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THE PROTECTION OF CELEBRITY NAME IN CHINA: AFTER THE ‘乔丹’ CASE BY THE SPC OF CHINA

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Abstract

The Supreme People's Court (SPC) case of ‘乔丹’, brought by Michael Jordan against Qiaodan Sports, is a landmark case over the protection of the right to the personal name in the People's Republic of China (PRC). In the retrial proceeding, the SPC gave eight exhaustive explanations to the disputed questions and eventually reversed the lower court's decision. After studying the judgment, this article finds that a famous foreign name can be protected by Chinese Trademark law only when it satisfies three conditions: First, the specified name enjoys a certain popularity in China and is well-known to the concerned public; second, the concerned public uses the specified name to refer to the original person of that name; and third, there has already been a stable match between the specific name and the original person of that name. Although China mainly adopts the “right to name” for the legal protection of celebrity names, the right to name is a kind of personal right, difficult to protect economic benefits derived from celebrities' names fully. Comparing Germany's extended protection model of personality rights and the United States model of “right of publicity,” this article suggested that China tries to introduce the United States model to protect the celebrity name's right.

Keywords : Michael Jordan, ‘乔丹’ case, right to personal name, popularity, right of publicity

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I. INTRODUCTION

Nowadays, a personal name, especially a famous name, contains a tremendous commercial value and can become the trademark preemption object by individuals or companies.

In China, with its first-to-file trademark registration system, famous foreign names or brands have learned the hard way to be proactive in protecting their names or brands in the Chinese language. However, some have been slow in protecting the Chinese language versions of those brand names and have seen their brand recognition pulled out from under them. Once the registered trademark conflicts with the prior user's right to personal name, what will happen? Most trademark laws in the world offer protection of the right to a personal name. For instance, according to article L. 711-4 (f) and (g) the French Intellectual Property Code, a trademark may not harm a third person's “personal right” (*droit de la personnalité*), such as the name, pseud-

onym or image, or a public territorial collectivity's name, image or reputation . In other words, a trademark will be forbidden to register if it harms another person's personal rights.

The protection of the right to a personal name in China can be summarized as follows. First, Article 32 People's Republic of China Trademark Law 2013 provides, "No application for trademark registration may infringe upon the existing prior rights of others, and bad-faith registration by illicit means of a trademark with a certain reputation already used by another party shall be prohibited." Before the revision of Chinese Trademark Law in 2001, section 1 (4) of Article 25 of the Implementing Rules of the Trademark Law of the PRC (1993) provided that the registration in violation of the lawful priority right of others equates to the obtainment of registration by deception or other improper means. If one registers a trademark in violation of others' lawful priority rights, it will be deemed as registration by deception or other improper means. This is the beginning of the protection of existing prior rights in Chinese trademark law.

According to Article 32, Chinese trademark law protects existing prior rights, including the right to name. Before the '乔丹' case, Chinese courts have protected the existing right of name by the judgment in the "Yi Jian Lian" case, "TRUMP" case, "IVERSON" case, and so on.

However, what is the difference between the '乔丹' series of cases and the cases mentioned above? The '乔丹' series of cases are confronted with more difficult and complex questions. For example, what are the conditions of applying Article 31 of Trademark Law to claim the right to a personal name as an existing right? Can foreigners claim the right of a personal name for the Chinese translation of his foreign name? Can a natural person claim the right of a personal name for his non-active use of the specific name? Can the registered trademark owner point out that he has a history of use and use of the disputed trademark and already acquired high popularity as a defense? What is the relation between the trademark's bad faith application and infringing upon the existing right of a personal name by the disputed trademark? The SPC has answered those questions in the judgments of '乔丹' cases.

The objective of this paper is to analyze why and how a famous name can be protected in China through the trademark disputes within the long-lasting, complex case of '乔丹'/'Qiaodan.' For this purpose, section 2 of this paper introduces the history of the series of '乔丹' cases and the judgments by the top Court of China. Section 3 analyzes the cases' focus on the legal basis and conditions of protection of famous foreign names in China. Section 4 further discusses the prospective of '乔丹' trademark after the SPC's decision and

some suggestions to protect famous names in China.

