The Third Civil Tribunal of the Beijing Higher People's Court, the Beijing Courts Report on the Trial of Cases Involving Well-known Marks.

⁵ The Beijing No.2 Intermediate People's Court's Civil Judgement No. Erzongzhichuzi 5/2001.

⁶ The Beijing No.1 Intermediate People's Court's Civil Judgement No. Yizhongzhichuzi 11/2000; the Beijing Higher People's Court's Civil Judgement No. Gaozhizhongzi 47/2001.

⁷ The Beijing No.1 Intermediate People's Court's Civil Judgement No. Yizhongminchuzi 9923/2003; the Beijing Higher's People's Court's Civil Judgement No. Gaozhizhongzi 214/2001.

⁸ The Beijing No.1 Intermediate People's Court's Civil Judgement No. Yizhongminchuzi 4536/2005.

⁹ The Beijing No.2 Intermediate People's Court's Civil Judgement No. Erzongminchuzi 5741/2006.

¹⁰ The Beijing No.1 Intermediate People's Court's Civil Judgement No. Yizhongminchuzi 3797/2006; the Beijing Higher's People's Court's Civil Judgement No. Gaominzhongzi 1481/2006.

¹¹ Said data are limited to cases closed by the Beijing No.1 Intermediate People's Court.

¹² The Beijing No.1 Intermediate People's Court's Administrative Judgement No. Yizhongxingchuzi 692/2004; the Beijing People's Court's Administrative Judgement No. Gaoxingzhongzi 119/2005.

¹³ The Beijing No.1 Intermediate People's Court's Administrative Judgement No. Yizhongxingchuzi 712/2004; Beijing Higher People's Court's Administrative Judgement No. Gaoxingzhongzi 31/2005.

¹⁴ The Beijing No.1 Intermediate People's Court's Administrative Judgement No. Yizhongxingchuzi 773/2006.

¹⁵ The Beijing No.1 Intermediate People's Court's Administrative Judgement No. Yizhongxingchuzi 1060/2005.

¹⁶ The Beijing No.1 Intermediate People's Court's Administrative Judgement No. Yizhongxingchuzi 793/2005.

¹⁷ Records of the Forum of Courts of Some Provinces and Municipalities on Judicial Protection of Well-known Marks.

¹⁸ The Hubei Wuhan City Intermediate People's Court's Civil Judgement No. Wuzhichuzi 45/2003; Shandong Zibo City Intermediate People's Court's Civil Judgement No. Ziminsanchuzi 1/2001; Ningxia Yinchuan City Intermediate People's Court's Civil Judgement No. Yinminchuzi 16/2006.

¹⁹ Guangxi Guilin City Intermediate People's Court's Civil Judgement No. Guishiminchuzi 59/2006.

²⁰ The Beijing No. 1 Intermediate People's Court's Administrative Judgement No. Yizhongxingchuzi 944/2005; Sichuan Chengdu City Intermediate People's Court's Civil Judgement No. Chengminchuzi 697/2006; Gansu Lanzhou City Intermediate People's Court's Civil Judgement No. Lanfamin-sanchuzi 11/2007; Beijing No.1 Intermediate People's Court's Civil Judgement No. Yizhongminchuzi 11352/2005.

²¹ The Fujian Province Higher People's Court's Civil Judgement No. Min-minchuzi 2/2005; Hubei Xiangfan City Intermediate People's Court's Civil Judgement No. Xiangzhongminchuzi 20/2004.

²² Tian Yu, "Cao Jianming: Establishment of Well-known Marks under Law to Promote the Famous Brands Promotion Strategy, on the Xinhuanet, 31 January 2007.

²³ Lu Hao, Amplification of Well-known Mark Establishment System, the China Trademark, No.6, 2006, P.57.

²⁴ Wan Kexian, On the Inadequacy and Improvement of Judicial Establishment of Well-known Marks, the Lawyers & Rule of Law, No. 12, 2006, P. 56.

²⁵ See Supra note 3.

