

China Law Update*

Laws

1. *Tort Law*

Promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010.

The Tort Law provides protection for a series of citizens' personal rights, such as right to life, health rights, privacy rights, patent rights, and inheritance rights. Some of these rights are being given a clear legal provision for the first time. The Tort Law was finally passed following the Property Law, which is a further protection of individual rights. It is a large step forward toward the ultimate goal of creating a complete Civil Code.

Highlights of the Tort Law are as follows:

Firstly, it has clarified the meaning of mental damages. Prior to the Tort Law's enactment, the civil law for mental damages was not clearly defined. Although the State Compensation Law Amendment Bill under consideration is to establish the mental damages compensation system, it is still limited to the administrative areas. In judicial practice, mental damage cases are dealt with by the Interpretation of the Supreme People's Court on Problems Regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts. Article 22 of the Tort Law provides, "where any harm caused by a tort to a personal right or interest of another person inflicts a serious mental distress on the victim of the tort, the victim of the tort may require compensation for the infliction of mental distress." It is the first time that mental damages have been clearly stipulated in the current law system.

Secondly, the Tort Law has established a product recall system with the related punitive damages. Article 46 provides, "where any defect of a product is found after the product is put onto marketplace, the manufacturer or seller shall take such remedial

* The update covers the period from Dec.1, 2009 to Mar. 31, 2010.

measures as warning and recall in a timely manner.” Article 47 provides, “where a manufacturer or seller knowing any defect of a product continues to manufacture or sell the product and the defect causes a death or any serious damage to the health of another person, the victim shall be entitled to corresponding punitive compensation a timely manner.” However the Law has not clarified the definition of punitive compensation.

Thirdly, joint liability of Internet Service Provider has been established. Before the Tort Law came into being, China just had the 2004 Interpretation of the Supreme People’s Court on problems regarding disputes of tort claims in relation to copyright of computer network. However, there are an increasing number of disputes concerning infringements of people’s reputation and acts revealing the one’s privacy such as “human flesh search.” Moreover, the Interpretation does not clarify the duty of Internet Service Providers. The new law thus will fill this gap. Article 36 provides that “a network user or network service provider who infringes upon the civil right or interest of another person through the Internet shall assume the relevant tort liability.”

2. *Amendment to the Law on Renewable Energies*

Promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 26, 2009, effective Apr. 1, 2010.

This amendment aims at promoting the development of renewable energies and elaborating on the Chinese government’s policies and commitments to reduce emissions, in light of the practical needs for overall development. The highlights of this amendment are as follows:

First, the government’s goal to promote the development of renewable energies is further substantiated by adding requirements on development planning, i.e. relevant departments of the State Council shall formulate plans for the facilitation of the middle-long term goal (2007-2020) to exploit and utilize national renewable energies, with reference to the already published National Middle-Long Term Renewable Energies Development Plan.

Additionally, the amendment also commits the government to deal with various kinds of adverse factors which may prevent the development of low-carbon economy. By removing barriers of exploitation and ensuring utilization of renewable energies in the aspects of systems and technologies, these measures are

implemented to create a level playing field between traditional energies companies and renewable energies ones. The amendment stipulates expressly that “Grid enterprises shall enter into parallel operation agreements with the corresponding renewable energy generators to purchase on-grid electric quantity.”

Lastly, the amendment introduces mandatory government subsidies to compensate for price differences between renewable energy on-grid electricity and conventional energy on-grid electricity. The State shall implement the “Renewable Energy Power Generation’s Fully Protective Acquisition System”, which will set up a foundation for the development and support of renewable energy.¹

3. *Amendment to the Copyright Law*

Promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 26, 2010, effective Apr. 1, 2010.

This amendment is a response to a 2009 WTO Panel report finding of “[t]he Copyright Law, specifically the first sentence of Article 4, is inconsistent with China’s obligation under ... The Berne Convention ... and ... the TRIPS Agreement.”² The report was adopted and then became lawfully effective, which indicated executive procedure that would be carried out.³ The amendment thus shows China’s decision of accepting the conclusion and recommendation to amend Article 4.