II. OVERVIEW OF ‘乔丹’ CASES

Air Jordan, created and named for professional basketball player Micheal Jordan, is a world-famous brand of Nike’s basketball footwear and athletic clothing. When Nike expanded the brand into China in the 1990s, it did not foresee the great value of Air Jordan in Chinese transliteration.

The Qiaodan Sports Company is a Fujian-based sports company that has established and produced sports accessories since 1984. In 2000, the company changed its name to Qiaodan Sports Goods Inc. Since 2002, the “乔丹,” “QIAODAN” word trademarks and related logo were registered by Qiaodan Sports. On 23 February, 2012, Michael Jordan (the retrial petitioner in the SPC retrial of ‘乔丹’ case, after this referred to as the retrial petitioner) accused Qidaodan Sports of using his name and images without authority. The Shanghai No. 2 Intermediate People’s Court heard this case on 5 March, 2012. This was the beginning of the series of ‘乔丹’ cases. This article will show the hierarchical structure of the ‘乔丹’ series case and 3 ‘乔丹’ cases by the SPC.

A. THE HIERARCHICAL STRUCTURE OF THE ‘乔丹’ SERIES CASE

Simultaneous to the civil litigation with Qiaodan Sports, Michael Jordan also sought administrative relief measures. On 31 October, 2013, he applied to cancel 78 registered/registering trademarks related to ‘乔丹’ or “QIAODAN” in the Trademark Review and Adjudication Board (TRAB) of the State Administration for Industry and Commerce of the People’s Republic of China (SAIC).

On 27 April, 2013, Shanghai No. 2 IPC began hearing civil litigation between Michael Jordan and Qiaodan Sports. Owing to the administrative process in TRAB, Shanghai No. 2 IPC suspended litigation to wait for TRAB’s decision.

On 14 April, 2014, the TRAB rejected Michael Jordan’s petition and upheld registration of the ‘乔丹’ trademarks of Qiaodan Sports.

Refusing to accept the decision, Michael Jordan appealed to Beijing’s No. 1 Intermediate People’s Court. Unfortunately, Beijing No. 1 IPC decided that Qiaodan Sports did not infringe upon the right to name and image of Michael Jordan. In July 2015, the decision was sustained by Beijing High People’s Court. Later in 2015, the top court decided to rehear ten of the Qiaodan Series of cases.

The whole hierarchical structure of the ‘乔丹’ series case can be seen as the following:

We can see the most important cases from the hierarchical structure are the administrative litigations in Beijing No.1 IPC, Beijing High People’s Court, and the Supreme People’s Court. Due to the factual similarity as well as the similar dispute issues in the cases, we will only make a detailed analysis for three of those cases: the judgment of Beijing No.1 IPC, the judgment of Beijing High People’s Court, and the judgment of the Supreme People’s Court.

B. JUDGMENT OF BEIJING NO.1 IPC

After receiving the TRAB’s judgment to maintain the registration of the ‘乔丹’ trademark, the retrial petitioner made an administrative litigation appeal to Beijing No.1 IPC, requesting to withdraw the decision of TRAB. With careful examination of the pieces of evidence offered by either party, Beijing No.1 IPC first discussed the dispute over Article 31 of Trademark Law 2001.¹ The disputed trademark is “乔丹.” The evidence submitted was not enough

¹ Beijing NO.1 IPC Administrative Judgment (2014) Yi Zhong Xing (Zhi) Chuze No. 9163.

to prove that a separate ‘乔丹’ could indicate Michael Jordan. The sportswear products featuring the disputed trademark show that Michael Jordan’s name carries some influence; however, the relative public is not likely to connect the disputed trademark with Michael Jordan. The existing evidence was insufficient to prove that the registration and use of the disputed trademark made improper use of Michael Jordan’s popularity. Thus, the evidence was not enough to prove that the disputed trademark registration harmed the right to the name of Michael Jordan. The court also discusses the dispute about section 1 (8) of Article 10, section 1 of article 41 of Trademark Law. Qiaodan Sports has made long-term, broad propaganda and use of the disputed trademark and already gained a high market reputation. This fact has co-existed with the market activities which the retrial petitioner and Nike enjoyed for nearly 20 years. By the big scale of propaganda and use, both parties have formed their respective consumer groups and market perceptions and a relatively stable competitive order. Thus, the disputed trademark should not be canceled. Eventually, the Beijing No.1 IPC affirmed the decision of TRAB.

