Construction and Application of Article 15 of the Trademark Law

Comments on and analysis of dispute over and administrative litigation involving “Toubaoxiling” trademark

Wang Ze

Article 15 of the Chinese Trademark Law provides: “where the agent or representative of a person who is the owner of a mark applies, without such owner’s authorisation, for the registration of the mark in his own name, if the owner opposes the registration applied for, the application shall be refused and the use of the mark shall be prohibited.” But the “agent or representative” is understood differently in the academic community and that of practitioners. This article is meant to define the “agent or representative” by probing into the legislative origin and aim of Article 15 of the Trademark Law, with an analysis made of the dispute over and administrative litigation involving the “Toubaoxiling” trademark, the first case of retrial in the area of trademark right determination in China for the purpose of facilitating correct implementation of Article 15 of the Trademark Law.

The case in brief[1]

The Chongqing Zhengtong Pharmaceutical Industry Co., Ltd. (Zhengtong for short) concluded, with the Sichuan Huashu Animal Pharmaceutical Industry Co., Ltd. (Huashu for short), an Agreement for Exclusive Distribution of “Toubaoxiling” Product (hereinafter referred to as the Agreement) upon being granted the name of the goods of the animal drug “Toubaoxiling” approved by the Chongqing Agriculture Bureau. It was agreed in the Agreement that Zhengtong authorized Huashu to exclusively distribute the powder injection of said drug product “Toubaoxiling” in China, and that Zhengtong should not distribute, and Huashu should not manufacture, said product; it was agreed that Huashu was responsible for designing the package, planning promotion and advertising said product, and fixing the price of the product. During the term of the Agreement, Huashu applied, without the authorisation of Zhengtong, for registration of the "Toubaoxiling" mark, which was similar to the name of the goods to be used in respect of the goods of veterinary preparation and veterinary drug in class 5. It was agreed between the two parties, upon the termination of the Agreement, that Zhengtong should not manufacture "Toubaoxiling" bearing Huashu's "HUASHU" trademark, and Huashu should not manufacture the "Toubaoxiling" product with the words "Made by Zhengtong" and Zhengtong's regulatorily approved name "Toubaoxiling" printed thereon. Later on, Zhengtong filed a request with the Trademark Review and Adjudication Board (TRAB) of the State Administration for Industry and Commerce (SAIC), for cancellation of Huashu's said registered mark. Upon review, the TRAB held that the "agent or representative" as mentioned in Article 15 of the Trademark Law included the distributor who might get to know about the mark of the trademark owner in their business transaction; Zhengtong and Huashu had entered into the agent relationship under the Agreement, and decided to have cancelled said mark in suit on the ground that Huashu's unauthorised application for the registration of the mark in suit was contrary to the provision of this Article 15 of the Trademark Law.

Dissatisfied with the decision made by the TRAB, Huashu brought an action. Upon hearing the case, the court of first instance ruled to have supported the TRAB's understanding and application of Article 15 of the Trademark Law, and upheld the TRAB's decision. Dissatisfied with the ruling of first instance, Huashu appealed. Upon hearing the case, the court of second instance believed that the "agent or representative" as mentioned in Article 15 of the Trademark Law referred only to the "trademark agent or representative"; Huashu and Zhengtong were not trademark agent and trademark owner; Huashu turned the name "Toubaoxiling" of the goods into a trademark with its acts of executing the Agreement in terms of packaging, advertising and distributing said goods, "Toubaoxiling" should be regarded as Huashu's non-registered mark, so the court made the judgment to have reversed the first-instance judgment and the TRAB's decision.

Dissatisfied with the second-instance ruling, both the TRAB and Zhengtong applied to the Supreme People's Court for retrial of the case. This was the very first case of retrial since the system of judicial review of trademark right determination was put in place in China. Upon hearing the case, the Supreme People's Court held that the "agent" as provided for in Article 15 of the Trademark Law included the agent or representative in the sense of those in the special relations of distributing agent, such as general distributors (exclusive distributors) and general agents (exclusive agents); the relationship between Zhengtong and Huashu, under the Agreement, was equal to one of the exclusive distribution characterized by the exclusive dealership; Huashu was thus qualified for exclusive distribution, and was the distributing agent in the sense of Article 15 of the Trademark Law; the name "Toubaoxiling" of the involved goods was a name particular to the drug Zhengtong was originally granted through regulatory approval; hence the ownership of said name would remain unchanged despite Huashu's use of it within the term of the Agreement between the two parties, and said name would be owned by Zhengtong after the termination of the Agreement. Accordingly, the Supreme People's Court decided to have reversed the second-instance judgment and have upheld the first-instance judgment.

