January 23, 2025

Legislative Affairs Commission of the
Standing Committee of the
National People's Congress
No. 1, Qianmen West Street, Xicheng District,
Beijing,
People's Republic of China
Postal Code: 100805

Via Fax: *8610-63096644*

Re: "Anti-Unfair Competition Law of the People's Republic of China (Draft Amendment)" (December 23, 2024)

Dear Legislative Affairs Commission:

The Intellectual Property Owners Association (IPO) appreciates the opportunity to respond to the solicitation of opinions on the *Anti-Unfair Competition Law of the People's Republic of China (Draft Amendment)"* ("Draft") published on December 23, 2024.

IPO is an international trade association representing a "big tent" of diverse companies, law firms, service providers and individuals in all industries and fields of technology that own, or are interested in, intellectual property (IP) rights. IPO membership includes over 125 companies and spans over 30 countries. IPO advocates for effective and affordable IP ownership rights and offers a wide array of services, including supporting member interests relating to legislative and international issues; analyzing current IP issues; providing information and educational services; and disseminating information to the public on the importance of IP rights.

IPO recognizes the importance of the objective of the Draft to promote fair competition by enhancing measures to forbid and punish unfair competition. IPO appreciates the efforts from the Standing Committee to try to promote fair competition. IPO hopes that our comments below will be helpful during the process of finalizing the Draft.

General Comments

As a preliminary comment, IPO is supportive of the steps being taken by the Standing Committee to promote fair competition by enhancing measures to forbid and punish unfair competition. Our comments set out below with respect to certain articles are primarily directed to further enhancing some measures against unfair competition, and revising other measures to better promote competition.

Articles 6, 14, and 15

Articles 6 and 14 recite "platform operator," while Article 15 recites "large enterprises and other business operators." IPO proposes making this language consistent between these Articles and replacing all of the above with "business operators," as the actions to be prohibited in these Articles 6, 14, and 15 should not be only applicable to platform operators and large enterprises, but should apply to all business operators.

Article 7

In the preamble to Article 7, IPO proposes using the "likelihood of confusion" standard to be consistent with Article 57(2) of the Trademark Law. IPO also proposes that the preamble reference confusion with respect to services in addition to the existing reference to confusion with respect to goods. IPO therefore suggests that the preamble to Article 7 be replaced with the following:

> Article 7: Business operators shall not engage in the following acts such that their goods or services would be likely to be confused with the goods or services of others or so as to lead to the mistaken belief that a specific connection exists between them and others: ….

IPO proposes that similar revisions be made to Article 7(6) so that it reads as follows:

> (6) Other acts of confusion sufficient to cause ~~people to mistake~~ a likelihood of confusion between their goods or services ~~for~~ and the goods or services of others or to ~~believe~~ cause the mistaken belief that a specific connection exists ~~with~~ between them and others.

IPO further proposes the elimination of Article 7(5), which prohibits "unauthorized use of the commodity name, enterprise name (including abbreviation, trade name, etc.) of another person that has certain influence as their search keyword."

Although this same provision was incorporated into the Interim Provisions on Anti-Unfair Competition on the Internet, IPO notes that the proposed amendment is inconsistent with global competition legal principles. For example, the Competition Commission of India held that competitive keyword advertising benefits competition. *In Re Google LLC, Google India Pvt. Ltd., Google Ireland Ltd.*, Comp. Comm'n India Nos. 07 and 30 of 2012, Feb. 8, 2018.[1] The