C. JUDGMENT OF BEIJING HIGH PEOPLE’S COURT

Refusing to accept Beijing No.1IPC’s decision, the retrial petitioner appealed to Beijing High People’s Court. The high court skipped the dispute over Article 31 of Trademark Law and heard arguments about section 1 (8) of Article 10, section 1 of article 41 of the Trademark Law. The high court first ruled on section 1 (8) of Article 10 of Trademark Law.² The disputed trademark itself was found to lack the factor of “Those [trademarks] detrimental to socialist ethics or customs, or having other unwholesome influences.” Based on this section, the TRAB affirmed the former judgment. Secondly, the court heard arguments on section 1, article 41 of the Trademark Law. The evidence submitted was not enough to prove that the disputed trademark acquired registration by improper means. Therefore, the high court upheld the judgment of Beijing No.1 IPC.

D. JUDGMENT OF SUPREME PEOPLE’S COURT

The retrial petitioner was still displeased with the Beijing high court’s judgment and petitioned the retrial of this case by the SPC. Beijing High People’s Court omitted the disputes about Article 31 of Trademark Law. The SPC decided to review it later in 2015 and made a long judgment after one year.

During the process of retrial, the retrial petitioner gave ten arguments for retrial.³ The TRAB and Qiaodan Sports each made detailed defenses to Mi-

² Beijing High People’s Court Administrative Judgment (2015) Gao Xing (Zhi) Zhongzi No.1915.

³ The Supreme People’s Court (2016) Zui Gao Fa Xingzai No.27.

chael Jordan's complaint.

After deliberately examining the complaints and defense opinions, the SPC affirmed that the issue is whether the registration of the disputed trademark harms the right to personal name claimed by Michael Jordan to “乔丹,” and violate the provision in Trademark Law Article 31 about “[a]n application for the registration of a trademark shall not create any prejudice to the prior right of another person.” Eight specific questions summarized the focus⁴: (1) what is the legal basis of the retrial petitioner's claim on the protection of the right of personal name; (2) what is the specific content protected by the right of personal name claimed by the retrial petitioner; (3) how famous and well-known is the retrial petitioner in China; (4) have the retrial petitioner and the authorized Nike ever used the logo “Qiaodan” on their own initiatives, and whether or not will the fact of their initiative use influence the right of personal name claimed in this case; (5) will the specific application of the controversial trademarks mislead the public to associate it with the retrial petitioner; (6) is there any obvious subjective malice in the registration of the controversial trademarks of Qiaodan Company; (7) will Qiaodan Company's operating conditions, propagating, applying, winning awards, getting protection of its name and trademarks concerned influence the case; and (8) will the fact that the retrial petitioner delayed in exercising the right of personal name he claimed influence the case?

With the framework provided by the eight specific questions, the SPC Judgment Committee made a thorough analysis and reached eight affirmations to them. The author will analyze those discussions and affirmations in the following section.

After giving eight exhaustive explanations to the above questions, the SPC held the registration of the controversial trademarks damaged the retrial petitioner's, before the right of personal name on “Qiaodan,” and violated the regulations of the rule that “an application for the registration of a trademark shall not create any prejudice to the prior right of another person” according to article 31 Trademark Law.⁵ Correspondingly, the Qiaodan Sports registration should be revoked.

⁴ The Collegiate Bench of the Supreme People's Court, Judicial Adjudication Rules and Enlightenment on The Case Series of Administrative Disputes Over the Trademark Of “Qiaodan”, China Legal Science, 5 (2017), 139-140. Also see the Supreme People's Court (2016) Zui Gao Fa Xingzai No.27 ; Zhang Chunbo, “The Exact Explanation of 8 Disputing Focuses in the Judgment of ‘乔丹’ Case,” *China Trail* 2, (2017): 12-15.