Comments and analysis

I. Meaning of "agent or representative" as mentioned in Article 15 of the Trademark Law

The concept of the "agent or representative" as mentioned in Article 15 of the Trademark Law has been construed in three different ways in the community as follows:

(1) An agent refers only to a trademark agent or attorney, i.e. a person appointed by an trademark registration applicant or a trademark registrant to attend to matters of application for the registration of a trademark or other trademark-related matters. A representative refers only to a trademark representative, i.e. a person attending to matters of application for trademark registration or any other trademark-related matters on behalf of his enterprise.[2]

(2) An agent or representative refers only to an agent or representative in the sense of the civil law[3], excluding distributors; and,

(3) The agents include not only the agents provided for in the General Principles of the Civil Law and the Contract Law, but also the distributors who may know about the mark of a trademark owner in their business transaction; the representatives, referring to individuals working for trademark owners and get to know about their marks by performing their duty for the latter, include legal representatives, board

directors, supervisors, managers and the executives of partnership.[4]

In the present case, the "agent" as mentioned in Article 15 of the Trademark Law has been construed dramatically differently in the second-instance ruling, the first instance ruling and the TRAB's decision. It is, therefore, necessary to define the "agent or representative" in line with the origin, aim or purpose of the legislation and with reference to the international treaties and practice to ensure correct application of the law provision on the terms.

Probing into the legislative origin to harmonise the construction of "agent or representative" with that in the international treaties and practice

Under Rule 25, paragraph one (3), of the Implementing Regulations of the Trademark Law as of 1993, "for an agent to acquire a trademark registration in his own name without authorisation of the trademark proprietor who appoints him to attend to the registration" is an act for obtaining a trademark registration by unfair means that should be ceased.[5] This provision became the provision of Article 15 of the current Trademark Law as of 2001, and the provision on prohibiting a representative from preemptively registering the mark of a trademark owner has been added thereto with reference to Article 6septies of the Paris Convention.[6] Just as what was pointed out in the retrial decision, "Article 15 of the Trademark Law has been made for China to perform its obligations under Article 6septies of the Paris Convention and, as well, to prohibit acts of agents or representatives to register other parties' trademarks in bad faith." In view of the legislative origin of Article 15 of the Trademark Law and with reference to the provision of Article 9 of the Supreme People's Court's Provisions on Several Issues Relating to Trial of Administrative Cases of International Trade that "where there are two or more justifiable constructions of the specific provisions of laws and administrative regulations applicable in the people's court hearing of the administrative cases of international trade, and one of them is in compliance with the relevant provisions of the international treaty to which the People's Republic of China is party or has acceded, the construction that is in harmony with the relevant provisions of the international treaty should be adopted except that which the People's Republic of China has declared its reservation", the construction of the "agent or representative" should be in compliance with the international treaty and the international practice.

Article 6septies of the Paris Convention provides: "if the agent or representative of the person who is the proprietor of a mark in one of the countries of the Union applies, without such proprietor's authorisation, for the registration of the mark in his own name, in one or more countries of the Union, the proprietor shall be entitled to oppose the registration applied for or demand its cancellation or, if the law of the country so allows, the assignment in his favour of the said registration, unless such agent or representative justifies his action." It is pointed out in the Guidelines of the Paris Convention for the Protection of Industrial Property that the legal meaning of the "agent or representative" in this provision should not be construed narrowly; this provision also applies to the circumstance where a distributor of the goods using a trademark applies for registration of said mark in his/its own name. [7]

The provision of Article 8 (3) of the European Community Trade Mark Regulations, which is substantially the same as that of Article 15 of the Chinese Trademark Law, has also derived from said Article of the Paris Convention. It is pointed out in the Guidelines for Trademark Opposition of the OHIM that this article is designed to protect the legitimate interest of trademark proprietors and stop their business partners from abuse of their trademark right; hence the "agent or representative" should be construed in its broad sense. This term is applicable to any relations in which one party represents another party's interest under, but not subject to the literal meaning of, the contract. Therefore, the "agents or representatives" include licensees of trademark proprietors and distributors authorized thereby.