²⁶ The Supreme People's Court provides, in the Opinions on Several Issues Relating to Application of Civil Procedure Law and Several Provisions on Evidence in Civil Procedure, that an interested party does not need to adduce evidence concerning facts ascertained in rulings of the People's Courts that have legally taken effect.

²⁷ The Hubei Hanyang City Intermediate People's Court's Civil Judgement No. Hanminchuzi 21/2006.

²⁸ The Beijing Haidian District People's Court's Civil Judgement No. Haiminchuzi 13637/2005; Beijing No.1 Intermediate People's Court's Civil Judgement No. Yizhongminzhongzi 14387/2005.

²⁹ The Beijing No. 1 Intermediate People's Court's Administrative Judge-

ment No. Yizhongxingchuzi 692/2004; Beijing Higher People's Court's Administrative Judgement No. Gaoxingzhongzi 119.

³⁰ The Shandong Zibo City Intermediate People's Court's Civil Judgement No. Ziminsanchuzi 3/2007.

³¹ The Chaoyang Court closed the case involving request for establishment of the "WANGWANG" well-known mark, on the Beijingcourtnet, 9 October 2007.

³² The Hubei Shiyan City Intermediate People's Court's Civil Judgement No. Shizhichuzi 1/2006.

³³ The Fujian Nanping City Intermediate People's Court's Civil Judgement No. Nanminchuzi 55/2005.

³⁴ The Shandong Weifang City Intermediate People's Court's Civil Judgement No. Weiminsanchuzi 49/2005.

³⁵ Shandong Zibo City Intermediate People's Court's Civil Judgement No. Ziminsanchuzi 1/2005.

³⁶ Jiang Weiping and Lu Chao, Three Principles Underlying Judicial Establishment of Well-known Marks, the China Trademark, No. 6, 2005.

³⁷ Huang Congzhen, Study on Judicial Establishment of Well-known Marks, the Fujian Jurisprudence, No.4, 2005.

³⁸ The Beijing No.1 Intermediate People's Court's Civil Judgement No. Yizhongminchuzi 11352/2005.

³⁹ Huang Hui, Legal Protection of Well-known Marks and Famous Marks, the Publishing House of Law, 2001, P.49.

⁴⁰ Supra Note 4.

⁴¹ Supra Note 17.

⁴² The Fujian Higher People's Court's Civil Judgement No. Minminchuzi 2/2005.

⁴³ The Guangdong Shantou City Intermediate People's Court's Civil Judgement No. Shanzhongfazhichuzi 12/2006.

⁴⁴ The Ningxia Yinchuan City Intermediate People's Court's Civil Judgement No. Yinminzhichuzi 16/2006.

⁴⁵ The Hubei Xiaogan City Intermediate People's Court's Civil Judgement No. Xiaominsanchuzi 28/2006.

⁴⁶ The Hubei Wuhan City Intermediate People's Court's Civil Judgement No. Wuzhichuzi 25/2005.

⁴⁷ The Shandong Weifang City Intermediate People's Court's Civil Judgement No. Weiminsanchuzi 49/2005.

⁴⁸ The Guangdong Shenzhen City Intermediate People's Court's Civil Judgement No. Shenzhongfaminsanchuzi 738/2005.

⁴⁹ The Hubei Xiangfan City Intermediate People's Court's Civil Judgement No. Xiangzhongminerchuzi 20/2004.

⁵⁰ The Shandong Rizhao City Intermediate People's Court's Civil Judgement No. Riminerzhichuzi 20/2005.

⁵¹ The Shandong Weihai City Intermediate People's Court's Civil Judgement No. Weiminyichuzi 38/2004.

⁵² Supra note 17.

⁵³ Jiang Haixuan, MONGNIU's "SUANSUANRU" has been judicially established as a well-known mark, the Chinacourtnet, on 27 April 2006.

⁵⁴ The Shandong Qingdao City Intermediate People's Court's Civil Judgement No. Qingminsanchuzi 1095/2003.

⁵⁵ The Hubei Wuhan City Intermediate People's Court's Civil Judgement No. Wuzhichuzi 45/2003.