Before the amendment, China required permits for all publications and had an examination mechanism for publications designed to filter illegal content before publications. Without approval from the examination authority in advance, no publication was allowed to be distributed, even though there was no violation of law or social interest.⁴ Many intellectual works were thus not protected by the Copyright Law because of the prior examination

¹ Li Zhi Qing, Ditan fazhan cuisheng kezaisheng nengyuan xinfu [Development of Low Carbon Induced New Law of Renewable Energy], China Energy Newspaper, Mar. 29, 2010, at 05, available at http://paper.people.com.cn/zgnyb/html/2010-03/29/content_476974.htm. (P.R.C.).

² Panel Report, China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362/R (Jan. 26, 2009), available at http://www.wto.org/english/news_e/news09_e/362r_e.htm.

³ Su Rufe, Guoji maoyi shijiao xia de zhuzuoquanfa disitiao diyikuan [The Modifications of the Article Four in Paragraph One in China’s Copyright Law], World Trade Org., Jan. 2010, at 25 25 (P.R.C.).

⁴ Chen Kai, Jiedu xin zhuzuoquanfa: yi zhuzuoquan chuzhi ying xiang guanli bumen dengji (Mar. 3, 2010), <http://finance.sina.com.cn/roll/20100303/16587493860.shtml>.

mechanism. After Article 4 was amended, however, the Law guarantees all intellectual works with protection, regardless of obtaining such advanced permission.

4. ***Amendment to the Electoral Law on the National People's Congress and Local People's Congress***

Promulgated by the Nat'l People's Cong., Mar. 14, 2010, effective Mar. 14, 2010.

The amendment was intended to address the developing needs of the Chinese legal system, to create a more justified and rational electoral system, as demonstrated in the following aspects.

Firstly, the number of people represented by each rural deputy was made equal to the number of people represented by each urban deputy. This removed the former unfair provision which granted rural deputies four times the civil representation of urban deputies. This also eliminated the disproportionate impact on predominantly rural ethnic minorities.

Secondly, since the number of deputies representing laborers and farmers has been declining in recent years, the Law provides a defined number of "grass-roots deputies" who represent the labor or farm groups. These deputies can speak out voices from the lower classes of the society who are easily neglected because there is a common view held by many Chinese that they are not important. If the number of "grass-roots deputies" keeps declining, their voices would gradually vanish. The amendment is intended to prevent the declining trend and to ensure a wide range of deputies who can represent people from all classes of China.

Thirdly, the amendment includes provisions to detail electoral procedures and facilitate full exercise of the right to vote. This provision includes the provision of election funds by the State Treasury, establishment of private voting booths for secret ballots, and of mobile polling boxes.

Existing problems still remain to be solved after the amendments. For example, there are shortcomings in the legal structure of the Electoral Law. Though the legislation did contain some principles for dispute resolution, no specific procedural rules were delineated as to how judicial authorities should participate in the dispute resolution mechanism and the amendment did not address this problem. Besides, during the election for deputies of the people's congress at the county or township level, people who are

not equipped with a good sense of democracy are easily affected by Chinese traditional culture, power and interest shared by the same clan, making the electoral procedure no more than a show.⁵ In other words, though the law may be better than it was, there are difficulties in its implementation.

Administrative Regulations

1. ***Amendment to the Implementation Rules of the Patent Law***
Promulgated by the St. Council, Jan. 9, 2010, effective July 1, 2010.

The amendment of the Implementation Rules of the Patent Law both modifies the prior implementation rules and adds new provisions for better practice.

The subjects affected by the amendment include: confidential review during applying for a patent to foreign;⁶ information disclosure system of genetic resources;⁷ the patent evaluation system, compulsory licensing system, and administrative penalties to the acts of counterfeiting patent, relevant provisions of patent application as well as review procedures and so on.

2. ***Amendment to the Regulations for the Implementation of the Audit Law***
Promulgated by the St. Council, Feb.11, 2010, effective May 1, 2010.

The amendment of the regulation is to coordinate with the new Audit Law effective on June 1, 2006. The amended regulation further clarifies the scope of audit supervising in order to guarantee the safety of State assets. In addition to auditing projects which are wholly owned by the State, audits must also be conducted when the government's investment exceeds 50% or when the government has the controlling power, even if its investment is less than 50%. Additionally, the amendment has

⁵ Li Yongyang Woguo xiangzhen rendadaibiao xuanju wenti yanjiu [*Research on Election of People's Congress's Representative of China's Township*] 12-13 (2009) (P.R.C.).