A sales agent, upon obtaining the trademark right of a foreign trademark proprietor (trademark owner) has factually obtained the exclusive right of distribution in its own country; said foreign trademark proprietor should not freely import goods to that country, nor should any other party of that country import the goods of that foreign trademark proprietor. The same mark is used by the same party, which is beneficial to maintaining the order of business transaction and protecting the interest of consumers. Besides, the commercial agent's obtained registration of said mark without unauthorized is equivalent to putting to an end the relationship of the mutual trust with the foreign trademark proprietor, and is contrary to the practice of honest transaction. For this reason, it is provided in Article 53-bis of the Japanese Trademark Law that an agent's or representative's preemptive registration of the mark of a trademark proprietor is one of the causes for cancellation of the registration, and the "agent or representative" refers not only to an agent or representative mentioned in the Japanese civil law or trademark law, but also to all distributors of imported goods.[8]

For this writer, Article 6septies of the Paris Convention regulates the relationship between a trademark proprietor from one member of the Union and his agent or representative from another member of the Union concerning the latter's registration or use of his mark, with an aim to prevent the latter from acts of registration of said mark without his unauthorisation. The "agent or representative" here mainly refers to sales agent or sales representative in the international trade. A distributor's preemptive registration of the mark of a trademark proprietor has all the basic features that an agent or representative who "clearly knows the mark of a trademark proprietor, and has preemptively registered it." It is regarded in the explanation of the above international treaty and international practice that a distributor is an agent or representative, without strictly setting one apart from the other. But within the community, the strict distinction between an agent and a representative in the three constructions of the concept is by no means due. The first and second constructions are not in conformity with the international treaty and international practice; the third constructions of the "agent" is in keeping with the international treaty, but the "representative" seems to have been explained too narrowly.[9] Besides, in the trial of foreign-related cases, said first two constructions of the "agent" is not in keeping with Article 9 of the Supreme People's Court's Provisions on Several Issues Relating to Trial of Administrative Cases of International Trade. If foreign-related cases are heard according to the third constructions, and cases of trademark dispute between two domestic parties involved according to the first and second constructions, the same law provision would inevitably be applied differently in respect of foreign and domestic parties, which is not conducive to the protection of the legitimate right and interest of the non-registered mark proprietors having relations with domestic agents or representatives.

The "agent or representative" should be construed in keeping with legislative aim and purpose

The mark of a trademark proprietor having relations with an agent or representative is protected under Article 15 of the Trademark Law; a prior well-known non-registered mark is protected under Article 13 thereof; a mark already in use and having certain influence is protected under Article 31. All these law provisions, together, constituted the basic system of the trademark law in China to duly protect non-registered marks and to prevent acts of preemptive trademark registration. Article 13, paragraph one, of the Trademark Law requires that a prior, non-registered mark be well known; Article 31 provides that a prior used mark have certain influence; Article 15 specifies that the two parties be related to each other as an agent or representative and the trademark owner; and all these provisions show that the person who acts for preemptive registration of another party's mark knows about the latter's mark. Besides, all these law provisions follow the legislative aim of good faith to legislatively prevent acts of unfair competition by way of preemptive registration of trademarks. When an agent or representative having relation with a sales agent or sales representative of commodity knows about the trademark proprietor's mark, the distributor of the commodity naturally knows about that mark; hence, the distributor and the agent or representative's preemptive registration of said mark is, in essence, an act of unfair competition violating the doctrine of good faith. For that matter, the "agent or representative" in Article 15 of Trademark Law is legislatively meant to include all that sell the goods of trademark proprietors, i.e. the distributors.

That the "agent" is defined as a trademark agent in the first construction changes the legal term and concept, and goes against the legislative aim or purpose of Article 15 of the Trademark Law in that the legislative term "agent" is used in Article 15 of the Trademark Law, but as the first construction of the terms shows, it is defined as a "trademark agent", and it is followed with an explanation made thereof. Besides, the "agent" in this Article obviously covers a scope wider than "trademark agent"; hence this construction of the term is not in keeping with the intended legislative meaning, and improperly limits the scope of application of the Article. According to the second construction, the "agent" is defined as an agent in the sense of the civil law, which is in keeping with the principle that the civil law overrides the trademark law; but the exclusion of distributors from the domain of "agents" would make it obviously impossible to stop the distributors' acts of preemptive registration of others' marks that arises in such large numbers in practice. For that matter, this construction of the term is not good for promoting practice of good faith, nor helpful for maintaining fair competition among main market players, so it is not in keeping with the legislative aim.