[1] https://www.cci.gov.in/antitrust/orders/details/746/0

United States Federal Trade Commission similarly found that agreements among competitors to restrict bidding on each other's trademarks were anti-competitive. *In the Matter of 1-800 Contacts, Inc.*, U.S. Fed. Tr. Comm'm No. 9372, Oct. 27, 2017[2] (subsequently overturned on other grounds). See also *Google Inc v Australian Competition and Consumer Commission* (No. HCA 1, 2013)[3] holding Google had not engaged in "misleading or deceptive conduct" by allowing advertisers to bid on trademarked keywords; the Paris Court of Appeal (No. 13/05025, 2014)[4] holding Google's passive involvement in keyword selection did not make it liable for trademark infringement or unfair competition; Judicial District of São Bento do Sul 1st Court (No. 500194-66.2013.8.24.0058, 2015); Spanish Supreme Court Civil Chamber (No. 105/2016, 2016); Court of Milan (No. 40551/2015, January 2016); *Vancouver Community College v. Vancouver Career College (Burnaby) Inc.*, British Columbia Court of Appeal (BCSC 1470, 2015);[5] *Veda Advantage Limited v Malouf Group Enterprises Pty Limited*, Federal Court of Australia (FCA 255, 2016).[6]

The proposed amendment also essentially holds competitive keyword advertising to be per se unlawful, and does not take into account the factors typically considered by Chinese courts and courts around the world in considering whether bidding on a third-party's name in fact amounts to unfair competition or trademark infringement (i.e., whether such use gives rise to a likelihood of confusion, whether the keyword is being used in bad faith, etc.). Courts in the vast majority of countries worldwide, including many of the highest judicial bodies, have consistently found that keyword bidding on all terms, including branded terms, does not violate trademark law. For example, the European Court of Justice (CJEU) in *Google France v Louis Vuitton* concluded that the provision of online ads based on keywords protected by trademarks did not violate EU trade mark law. CJEU Joined Cases C-236/08 to C-238/08, 2010.[7] The India Supreme Court also recently observed that chances of confusion between two established competitors based on trademark keyword advertising was low. *Google LLC vs. MakeMyTrip (India) Pvt. Ltd.*, 147/2022 & CAV 155/2022,[8] affirming decision of the High Court of Delhi.[9] United States appellate courts also have recently and consistently rejected claims of trademark infringement based purely on competitive keyword bidding. *Lerner & Rowe, PC v. Brown, Engstrand &*

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[2] https://www.ftc.gov/system/files/documents/cases/docket_9372_1-800_contacts_inc._initial_decision_final_redacted_public_version.pdf
[3] https://jade.io/article/289620
[4] https://f.datasrvr.com/fr1/514/22207/13-05025.pdf
[5] https://www.canlii.org/en/bc/bcsc/doc/2015/2015bcsc1470/2015bcsc1470.html
[6] https://wipolex-res.wipo.int/edocs/lexdocs/judgments/en/au/au100-jen.html
[7] https://curia.europa.eu/juris/document/document.jsf;jsessionid=7E12874C568120EB18ED6BF55E40FDB3?text=&docid=73281&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10586353
[8] https://api.sci.gov.in/supremecourt/2024/2135/2135_2024_1_5_51212_Order_07-Mar-2024.pdf
[9] https://indiankanoon.org/doc/142523116/

Shely, LLC (9th Cir. Oct. 22, 2024);[10] *1-800 Contacts, Inc. v. JAND, Inc. (2d Cir. Oct. 8, 2024)*.[11] Inconsistent rules make it more challenging for globally-operating companies to manage their search engine advertising practices.

In light of the foregoing, if Article 7(5) is not deleted, IPO would propose, in the alternative, the inclusion of additional qualifying language making explicit the factors necessary to find bidding on a third-party name as a keyword to be unfair competition. Such a revision could read as follows:

> Article 7. Business operators shall not engage in the following acts of confusion, causing people to mistake their goods for the goods of others or to believe that a specific connection exists with others:
> …
> (5) Unauthorized use of the commodity name, enterprise name (including abbreviation, trade name, etc.) of another person that has a certain influence as their search keyword in a manner that gives rise to a likelihood of consumer confusion or otherwise constitutes bad faith;

IPO also observes that the final paragraph of Article 7 does not align with proposed Article 22, as there is no knowledge requirement in Article 7 and knowledge is a requirement of Article 22. Liability should not be imposed on parties that do not have knowledge that the acts violate the law, so IPO believes Article 7 should be consistent with Article 22 in that regard. Otherwise, the inconsistency is likely to lead to conflicting judicial interpretations of the law. This should be remedied in a manner that only imposes liability where a business operator knowingly facilitates acts of confusion. IPO accordingly proposes the following amendment:

> Business operators shall not knowingly provide convenience for others to engage in acts of confusion.