⁶ The Patent Law provides that any unit or individual who completes a invention in China and applies for foreign patent should first submit confidential review to the Patent Administration Department of the State Council, which is a standard international practice to safeguard national security.

⁷ The applicant shall explain in the request and fill out the form formulated by the Patent Administration Department of the State Council as to whoever completes the patent invention relying on genetic resources.

standardized the authority of audit oversight and strengthened the supervision of the auditing department.

3. ***Amendment to the Regulation on Customs Protection of Intellectual Property Rights***

Promulgated by the St. Council, Mar. 24, 2010, effective Apr. 1, 2010.

The amendment is aimed at making more specific rules of registered intellectual property and to deal with suspected infringing imported or exported goods. As a whole, the amended regulation makes more explicit rules concerning customs protection of intellectual property rights.

4. ***Notice of the State Council on Controlling the Rapid Rise of Home Prices in Some Cities***

Promulgated by the St. Council, Apr. 17, 2010, effective Apr. 17, 2010.

Without adequate rules set by the Chinese legal system, real estate agents who chase after short-term returns with extremely high profit gradually push the real estate market in China to a bubble economy, causing rapid surge in house prices.⁸ While the lack of governmental management is main reason engendering the housing boom, the Notice serves as one of measures to solve this problem.

Apart from giving fundamental directions as in all other notices, this notice comes up with many quantitative criteria which arouse public concerns and interests. In particular, it sets out various debt to equity ratios for real estate mortgages. For example, families (including debtors, partners and juvenile children) that purchase an apartment or a house bigger than 90 square meters for their own needs should not apply for a loan with less than a 30% down payment. For those who finance the purchase of a second apartment or house, the down payment should not be less than 50% and the interest rate ought not to be lower than 1.1 times prime rate. With detailed rules, though the Notice includes no specific rules but only guiding principles, it can still affect as a direction, leading the real estate market develop toward a healthy direction. However, the rules need to be detailed before the notice truly has real implementation capacity.

⁸ Zhu Yikun, Huang Binteng, Yizhi fangdichan paomo de falu duice tansuo [Legal Measure on Avoiding Bubble Economy in Real Estate], Legal F., July 2005 (P.R.C.).

Academic Developments

1. *Five scholars from Peking University petitioned the Standing Committee of the National People's Congress to review the Regulations on the Administration of the Demolition and Removal of Urban Houses.*

Without adequate rules set by the Chinese legal system, real estate agents who chase after short-term returns with extremely high profit gradually push the real estate market in China to a bubble economy, causing rapid surge in house prices.⁹ While the lack of governmental management is main reason engendering the housing boom, the Notice serves as one of measures to solve this problem.

According to the Legislation Law of China, citizens may make written petition to the Standing Committee of the National People's Congress where they find administrative regulations or specific regulations in contrary to the Constitution or laws. Written petitions shall be handled by the organs of the Standing Committee and be sent to special committees for review and comments when necessary.

The five professors from Peking University sent a letter to the Standing Committee on December 7, 2009. They contended that the Regulations on the Administration of the Demolition and Removal of Urban Houses ("Regulations") are in conflict with the principles and specific provisions in the Constitution, Property Law and Real Estate Management Law in the aspects of the protection of citizen's houses and other real estate, which leads to the imbalance between the urban development and the protection of private property. They petitioned for reviewing the Regulations and removing or modifying the Regulations.

The Petition letter listed three areas of conflict with the constitution and other laws:

Firstly, in accordance with the Constitution, the compensation shall be accomplished before the demolition and removal of the houses. However, the Regulations delay the compensation to be completed in the removal stage, which is supposed to be done in the expropriation stage.

⁹ Zhu Yikun, Huang Binteng, Yizhi fangdichan paomo de falu duitse tansuo [Legal Measure on Avoiding Bubble Economy in Real Estate], Legal F., July 2005 (P.R.C.).

Secondly, the subject of the collection and compensation shall be the State. Consequently, the relation of compensation for expropriation shall be an administrative legal relation. Nevertheless, the Regulations define the subject of compensation to be the remover, which makes the relation of compensation for expropriation be a civil legal relation.

Thirdly, it should be done beforehand to collect the houses before removing. Yet, the Regulations entitle the House Demolition Administrative Department to permit the remover to demolish in the absence of the premise of lawful collection.¹⁰

The current Regulations have not dealt properly with the relationship between the public demand for urban development in China and citizen's property protection. Nevertheless, the new amendment draft of the Regulations will finally be released to collect public opinions, which would enhance the protection of private rights.