To conclude, it is better for the "agent or representative" as mentioned in Article 15 of the Trademark Law to be explained in a broad sense so that they include not only agents or representatives (including trademark agent or trademark representative) in the sense of civil law, but also those (including distributors) related with sales agents or sales representatives.[10] In the present case, the Exclusive Distribution Agreement between Zhengtong and Huashu shows that between the two parties an agency relationship is established in the nature similar to that of exclusive distribution; Zhengtong is the manufacturer, and Huashu, accordingly, is qualified for the exclusive distribution; it is the seller of Zhengtong's "Toubaoxiling" product, or the sales agent in the sense Article of the Trademark Law.

2. Relationship between goods names and trademarks

The function of a goods name is to show the property, function, use, ingredients or raw material of the goods, while a mark functions to directly indicate and distinguish the source or origin of goods. Under Article 11, paragraph one (1), of the Trademark Law, a generic name of goods should not be registered as a mark. But the name of a goods and a mark thereof is different in relative terms. When used improperly, a mark would lose its function to distinguish source of goods, and be reduced to generic name. Conversely, a non-generic name of goods may function to show the source of a goods, i.e. acquiring the meaning as a mark by way of longtime use or due to its own function to show the origin of goods. Examples of the former are the names particular to famous goods provided for in Article 5 (2) of the Unfair Competition Law[11], and those of the latter are names particular to goods of "animal drug" and "farm chemicals"[12] that enjoy the exclusive right upon regulatory examination and approval. Both such names should be protected under law.

It is held in the second-instance ruling that "the name Zhengtong has acquired when applying for the regulatory animal drug manufacture permit is not a name particular to a famous goods," and "the function of the name of the goods 'Toubaoxiling' to objectively show the source of the goods as a mark is the result of the efforts Huashu had put into advertising and marketing the goods involved, and that Huahshu has commercialised the name of the goods through use of the name of the goods of 'Toubaoxiling'." This erroneous conception is rooted in the confusion about the relationship among names of goods, names particular to famous goods and trademarks, with a belief that only the name particular to a famous goods of animal drug constitutes a trademark. It is respectively made clear in Articles 2 and 3 of the Notification of Enhanced Administration of Names of Animal Drugs issued by the Ministry of Agriculture on 10 March 1998 that the animal drug names collected in the National Animal Drug Standards, the Professional Standards of the Ministry of Agriculture, and Local Animal Drug Standards are the statutory names of animal drugs (generic names) …, and the generic names of animal drugs should not be registered as marks. An animal drug manufacturer may come up with a name particular to a animal drug if needed, and files an application in respect of the name when applying for the regulatory approval for making the animal drug and for a number of the approved product. Upon grant of the regulatory approval, the manufacturer may use the name, and file an application with the State Administration for Industry and Commerce (SAIC) for registering it as a mark. Such animal drug name should not be used as a generic name of an animal drug, which shows that the name particular to an animal drug *per se* functions to show the source of goods and constitutes a non-registered mark, without the need for it to be famous as a animal drug name to be used as a mark.

3. Ownership of goods names and their marks

Original acquisition of names of goods

On 28 May 2002, Zhengtong was granted by the Chongqing Agriculture Bureau the Chongqing Municipal Regulatory Approval of Animal Drug, in which it was made clear that the present applicant was approved to make and market the animal drug by the generic name "compound potassium penicillin injection (Type I)", and with the goods named "Toubaoxiling powder injection". Since powder injection refers to a state of the drug "Toubaoxiling", as the name particular to the drug was originally acquired by Zhengtong that has the exclusive right to use it, and the right and interest in the name as a non-registered mark was owned by Zhengtong. In the absence of the intention on the party of both Zhengtong and Huahshu to change the ownership of the name and/or other specific legal facts to this effect in the future, the ownership would remain unchanged.

Distinction between manufacturer's mark and distributor's mark

The producers' mark, also known as manufacturer's mark, is a mark the producer of a goods uses to show the origin of goods it makes; the distributor's mark, also known as a distributor's mark, is a mark the distributor uses on the goods it sells. Not as widely used as a manufacturer's mark, the distributor's mark is usually used where the manufacturer is weak and the distributors is strong.