⁵ The Collegiate Bench of the Supreme People's Court, Judicial Adjudication Rules and Enlightenment on The Case Series of Administrative Disputes Over the Trademark Of “Qiaodan”, 5 China Legal Science, 142 (2017).

III. FOCUS OF THE CASE: WHETHER THE REGISTRATION OF THE DISPUTED TRADEMARK HARMS THE RIGHT TO PERSONAL NAME AS CLAIMED BY THE RETRIAL PETITIONER TO ‘乔丹’?

From the facts mentioned earlier, we can find that the disputes are centered on whether the registration of the disputed trademark harms the right to personal name claimed by Michael Jordan to “乔丹.” In these complex disputes, Michael Jordan insisted that the ‘乔丹’ trademark registration damaged his right to a personal name. Simultaneously, the TRAB and Qiaodan Sports asserted that Jordan was a common English name, and ‘乔丹’ did not establish any unique match with Michael Jordan.⁶ However, this point of view was reversed by the Supreme People’s Court. The SPC made a thorough investigation and examination of the case’s facts and evidence and exhaustively discussed these questions.

A. LEGAL BASIS OF PROTECTING THE RIGHT TO PERSONAL NAME

In the disputed issues, the first one that should be discussed is the legal basis of the right to personal name protection. Generally speaking, the right to personal name is an extremely important right that can be protected by civil law in China. According to Article 99 of the General Principles of the Civil Law⁷ and Article 2 of the Tort Liability Law.⁸ Following those provisions, the right of the personal name is protected when the registration of a trademark infringed on another’s right to name. It will violate Article 32 of Trademark law. The legal basis of protecting the right to personal name has been accepted by Chinese legal circles, the TRAB, and the judiciary. However, there are still some uncertainties over the conditions to protect prior right to name, especially to protect part of a foreigner’s name in Chinese characters. The judgment of the SPC made this question clear. It affirmed that the registration of the controversial trademarks violates Article 31 of the Trademark Law if it damages another person’s prior right of personal name by registering the name

⁶ Beijing High People’s Court Administrative Judgment (2015) Gao Xing (Zhi) Zhongzi No.1915.

⁷ Article 99 provided, “Citizens shall enjoy the right of personal name and shall be entitled to determine, use or change their personal names in accordance with relevant provisions. Interference with, usurpation of and false representation of personal names shall be prohibited. Legal persons, individual businesses and individual partnerships shall enjoy the right of name. Enterprises as legal persons, individual businesses and individual partnerships shall have the right to use and lawfully assign their own names.” See http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm. Last visited October 5, 2017.

⁸ Article 2 provided, “Tort liability shall be borne in accordance with this Law for any infringement of civil rights.” “Civil rights” as mentioned in this Law refer to personal and property rights and interests, including, inter alia, the right to live, right to health, right of name...” see http://www.npc.gov.cn/englishnpc/Law/2011-02/16/content_1620761.htm. Last visited October 5, 2017.

on which another person shall enjoy the prior right of a personal name without authorization.⁹

B. THE CONDITION OF PROTECTION OF FAMOUS FOREIGN NAME IN CHINA

During the TRAB trial, the first instance trial, or the appealed trial, the crucial question, in this case, is whether Michael Jordan owns the right to personal name to ‘乔丹’ in Chinese translation. Qiaodan Sports denied that Michael Jordan owned the right for ‘乔丹’. Qiaodan Sports argument lays with two reasons.¹⁰ Firstly, the name of Michael Jordan is not ‘乔丹’, he never uses ‘乔丹’ to refer to himself actively, but uses ‘Michael Jordan’. Secondly, ‘乔丹’ is a translation of a common English name, which has no unique match with Michael Jordan. Then this point was identified by the court of the first instance and the TRAB. This conflicted with common sense.

According to the SPC judgment, Article 31 of the Trademark Law can be applied when a famous foreign name can be protected in Chinese Trademark Law only when it satisfies three conditions.¹¹ Firstly, the specified name shall enjoy certain popularity in China and be well-known to the concerned public. Secondly, the concerned public uses the specified name to refer to the natural person. Thirdly, there has already been a stable match between the specific name and the natural person.