IPO further recommends that new clauses be added to the law confirming that the filing of a trademark application in bad faith constitutes an act of unfair competition, and allowing Market Supervision Bureaus (MSBs) to impose fines against violators. This could be addressed by adding the following at the end of Article 7: "The filing of a trademark application in bad faith is deemed to be an act of unfair competition."

This addition would then allow the imposition of the remedies available for breaches of Article 7 as set out in Articles 21 and 22. Since 2019, Chinese courts have recognized bad faith filings as

[10] https://scholar.google.com/scholar_case?case=3976839989881267549
[11] https://scholar.google.com/scholar_case?case=11521955381349541862

unfair competition and awarded compensation of registry-related legal costs, subject to the plaintiff demonstrating that the defendant has actually used the pirated mark. Widening the scope of protection to the mere filing of marks in bad faith – and without evidence of the actual sale of goods bearing the mark - should create significant deterrence against bad faith filers in China. The benefits of such deterrence will be enjoyed not only by victim brand owners but by the Trademark Office and Trademark Review and Adjudication Department of the China National IP Administration (CNIPA) and the Beijing courts, all of which bear significant burdens in dealing with registry proceedings involving bad faith filings. It is our understanding that CNIPA issued a draft amendment of the Trademark Law in 2023 that included analogous language. But we believe it critical for this issue to instead be addressed in the Anti-Unfair Competition Law.

Article 10

IPO proposes clarifying in this Article that modifications of misappropriated trade secrets and use of such modified trade secrets shall constitute actionable trade secret misappropriation. We propose making this addition to the Article: "The word "use" in this article includes modifying trade secrets acquired in violation of the Law or using the modified trade secrets."

IPO believes this addition is appropriate to reflect certain realities regarding trade secret misappropriation. In practice, misappropriators sometimes do not use trade secrets acquired by illegal means directly; for example, they might modify the trade secrets to conceal the sources, or allow others to use the modified information. Such modification of a misappropriated trade secret is still wrongfully using the trade secret and should be deemed trade secret misappropriation. Another example of a use that should be prohibited is creating the design for a product or process based upon the misappropriated trade secret knowledge that certain experiments have failed.

At least one court in China agrees and has concluded that modification of misappropriated trade secrets constitutes misappropriation. In the case of *Chongqing Changshou Xinxieli Chemical Engineering Co. v. Hu Xiantang* ((2010) Yu Yi Zhong Fa Min Chu Zi No. 0055), the Court held that "regardless if the defendant was using [the trade secrets] directly or after making minor improvements, the defendant acquired the trade secrets by illegal means, and the nature of the defendant's misappropriation acts does not change." The judgment confirmed that modification of trade secrets was an act of misappropriation.

From a perspective of legislative intent and policy consideration, the goal of protecting trade secrets is to protect intellectual property and encourage innovation. The core principle of modern trade secret law is that "use" is very broadly interpreted to include any behavior that was even inspired by access to the secret information, or that otherwise advantages the misappropriator to begin their own work. With or without modification, using trade secrets acquired by illegal means constitutes misappropriation, and it causes damage to legal owners. Allowing misappropriators to rely on modification as a defense to legitimize their wrongful acts would open the door to trade secret theft, permitting trade secret misappropriators to benefit and true innovators to suffer. This anomaly clearly contravenes the objectives of the Anti-Unfair Competition Law to promote fair competition, counter unfair competition, and protect businesses' legitimate interests. It is also inconsistent with China's national policy of encouraging self-reliant innovation.

Neither the current Anti-Unfair Competition Law nor the Amendment, however, expressly specifies that such acts of modification constitute trade secret misappropriation. We suggest writing this principle into the Anti-Unfair Competition Law.

Article 13

This Article prohibits certain business activities on the internet using forbidden means. In the draft revision, "technical means" in then-Article 12 has been replaced with "data, algorithms, technology, platform rules, and the like." IPO suggests replacing the latter with "technical and/or non-technical means" or "any means" to further the revision's apparent intent to provide more flexibility and scope, which IPO supports.