In the present case, Huahshu and Zhengtong entered into the Exclusive Distribution Agreement, Zhengtong being the manufacturer and Huahshu the distributor. “Toubaoxiling” was the name Zhengtong had originally acquired which was particular to the goods involved in the case, and constituted a non-registered mark. Huahshu’s use of the name “Toubaoxiling” was an authorized use of another party’s name of goods, and its use of “HUSHU” mark is the use of its own mark. With the “HUSHU” mark, consumers had got to know that the goods by the name “Toubaoxiling” were distributed by Huahshu, and through “Toubaoxiling”, they knew that the products were made by Zhengtong. If Zhengtong authorised several parties to distribute its products and the distributors used their own marks together with the name “Toubaoxiling” for the drug on the package of the goods, then it would be impossible for consumers to identify the distributors through the name “Toubaoxiling”, and they would only know that the products were made by Zhengtong according to the name “Toubaoxiling”. For that matter, on the package, “HUSHU” was the distributor’s mark, and “Toubaoxiling” the manufacturer’s non-registered mark, which shows that the goods comes from Zhengtong, but not the distributor Huahshu.

Nature and legal consequence of “act of use” in execution of Agreement

One of the grounds on which the non-registered mark of “Toubaoxiling” was deemed to be owned by Huahshu in the second-instance ruling is that “Zhengtong had no evidence to show that it sold the animal drug by the name “Toubaoxiling” after it was regulatorily approved to make said drug and before it entered into cooperation with Huahshu and that Zhengtong did not use said name in its sale of said goods after it “acquired” (the name of the goods) and before Huahshu applied for registration of the mark. What this implies is that to obtain its right and interest in the non-registered mark of the name of the goods, Zhengtong should have either marketed the Toubaoxiling product before entering into the cooperation, or had marketed the product after entering into cooperation and before Huahshu applied for registration of said mark. According to the business practice, a manufacturer that has developed a new product, it is obliged to make and market the product. It may sell the product itself or by someone else by way of cooperation, authorisation or dealership. Article 1 of the Agreement involved in the present case expressly provided that Zhengtong authorised Huashu to exclusively market the product of “Toubaoxiling” in all regions around the nation. Huahshu’s right to market the product and to use the name “Toubaoxiling” came from the authorisation of Zhengtong, and the two parties had entered into the dealership. In other words, Zhengtong had Huahshu sold its product, so the latter’s sale should be deemed to be the former’s sale of the product. In the second-instance ruling the sale had been defined as the manufacturers’ own sale and the seller’s sale authorized by the manufacturer had been determined as sale independent of the manufacturer of the product, which is obviously contrary to the business practice; it was decided in the second-instance ruling that requiring Zhengtong to separately sell the “Toubaoxiling” product from the time of its entry into co-operation with Huahshu to that of its application for the mark registration was against the provision of the Agreement that Zhengtong should not sell said product.

The second ground on which the non-registered mark of “Toubaoxiling” was deemed to be owned by Huahshu in the second-instance ruling is that “Huahshu has used the name “Toubaoxiling” in a noticeable place on the package of the animal drug it made; and Huahshu marketed and advertised the “Toubaoxiling” product at its own expenses. It is argued in this article that this ground presented in the second-instance ruling is obvious untenable for these reasons. First, Huahshu did not make the drug, but only designed the package thereof under the Agreement. Second, the “Toubaoxiling” used in a noticeable place on the package it designed was the name particular to the drug Zhengtong made, and its use was authorized by Zhengtong. Third, Huahshu’s marketing and advertising, at its own expenses, the “Toubaoxiling” drug made by Zhengtong were acts performed under the Exclusive Distribution Agreement to maximumise the profit from the sale. While useful to make the “Toubaoxiling” drug more reputable, Huahshu’s act to execute said Agreement would not change the ownership of the rights and interest in the name of “Toubaoxiling” and in the non-registered mark. If Zhengtong had authorized several dealers to sell its “Toubaoxiling” product, and all these dealers design their own package and carried on advertising for the product, according to the logic of the second-instance ruling, “Toubaoxiling” would becom a non-registered mark as a result of use of it by all these dealers. In this case, the mark should have been owned by all these dealers, and the manufacturer would have owned nothing of it. This would have been obviously unfair. Obvious, it was legally and reasonably baseless to have determined in the second-instance ruling that Huahshu had acquired the right and interest in the non-registered mark in respect of the name by way of use of the name of Zhengtong's goods.