2. Seminar on Theory and Practice of Patent Infringement Defense.

The Seminar on Theory and Practice of Patent Infringement Defense was held by the Beijing First Intermediate People's Court on November 30, 2009, at the China IP Training Center. The Beijing No.1 Intermediate People's Court is the court that first heard and has heard the largest number of patent cases in China. At the seminar, judges presented research concerning the cause of patent infringement defense, a variety of defenses with its legal bases and application, as well as problems they encountered during their twenty-year judicial practice. The discussion and heated debates among the attending legal experts and practitioners mainly concern the following topics:

Firstly, "[f]or Non-production or Business Purposes" under Article 11 of the Patent Law, "non-production and business purposes" by alleged infringer is an ingredient of patent infringement. Accordingly, in patent infringement litigation, defendants often make defense on account of this element. The

¹⁰ Shen Kui, Wang Xixin, Chen Ruihong, Qian Mingxing, Jiang Mingan, Guanyu dui chengshi fangwu chiqian guanli tiaoli jinxing shencha de jianyi [Suggestions on the Review of Regulations on the Administration of the Demolition and Removal of Urban Houses], available at <http://npc.people.com.cn/GB/14840/10553850.html> (P.R.C.).

research panel on the topic believed that it was impossible to address the matters in practice by directly making use of the concept of “non-production or business purposes” defense to apply to be an exemptible production and business entity. Meanwhile, it was impossible to merely use “production and business” purpose to cover infringing acts with non-profit making purposes. For that reason, the panel recommended interpreting the “for non-production and business purposes” element in the defense as “privately and not for profit-making purposes.”

Secondly, regarding the prior-use-right defense, as provided in Article 69(2) of the currently in force Patent Law that “where, before the date of filing of the application for a patent, any person who has already made the identical product, used the identical process, or made necessary preparations for its making or using, continues to make or use it within the original scope only” is deemed not to be an infringement of the patent right. As for the highly controversial scope of the prior use right, the research panel believed that it included not only acts of manufacture and use, but also those of sale, offer for sale and importation within the scope of the patent right.¹¹

Cases

1. *BMW v. Shi Ji Bao Ma Reputed Trademark Case, High Court of Hunan Province*¹²

The Plaintiff, Bavarian Motor Works Co., Ltd (BMW), is a world famous automobile manufacturer set up in 1916. The Company's trademarks “BMW with logo”, “BMW” and “Bao Ma” are ratified to be used in the 12th category commodities including motor vehicles, motorcycles and parts thereof, upon the approval by and registration in the China Trademark Office. The first and second Defendants, Shenzhen City Shi Ji Bao Ma Clothing Co., Ltd (Shi Ji Bao Ma) and Jia Duo Run Commercial Co., Ltd, used “MBWL with logo”, “MBWL” and “Bao Ma” as its Company's name. The third Defendant, Fu Xianqin, was an employee of Shi Ji Bao Ma who provided her bank account to gather loans and caution money for partnership. The High Court of Hunan Province ordered the three defendants on December 15,

¹¹ Xiao Hai, *Seminar on Theory and Practice of Patent Infringement Defence*, 100, China Patents & Trademarks, at 95.

¹² *People's Court Daily*, April, 22 2010, at 02, available at http://rmfyb.chinacourt.org/paper/html/2010-04/22/content_7966.htm.

2009 to stop infringing the registered trademark of the Plaintiff and creating unfair competition; they were required to remove its influence. In addition, Shi Ji Bao Ma Company and Fu Xianqin should compensate the Plaintiff's economic loss of RMB 500,000.

The High Court of Hunan Province held that the Plaintiff's registered trademark had become a reputed one after long-term use and wide publicity. The Plaintiff, as the owner of the trademark, was entitled to enforce its legitimate rights against the Defendants for causing public confusion as to the origin of the merchandises between the reputed trademark "BMW" and the relevant "MBWL" counterfeits. Since Defendant Fu Xianqin knew that Shi Ji Bao Ma was engaged in infringement acts but still provided her bank account as a means of facilitation, it was considered as a complementary act constituting the alleged tort and unfair competition. The first instance decision took effect as the defendants did not raise any appeal.