Article 13(4) is a new provision that specifies that using fraud, coercion, electronic intrusion or other improper means to obtain data legally held by others is a violation. In order to strengthen this prohibition, IPO suggests deleting "legally" in order to better discourage using improper means to obtain or use *any* data held by others, in order to reduce the burden on plaintiffs to prove in all cases that their data is legally held. IPO therefore proposes this revision:

> (4) Obtaining and using data ~~legally~~ held by other business operators by fraudulent, coercive, electronic intrusion and other improper means;

Article 13(5) is also a new provision that prohibits "[a]busing platform rules and conducting malicious transactions." It is unclear what transactions would be considered "malicious," so IPO therefore respectfully requests more clarity (for example, by referencing the Anti-Monopoly Law).

Article 18

This new article suggests that where a "business operator" is suspected of violations, the MSBs may "conduct interviews" and "request measures be taken for timely rectification." We suggest this language be amended and expanded to require operators to cooperate with MSB investigations (as is already provided in the Trademark Law), including in particular by disclosing the source of infringing goods. This could be accomplished through the following revision of Article 18:

> Article 18. If a business operator is suspected of violating the provisions of this Law, the supervision and inspection department may conduct interviews with its legal representative or person in charge, requesting them to take measures for timely rectification. <u>Business operators shall co-operate with such investigations and requests including, but not limited to, by disclosing the source of their infringing goods.</u>

Article 22

Consistent with Article 62 of the Trademark Law of China, we suggest that resellers of infringing goods under the law be required to provide information on the legal source of the goods – a measure that will both help to prove the sellers' good faith as well as to assist enforcement authorities and IP owners in investigating the factory source of the goods. This can be accomplished by making the changes shown below to Article 22, paragraph 2:

> Article 22. Where a business operator violates the provisions of Article 7 of this Law by engaging in acts of confusion or knowingly providing convenience for others to engage in acts of confusion, the supervisory and inspection authorities shall order it <u>to provide information on the source of its infringing goods and shall order it</u> to cease the illegal acts and confiscate the illegal goods.

Articles 22, 23 and 24

Articles 22, 23 and 24 provide for the revocation of business licenses for violations in serious circumstances. In Article 22, such revocation is in parallel with fines. In Articles 23 and 24, it is not clear whether such revocations are in parallel with fines.

Therefore, IPO proposes revising Articles 23 and 24 to parallel the wording in Article 22 (i.e., the revocation of the business license should be done together with fines). Otherwise, this would send a message that the actions in Articles 23 (bribery) and 24 (fake advertisement) are less severe than those in Article 22 (confusion).

Proposed Article 22A

IPO lauds the new language in Article 6 confirming the obligation of platform operators to provide rules on fair competition in their service agreements and to take necessary and timely measures to stop acts of unfair competition when violations occur. However, the draft law fails to provide clear provisions for either civil remedies or administrative sanctions for violations of Article 6. While in practice IP owners have been able to pursue civil remedies against platforms for their failure to take necessary measures, they have generally been unable to reliably pursue administrative complaints against platforms for such violations.

As such, we suggest a provision be added to address these gaps, perhaps with a new clause that is based upon the language of Article 22 of the draft. For example, a new Article 22A could be introduced to provide:

> Where a platform operator violates the provisions of Article 6 by failing to take reasonable steps to prohibit acts of unfair competition on their platforms, the supervisory and inspection authorities may impose a fine of not more than RMB 1 million [US$137,000].

Article 23

Article 23 is a revision of previous Article 19. The fine against bribery in Article 23 has been reduced, and the fine mechanism has been made more complex. As bribery should be discouraged (consistent with Chinese government policy), IPO proposes increasing the maximum fine, and returning to the original simple mechanism.

Articles 24, 25, 27, and 28

The amendments to Article 24 remove the minimum punishment amount for non-serious cases. The minimum punishment amount, however, has been increased in Articles 25, 27 and 28 (and IPO supports increasing the punishment amount, in order to better deter violations of these Articles). In light of this inconsistency, IPO proposes restoring a minimum punishment amount in Article 24, and increasing it to RMB 300,000, both for consistency and to better deter violations of Article 24.