Huahshu's acts of using and advertising the name "Toubaoxiling" for the goods are merely acts for executing the Agreement. As was pointed out in the retrial ruling, the acts, while enhancing the distinguishing function of the name "Toubaoxiling" for the product, have made it possible for Huahshu to get the contractual consideration[13], and the acts, in essence, may be deemed to be the special acts of use by Zhengtong, and would not legally result in the changed ownership of the name "Toubaoxiling" for the goods.

Name of goods and its mark should be owned by the same entity

Under Articles 1 and 10 of the Exclusive Distribution Agreement, Huahshu should not make Toubaoxiling, and Zhengtong had the right to continue making said product after the Agreement expired or terminated before the date of expiration, and Huahshu should not use its own corporate "HUSHU" mark (which was reconfirmed when the two parties terminated the Agreement). It is determined in the second-instance ruling that Huahshu acquired the name particular to the reputable goods and the non-registered mark "Toubaoxiling" via use, which means that Huahshu was allowed to make "Toubaoxiling" product, and Zhengtong should not continue making said product. This obviously violates the Agreement. Accroding to the determination made in the second-instance ruling, Huahshu's acquision of the non-registered mark "Toubaoxiling" and Zhengtong's owning the prior acquired the name of the mark "Toubaoxiling". This did not correctly resolve the dispute between Huahshu and Zhengtong over registration of the mark. Rather, it would cause a new conflict between the mark and the name of the goods.

4. Proposed amendment to Article 15 of the Trademark Law

As the comparison between Article 15 of the Trademark Law and Article 6septies of the Paris Convention shows, it is not difficult to see that the two provisions are obviously different in these aspects. First, they are different in expression used. In the Paris Convention the concept of "mark proprietor" is used, while the Chinese term meaning "one that an agent or representative works for" (but in the English version of the Trademark Law the term "mark owner is also used)" is used in correspondence thereto in the Chinese Trademark Law. The Chinese term has given rise to ambiguity that should not have arisen in practice since it is held to be applicable to the "relationship of trademark agent or trademark representative". Second, they are different in method of protection. The Chinese Trademark Law only provides that "if the owner opposes the registration of a mark applied for, the application shall be refused and use of the mark shall be prohibited, while the Paris Convention empowers a mark proprietor to oppose and have the registration cancelled" and to request to assign the registration to itself if the law of the member state so allows. Third, they are different in the absence of provision on exception: the Paris Convention provides that "unless such agent or representative justifies his action", but the Chinese Trademark Law does not provide for the exception.

While the Chinese Trademark Law provides for the registration doctrine and the first-to-file doctrine, the life of a mark resides in its use. Application and registration of a mark should not violate the industrial and commercial customs of good faith, nor infringe another party's prior mark. Articles 15 and 31 of the Trademark Law both provide for the protection of non-registered marks. The Trademark Law should be amended to prevent registration by unfair means and to further enhance protection of prior used marks and no longer taking the "relationship of trademark agent or trademark representative" or "having certain influence" as the conditions for the protection. A separate provision may be set forth that "where a mark applied for registration is identical with or similar to a mark another party has used before in respect of the identical or similar goods and the applicant knows or has the reason to know about the existence of the other party's mark, the mark shall not be registered unless the other party allows the registration of said mark"[14] to replace the Articles 15 and Article 31 of the Trademark Law that "an applicant shall not register in an unfair means a mark that is already in use by another party and has certain influence". And on the basis of this, we should draw on the provision of Article 6septies of the Paris Convention on "compulsory assignment' and empower an owners of his prior non-registered trademark to request another party that has preemptively registered it to "assign" said mark to him.

The author: Director of the Comprehensive Division of the Trademark Review and Adjudication Board of the State Administration for Industry and Commerce

[1] For the details of the basic facts of the case, see the TRAB's Adjudication No. Shangpingzi 289/2005 on Dispute over the "Toubaoxiling" Trademark No. 3304260; the Beijing No. 1 Intermediate People's Court's

Administrative Ruling No. Yizh ongxingchuzi 437/2005; the Beijing Higher People's Court's Administrative Ruling No. Gaoxingzhongzi 93/2006; and the Supreme People's Court's Administrative Ruling No. Xingtizi 2/2007.

[2] Yi Jihua from the Legal Affairs Work Committee of the National People's Congress, Interpretation and Guidelines for Application of Trademark Law of the People's Republic of China, the Publishing House of Research, 2001, Pp. 91 – 95. This interpretation was adopted in the second-instance ruling, and it was, thus, decided that Zhengtong and Huahshu were in the relationship of cooperation distribution, not in the relationship of agency.