C. THE POPULARITY OF THE RETRIAL PETITIONER AND ITS INFLUENCE

Is Michael Jordan famous or well-known enough in China? The retrial petitioner insisted that Michael Jordan had acquired high popularity in China, which should be estimated in examining whether the concerned public believed the match had been established between the disputed trademark and Michel Jordan. The SPC supported this. According to the decision, the dispute is vital to a group of judgments, including whether the retrial petitioner shall enjoy the right of personal name on ‘乔丹’, there is subjective malice in the registration process, or the concerned public will connect the commodities with controversial trademarks to the retrial petitioner.¹² However, it should

⁹ The Collegiate Bench of the Supreme People’s Court, Judicial Adjudication Rules and Enlightenment on The Case Series of Administrative Disputes Over the Trademark Of “Qiaodan”, China Legal Science, 5 (2017), 140.

¹⁰ Wang Qian, ‘Return to the common sense - Comments on the ‘Qiaodan’ Retrial of Trademark Dispute Case’, 5 People’s Judicature, 012(2017).

¹¹ The Supreme People’s Court (2016) Zui Gao Fa Xingzai No.27.

¹² The Collegiate Bench of the Supreme People’s Court, Judicial Adjudication Rules and Enlightenment on The Case Series of Administrative Disputes Over the Trademark of “Qiaodan”, 5 China Legal Science, 140- 141 (2017).

be mentioned that popularity is not a requirement to own or protect the right to a personal name - it is just an important factor to judge the stable match between the specific name and the natural person. Even for a person without high popularity, if his name is registered by someone who is familiar with him in bad faith, the registrant will also infringe the right to a personal name.¹³ Otherwise, the right to name will become the right used and owned only by public figures, not by all citizens.¹⁴ This is obviously unfair and violates the laws in China. Based on the retrial petitioner's evidence, the SPC held that the retrial petitioner had been a famous person not only as a basketball player but also as a widely known celebrity before registering the controversial trademarks 2015.¹⁵

D. THE STABLE CONNECTION BETWEEN THE SPECIFIED NAME AND THE FAMOUS NAME

A highlight in the judgment is that the SPC uses the term 'stable match' as a substitute for a 'unique match'. As mentioned above, Qiaodan Sports, the TRAB, the court of the first instance, and the court of the second instance all held that the controversial trademark did not have a unique match with Michael Jordan.¹⁶ However, the 'unique match' is a too high requirement to reach for the retrial petitioner. Limited to the words used in a personal name, anyone could get a unique name. Thus, it is too harsh to require a natural person who claimed the protection of a personal name has a unique match with his name.¹⁷ According to the SPC, the "unique match" between the specific name and the natural person is not the precondition that protects the right to name. Therefore, if the specific name claimed by the natural person has a stable match with him, even if it does not reach the "unique" degree, his right to personal name can be protected. Hence, the SPC held that the propaganda of the media has made Michael Jordan acquire high popularity, the concerned public universally uses '乔丹' to refer to the retrial petitioner, and the '乔丹' mark had formed a stable match with the retrial petitioner¹⁸.

¹³ Beijing NO.1 IPC Administrative Judgment (2012) Yi Zhong Xing (Zhi) Chuzi No. 1386.

¹⁴ Zhao Lin, the Role of 'Popularity' in the protection of right to personal name: starting from the '乔丹' case, (2017) 1 China Trademark, 17.

¹⁵ The Supreme People's Court (2016) Zui Gao Fa Xingzai No.27.

¹⁶ Beijing High People's Court Administrative Judgment (2015) Gao Xing (Zhi) Zhongzi No.1915.

¹⁷ Zhang Guangliang, A Judgment of Protection of Personal Right and the Superior of Judicial Rules, 2 China Trail, 24(2017).

¹⁸ The Supreme People's Court (2016) Zui Gao Fa Xingzai No.27.