Articles 27 and 28 have been amended to increase the amount of maximum fines. However, such an increase has not been made in Articles 24 and 25. IPO proposes increasing the maximum fines in Articles 24 and 25 for consistency, otherwise this may send a message that the violations covered by Articles 24 and 25 are not as forbidden as those in Articles 27 and 28.

Article 25

Article 25 provides measures to punish violations of Article 10, and limits the amount of enhanced fines to "serious" circumstances. IPO suggests that "serious" is a vague term, and whether a violation warrants enhanced fines should be judged by the totality of circumstances. IPO therefore proposes amending Article 25 as follows:

> Article 25. Where a business operator or any other natural person, legal person, or unincorporated organization violates the provisions of Article 10 of this Law by infringing upon trade secrets, the supervisory and inspection authorities shall order it to cease the illegal acts and impose a fine of not less than RMB 100,000 but not more than RMB 1 million; if the circumstances are serious, as judged by the totality of circumstances, a fine of not less than RMB 1 million but not more than RMB 5 million shall be imposed.''

The Article also allows the supervision and inspection authorities to order businesses and third parties to cease the acts that constitute a violation of the provisions of Article 10. IPO believes that Article 25 should make clear that such an order can be made to prevent a future violation of Article 10, and not only to remedy a past violation of Article 10. Including clarifying language would comply with Article 39 of the TRIPS agreement (which provides that persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent) and Article 41 of the TRIPS agreement (which provides that members shall include expeditious remedies to prevent infringements in the IP enforcement procedures).

Article 34

While the draft amendments to Article 21 remove confiscating illegal gains as a remedy, new Article 34 restores it. However, Article 34 does not make clear that the illegal gains should be awarded to the plaintiff to make it whole. IPO thus proposes this amendment:

> Where a business operator violates the provisions of this Law by engaging in unfair competition, any illegal gains shall be confiscated and awarded to the plaintiff, except where they should be refunded in accordance with the law.

Article 40

IPO recognizes that while there may be instances where extraterritorial conduct warrants enforcement under the Anti-Unfair Competition Law, such jurisdiction should be exercised cautiously and sparingly to prevent unintended stifling of competition, which would be contrary to the aim of the Anti-Unfair Competition Law to *increase* competition. However, this Article creates overly expansive extraterritorial liability with few limitations. In addition to stifling competition, this is contrary to the international norm that one country ought not exercise state power over the territory of another unless a recognized exception applies.

For example, "long-arm jurisdiction" in the United States has important limitations that IPO suggests be incorporated in this Article. These include the requirement of "minimum contacts" with the forum. *See World-Wide Volkswagen Corp v. Woodson*, 444 U.S. 286 (1980).[12] Another limitation is that "traditional notions of fair play" permit the assertion of jurisdiction over a defendant in another jurisdiction only when a reasonableness requirement (that is analyzed using the following five factors) is met:

1. What is the burden on the defendant?
2. What are the interests of the forum in the jurisdiction?
3. What is the interest of the plaintiff in litigating the matter in that jurisdiction?
4. Does the allowance of jurisdiction serve inter-jurisdiction efficiency?
5. Does the allowance of jurisdiction serve inter-jurisdiction policy interests?

See Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987).[13]

IPO suggests that limitations such as those found above be incorporated into the law to provide consistency in the approaches of the legal systems of the U.S. and China, thereby promoting a predictable system that enables companies to operate successfully on a global basis. This will further, rather than stifle, competition, consistent with the aim of the Anti-Unfair Competition Law.

[12] https://scholar.google.com/scholar_case?case=2649456870546423871
[13] https://scholar.google.com/scholar_case?case=11850432900293030946

IPO thanks the Standing Committee for its attention to IPO's comments submitted herein, and welcomes further dialogue and opportunity to provide additional comments. IPO has enclosed this letter as translated herewith.

Sincerely,

Krish Gupta

Krish Gupta
President

Enclosure