⁵⁶ The Guangdong Shenzhen City Intermediate People's Court's Civil Judgement No. Shenzhongfaminsanchuzi 738/2005.

⁵⁷ The Ningxia Yinchuan City Intermediate People's Court's Civil Judgement No. Yinminzhichuzi 16/2006.

⁵⁸ The Shandong Jinan City Intermediate People's Court's Civil Judgement No. Jiminsanchuzi 51/2006.

⁵⁹ The Fujian Zhangzhou City Intermediate People's Court's Civil Judgement No. Zhangminchuzi 15/2005.

⁶⁰ The Shandong Jinan City Intermediate People's Court's Civil Judgement No. Jiminsanchuzi 35/2005.

⁶¹ The Shandong Jinan City Intermediate People's Court's Civil Judgement No. Jiminsanchuzi 31/2005.

⁶² Article 8 of the Well-known Mark Interpretation (Draft 20070900) provides that under the following circumstances it may be established as "misleading the public and the interests of the well-known mark registrant are likely to be damaged by such use" as provided for in Article 13, paragraph two of the Trademark Law and this Judicial Interpretation:

(1) where the relevant sector of the public confuse about the origin of the goods or wrongly believe that the two are specially related to each other; and (2) where the good-will of the well-known mark is tarnished or its distinctive character seriously diluted.

⁶³ Huang Hui: the Trademark Law, the Publishing House of Law, No.9, 2005.

⁶⁴ Zhang Junqing, the System of the Protection of Well-known Marks in Germany, the Trademark Communication, No.9, 2005.

⁶⁵ The Shandong Weihai City Intermediate People's Court's Civil Judgement No. Weiminyichuzi 38/2004.

⁶⁶ The Shandong Dezhou City Intermediate People's Court's Civil Judgement No. Dezhongminsichuzi 59/2005.

⁶⁷ The Shandong Jinan City Intermediate People's Court's Civil Judgement No. Jiminsanchuzi 35/2005.

⁶⁸ The Shandong Jining City Intermediate People's Court's Civil Judgement No. Jiminshichuzi 28/2005.

⁶⁹ The Shandong Zibo City Intermediate People's Court's Civil Judgement No. Ziminsanchuzi 1/2005.

⁷⁰ The Shandong Weifang City Intermediate People's Court's Civil Judgement No. Weiminsanchuzi 49/2005.

⁷¹ The Ningxia Yinchuan City Intermediate People's Court's Civil Judgement No. Yinminzhichuzi 16/2006.

⁷² The Beijing No.1 Intermediate People's Court's Civil Judgement No. Yizhongminchuzi 12344/2007.

⁷³ The Henna Zhengzhou City Intermediate People's Court's Civil Judgement No. Zhengminsanchuzi 246/2005.

⁷⁴ The Shandong Jinan City Intermediate People's Court's Civil Judgement No. Jiminsanchuzi 137/2005.

⁷⁵ The Shandong Taian City Intermediate People's Court's Civil Judgement No. Taizhichuzi 12/2006.

⁷⁶ The Shandong Rizhao City Intermediate People's Court's Civil Judgement No. Riminerzhichuzi 20/2005.

⁷⁷ Article 9 of the Well-known Mark Interpretation (Draft 20070900) provides that where an interested party fabricates facts of a case for the purpose of establishing a well-known mark, his lawsuit shall be rejected under Article 108 of the Civil Procedure Law.

⁷⁸ Article 9 of the Well-known Mark Interpretation (Draft 20070900) provides that where an act constitutes fabricating evidence to interfere with the civil procedure, punishment shall be imposed under Article 102 of the Civil Procedure Law.

⁷⁹ Article 11 of the Well-known Mark Interpretation (Draft 20070900) provides that the People's Court's establishment of a well-known mark shall not stated in the main text of the civil judgement.

⁸⁰ Article 15 of the Well-known Mark Interpretation (Draft 20070900) provides that the Supreme People's Court sets up a database of judicially established well-known marks, and publicises the established well-known marks in a proper form.