2. *Tangshan City Renren Information Service Co., Ltd. (Renren) v. Beijing Baidu Network Information Technology Co. Ltd (Baidu) Monopoly Dispute Case, Beijing First Intermediate People's Court*¹³

The Plaintiff, Renren, was a provider of medical and drug information, and consultation services. From March 2008, it began to pay for the paid websites rating program operated by Baidu. In May 2008, the Plaintiff had to reduce its payment due to its own business reasons. In July, it found the listings of Renren's website dramatically reduced. In September 2008, the Plaintiff found out, by way of checking the search listings made on Google and Baidu, that there were 6690 pages of search listings of the website on Google, while there were only as few as four pages on Baidu.

The Plaintiff believed that the Defendant, Baidu, had fully blocked out the website as the Plaintiff reduced its payment for the rating system on Baidu, thus causing dramatic reduction of the listings of the website. The Plaintiff also claimed that, in accordance to the news reports or articles it presented to the court, the Defendant's market share had exceeded by 50%. According to Article 19 of the

¹³ See *China Patents & Trademarks* No.1, vol.100, No.1, 2010, At 66.

Antimonopoly Law, Baidu had assumed a dominant position in China's search engine market. Taking advantage of its dominant position, the Defendant blocked the Plaintiff's website, and thus inflicted huge financial damage to the Plaintiff. Its act was contrary to Article 17 of the Antimonopoly Law, which constituted an abuse of its dominant position in the market by forcing the Plaintiff to increase its payment for the paid website rating program.

The Defendant made the following defenses. First, the Defendant did take measures to reduce the listings of the Plaintiff's website after the search engine automatically blocked the website for having large amount of junk external links which constitute fraud. Second, the Plaintiff's allegation of the Defendant's abuse of its dominant market position was not supported by the case facts.

This raised two main questions in this case. First, whether the Defendant occupied the dominant position in the "search engine service market in China". Article 19 provides that once a business' market share reaches 50% of the relevant market, it is presumed to have occupied a dominant market position. The Plaintiff claimed that the act of Baidu satisfied the condition of Article 19. However, the judge held that the Plaintiff's evidence was flawed and lacked support to prove that the Defendant had secured 50% of the market share in the search engine market.

The second question is based on an assumption that, even if Baidu has a dominant position, whether the Defendant abused its dominant position in the market. The Plaintiff argued that the Defendant took technological measure to reduce the listings of its website because it reduced its payment for the paid website rating program of Baidu. The Defendant counter-argued that the automatic blockages publicized by the Website Leader's FAQ, with its algorithmic rules and mode of punishments detailed to allow the Plaintiff to understand why Baidu had taken actions against "punishing" websites with large amount of junk links constituting fraud, which engendered the dramatic reduction of Renren website's listings. Nevertheless, the judge believed that the paid rating system and natural rating system are two independent systems. Only the former was closely related to the amount of payment, and the latter was unrelated and irrelevant. The act of reducing the payment thus had no direct relationship with the reduction of listings.

The Beijing No.1 Intermediate People's Court took the view that, according to the available evidence, the Plaintiff did not adduce sufficient evidence to substantiate the Defendant's dominant position in the search engine market in China, nor did it prove that the Defendant had abused its dominant position in forcing the Plaintiff's to increase payment for the paid website rating program. Therefore, the Court rejected all the Plaintiff's claims.

3. *Wang Fei v. Zhang Leyi Right Reputation Infringement Case, Beijing Chaoyang District People's Court*

On December 18, 2008, the Chaoyang District Court in Beijing issued a sentencing on Zhang about defamation. Zhang filed an appeal to the Second Court of Beijing, where a final judgment was held on December 23, 2009.

The case originated from Wang being disloyal to his wife Jiang Yan. Jiang committed suicide for Wang's disloyalty and his family's abominable behavior. Zhang, the classmate of Jiang registered a website with contents based on Jiang's blog, and linked it to some well-known websites. He also gave out articles and made public Wang's personal information. The condemnation of the netizens caused disruption to Wang's life in many incidences, such as his resignation of his work.