[3]An agent refers to a party that acts in the name of a mark owner within the authorisation according to his own will and whose action has effect on the mark owner; a representative means a party that exercises the power on behalf of a legal entity or any other organization under the law and pursuant to the articles of association of the entity. See Zhao Xibing from the Legal Affairs Work Committee of the National People's Congress, Interpretation of the New Trademark Law, the People's Court Publishing House, 2002, Pp. 65 – 66.

[4] The TRAB's Trademark Examination Standards (II) "Standards for the Examination of Unauthorised Application for Registration of Mark of Trademark Owner.

[5] Ever sine the Regulations went into effect, the TRAB has been interpreting the "agents" as including dealers or distributors, which has plaid an active role in preventing agents from carrying on acts of unfair competition in the form of preemptive registration of marks, For example, in the case of registration of trademark No. 347501 by unfair means, the TRAB decided that the "agent" in the exclusive distribution contract was an "agent" provided for in Rule 25, paragraph one (3), of the Implementing Regulations of the Trademark Law. See the TRAB's Adjudication No. Shangpingzi 231/1993 on the case of registration of mark No. 347501 by unfair means published in the Selected Cases of Trademark Review and Adjudication complied by the TRAB, the Industry and Commerce Publishing House, 1994, Pp. 19 - 21.

[6] On 22 December 2000, Wang Zhongfu, former Commissioner of the SAIC pointed out in his explanation of the draft Amendment to the Chinese Trademark Law that, according to Article 6septies of the Paris Convention, and considering the practical situation of constant increase in registration of other parties' trademark by unfair means, the provision of said Article 6septies of the Paris Convention was added to Article 15 of the Trademark Law.

[7] Bodenhausen, Guide to the Application of the Paris Convention for the Protection of Industrial Right, translated by Tang Zongshun and Duan Ruilin, the China Renmin University Press, 2003, P.306.

[8] Monya Nobuo (Ed.), Fifty Lectures on Trademark Law, translated by Wei Qixue, the Publishing House of Law, 1987, Pp. 255-258.

[9] The "agent" is construed in the Trademark Examination Standards as being not limited to the civil law concept. It is consistent with that of the international treaty. But the "representative" construed as being limited to the concept of representative under the civil law. For that matter, "agent" and "representative" are not consistently construed.

[10] It was held in the retrial of the case that to cease an act of an agent or representative who knows about or uses another party's trademark due to the special dealership to apply for registration of the latter's trademark by unfair means and in bad faith, the "agent" provided for in Article 15 of the Trademark Law should be broadly construed, without limiting it to the trademark agent or representative appointed by the trademark applicant or registrant to act within the scope of authorisation for matters of trademark registration prosecution. They should include agents or representatives, such as general (exclusive) distributors and general (exclusive) agents in the sense of special dealership. Since Huahshu involved in the case was an exclusive distributor, there would be no disagreement on the application of the interpretation of agent or representative to the present case. But views were divided as to the law application in connection with acts of applying for registration of others' trademark by unfair means by secondary distributors or dealers other than general distributors or agents.

[11] Under Article 2 of the Supreme People's Court's Interpretation of Several Issues Relating to Application of Law to Trial of Civil Cases of Unfair Competition, names having distinctive character to distinguish sources of goods should be determined as particular names.

[12] Under Article 6 of the Farm Chemicals Administration Regulations, China adopts the system for farm chemicals registration. Rule 12 of the Measures for Implementing Farm Chemicals Administration Regulations provides that "when applying for registration of a farm chemical, a manufacture may apply for use of the name of the goods of the farm chemical. The name of the farm chemical shall meet the prescription, shall not be too descriptive and misleading. A name of farm chemical shall be used by the applicant upon approval by the Ministry of Agriculture.

[13] The contractual consideration includes qualification of exclusive distributional agent and profit from sale of Zhengtong's "Toubaoxiling" products.

[14] Similar legislation includes the Trademark Law of the Taiwan Region, Article 23, paragraph fourteen of which provides "A trademark application shall be rejected if the proposed trademark is identical or similar to a trademark that has been used prior by another person on the identical or similar goods or services, and

the applicant thereof is aware of the existence of the said trademark through contractual, geographical, or business connections, or any other relationship with the said person. However, the aforementioned shall not apply to an application filed with consent from the said person."