The Court found Zhang's behavior a violation of Wang's privacy. The disclosure of Wang's privacy infringed upon Wang's right of reputation. As the supervisor of the website, Zhang did not take any mitigating measures when the harm had taken place or after Wang sued him. Zhang was ordered to delete the related information and compensate Wang for moral damage.¹⁴

The case raises two issues. First, did Zhang's making public of Wang's personal information and history violate the victim's right of privacy? The academic debates remain largely inconclusive.¹⁵ The definition of privacy is two-folded. One prohibits the domination of peaceful personal life and the other guarantees a right of independent decision-making for the use of private information. Even though some of Wang's personal

¹⁴ Beijingshi chaoyangqu renmin fayuan shen li wang fei su zhang leyi qin fan mingyuquan an minshi panjueshu [Judgment of Wang Fei v. Zhang Leyi] Dec.18, 2008, at 10930 (Chaoyang D. People's Ct.).

¹⁵ Xin Chunxia, Shi yingxiang, wangluo yinsiquan gainian xinjie [New Comprehension on the Definition of Right of Privacy on the Internet], Journal of Gansu Political Science and Law Institute, Jul.2009, at 15.

information was already public accessible, the fact that more of his personal information was spread without his approval may still be regarded as a tortious act.¹⁶ The Court opined that private information should only be publicly accessible to people of proximity. Since Zhang purposefully spread Wang's personal information, in particular his emotional life which he unwilling to disclose to the wider public that included people not of proximity, Zhang's acts were held to be liable of defamation.¹⁷

The second issue considers how much Zhang should compensate for the harm caused by his tortious acts. Though the court held that "the contents written by Zhang himself and some of the netizens had broken the law and violated Wang's right of privacy and reputation,"¹⁸ these contents had not be treated as proof of the punishment. The Court only found the supervisor of the website, Zhang, liable for compensating Wang's loss as he had not dealt with the defamatory information in time. Due to the difficulty in ascertaining evidence to prove the netizens' commitment of defamation, the law could not find them liable.¹⁹ Based on the Tort Law, which was issued after the case, in light of protecting the freedom of speech, only the network service providers are under a statutory duty²⁰ to examine and filter violating contents written by the netizens, failure of doing so will

¹⁶ Renrou sousuo yinqin diyi an, Bai hua faxue gongzuofang diyi qishi lu [This is a record of a seminar, words cited came from Zhong Kai], *available at* <http://www.bhtlaw.cn/Introduction/Discussion/2010-01-03/318.html>

¹⁷ Editor's note: China used to treat all privacy cases as defamation cases in accordance with the No.140 of Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China, saying that:

In case anyone propagates the private information of any other person in writing or orally, or fakes acts to uglify the personality of other person overtly, or damages another person's reputation by ways of insulting and slandering, which result in a certain influence, such act shall be determined as act infringing the citizen's right of reputation.

Issued on Dec.26th 2009, Tort Law of the People's Republic of China (thereinafter, Tort Law) No.2 has affirmed right of privacy officially but still is short of the judgment basis and the compensation standard.

¹⁸ Wang Fei v. Zhang Leyi, *supra* note 1.

¹⁹ Liu Peihe, Tian Yining, Renrou sousuo diyi anzhi fenxi [*Analysis of the First Case on Renrou Search*], *Contemporary Law Review*, May 2009, at 128.

²⁰ Editor's note: Article 36 of Tort Law: "If, after being notified, the network service provider fails to take necessary measures in a timely manner, it shall be jointly and severally liable for any additional harm with the network user." This article has clarified the obligation of the network service provider. People who are violated on the internet can demand the network service provider takes the responsibility directly even it had not been recognized by the court to get a remedy from the tort-feasor.

possibly incur legal liability upon them.²¹ However, netizens do not have a duty to filter their words before posting them online.

4. ***Zhu Deyong v. Shanghai Weizong Media Co., Ltd., Shanghai First Finance & Economics Media Co., Ltd. and China Beijing Television Station, Beijing Haidian District People's Court***

The famous Taiwan cartoonist Zhu Deyong made a complaint against Shanghai Weizong Media Co., Ltd. (Weizong Media), Shanghai First Finance & Economics Media Co., Ltd. (First Media) and China Beijing Television Station (BTV), claiming that the three Defendants infringed his copyright in one of his famous cartoons. The People's Court of Haidian District in Beijing Municipality made a final judgment on April 23, 2010.

Plaintiff, Zhu, contended that the action of the three Defendants infringed his copyright and constituted unfair competition because they adopted his famous cartoon "Guan Yu Shang Ban Zhe Jian Shi" into their talk show named "Shang Ban Zhe Dian Shi." In addition, they advertised the show with a popular slogan from Zhu's cartoon without any permission from him. The Court held in the final judgment that Weizong Media and First Media's misconduct constituted unfair competition and they had to bear the responsibility to compensate the damages to Zhu, while BTV was not responsible for the examination of the broadcasted content that gave rise to unfair competition. Therefore, Zhu's complaint against BTV was dismissed.

There are two main issues in this case. First, whether the acts of Defendants constituted infringement of Zhu's copyright. To begin with, it should be made clear what kinds of action would fall within the definition of infringement of copyright under the Chinese law concerning intellectual property. Article 46 of the Copyright Law lists eleven kinds of acts that infringe on copyright and Article 47 stipulates another eight kinds in a more specific way, from which it can be noted that acts of infringement of copyright are listed out in the Chinese legal framework²² but

²¹ Zhang Zuoguo, Cong renrou sousuo kan wangluo yanlun ziyou de heli xianzhi, [Reasonable Restriction on Freedom of Speech, from Renrou Search], Journal of Adult Education of Gansu Political Science and Law Institute, Jun.2009, at 11.

²² Lin Guorong, Qin fan zhu zuo quan de gou cheng yao jian - qin fan zhu zuo quan de fa lv wen ti yan jiu zhi yi [The Components of the Copyright Infringement], J. Fuqing Branch of Fujian Normal U., Dec. 2003, at 8, 9 (P.R.C.).

these few examples of infringement of copyright never result in one definite concept in law.²³ Theoretically, however, infringement of copyright requires at least four elements, namely, the Plaintiff's copyright of his or her work, the possibility that the Defendant gets access to the work and the action he or she copies it, a substantive similarity between the Plaintiff's work and the infringed, and the fact that no justifiable causes exist, which have been provided in Article 22 in Copyright Law.²⁴ There were little arguments on the other three elements apart from the substantive similarity element. When determining substantive similarity, emphasis should be put on substantive contents rather than the quantity of contents.²⁵ In this case, though Defendants used the title and a popular slogan in the Plaintiff's cartoon without authorization in their talk show, there were few similarities between the contents of the talk show and the cartoon. For this reason, the Court dismissed the Plaintiff's claim that Defendants have infringed his copyright.

Second, whether BTV, one of the three Defendants, bore the responsibility to examine the show before it was broadcasted. According to provisions in the Advertising Law of the People's Republic of China, a self-examination system of advertisements on usual commodities and services shall be established for publisher in reviewing the contents of the advertisements before publication, while contents of an illegal nature shall be filtered.²⁶ Because false advertisements deceive or mislead the public, an advertisement publisher, who is in a better position with more available resources of information than the public, should bear the responsibility to examine the advertisements in avoiding the bad influence they may cause.²⁷ In addition, according to Article 24 of the Anti-Unfair Competition Law, "If the traders design, make or publish a fake advertisement with the knowledge of the true situation, the authority who is responsible to supervise and examine advertisement shall order to stop the illegal activities,

²³ *Id.* at 10.

²⁴ Han Chengjun, *Zhu zuo quan qin quan xing wei de pan ding* [Definition of Infringement of Copyright], Acad. Exch., Aug. 2007, at 52, 52-53 (P.R.C.); Chu Jing, *Chu Yi Zhu Zuo Quan Qin Quan Zhi Jie Ding* [Brief Comments on the Definition of Copyright Infringement], J. Hunan City U., Mar. 2007, at 45 46-48(P.R.C).

²⁵ Han Chengjun, *Zhu Zuo Quan Qin Quan Xing Wei De Pan Ding* [Definition of Infringement of Copyright], J. Henan Normal U., Jan. 2001, at 78, 79-81 (P.R.C.).

²⁶ Qi Liulei, *Lun xu jia guang gao fa bu zhe de fa lv ze ren ji xiang guan zhi du gou jian* [ON FALSE ADVERTISEMENT PUBLISHERS' LEGAL RESPONSIBILITY AND RELATED SYSTEM CONSTRUCTION] 8-10 (2008).

²⁷ *Id.* at 14-15.

confiscate such illegal income and fine in accordance with the law.” As far as the editor was concerned, BTV, which broadcasted the talk show of the other Defendants, was responsible for examining the content of the show before putting it on air. As BTV failed to find out the illegitimate contents that created unfair competition, which could be discovered in advance, BTV should ultimately bear the legal responsibility.