IV. DISCUSSION AND IMPLICATIONS

The SPC's judgment on the '乔丹' case has gained great fame and influence in the world. The US Chamber of Commerce said that the ruling "marks a step forward for efforts to foster a better business ecosystem in China."¹⁹ The top court made an effort to televise the live trial on 26 April 2016 and televise the live decision on 8 December 2016, and this clearly proved China's top court viewed this as a landmark decision. Although the case of '乔丹' ended, this case itself still has implications for understanding the current protection of the right to a personal name and its future direction in China.

A. THE TRAB'S OPINION AND TREND IN PROTECTING RIGHT TO PERSONAL NAME

The TRAB has always paid great attention to protecting the right to a personal name. XiaoJian Xu, an adjudicator of the TRAB, said, "the right of personality is the important human rights content. Some international human rights documents, such as the *Universal Declaration of Human Rights*, call on human rights protection by all countries. In this context, China's protection of the right to personal name is not only a moral requirement but also a demand to comply with our international duty."²⁰

From 'GIORGIO ARMANI', '屠呦呦' (Tu Aobao), 'Yi Jianlian', and 'Guo Jingjing' cases, we can conclude that the TRAB favors the protection of the right to a personal name. In the '屠呦呦' case, there are two conditions that damaged the right to personal right: first, in recognition of the concerned public, the disputed trademark refers to the natural person; second, the registration of the disputed trademark shall harm others right to a personal name.²¹ In the '李娜' (Lina)²² case, the TRAB affirmed that one of the preconditions to judge whether the disputed trademark disturbed another's right to personal name is if the disputed trademark refers to the specific natural person. In other words, the disputed trademark is the same as another's name or reflects another person's main features and has a stable match with the natural person. The TRAB held that the disputed trademark did not harm Lina's right to personal name because it did not uniquely refer to Lina.²³

¹⁹ Sui-Lee Wee, "Michael Jordan Owns Right to His Name in Chinese Characters, Too, Court Rules," *New York Times*, 7 December 2016, see <https://www.nytimes.com/2016/12/07/business/international/china-michael-jordan-trademark-lawsuit.html>, last visited October 6, 2017.

²⁰ XiaoJian Xu, "The Protection to Personal Name in Chinese Trademark Law Comments on the No. 1560251 'GIORGIO ARMANI'" Trademark Dispute Case, 11 *China Trademark*, 28, 2014.

²¹ TRAB, The No. 11033155 '屠呦呦' Trademark Invalidation case, see http://www.saic.gov.cn/spw/alpx/201709/t20170925_269358.html, last visited December 10, 2017.

²² Lina is a world-famous Chinese tennis ball player.

²³ TRAB No. 9627677 'Lina' Trademark Invalidation case.

According to Baoqing Zang, a senior adjudicator in TRAB, there are two shortcomings in protecting the right to personal names. First, in cases relating to personal name, small cases acquired protection for the protection of the right to personal name, and article 32 of the Trademark Law is limited in its applying scope. Second, the massive application of section 1 (8) of article 10²⁴ obscures the limit between private right and public domain, proactively reviewing the parties' claims²⁵.

B. THE CHINESE JUDICIARY'S OPINION ON THE PROTECTION OF RIGHT TO PERSONAL NAME

Because of the vague Chinese trademark law and the different understandings and explanations, there are always conflicting views on protecting the right to a personal name. One such conflict is whether the protection of the right to personal name must precondition that the civil subject has popularity in China. Since most of the disputed cases concerning the protection of the right to personal name are related to celebrities' names, the popularity of a personal name is crucial to judge whether the disputed trademark infringed the right to a personal name. For example, in the 'Yi Jian Lian' case, Beijing High People's Court held that Yi Jian Lian proved to have popularity in China. Without permission, Yi Jian Lian Corporation applied for registration of the trademark under dispute. It was easy to make the relevant public connect such a trademark with Yi Jian Lian and think that the relevant product or service was provided by Yi Jian Lian, thus infringing upon Yi Jian Lian's personal name.²⁶ However, in the 'Kate Moss' (a famous UK model) case, Kate Moss popularity in China is difficult to be proven, the court decides that the registrant was a practitioner in the fashion industry and should have higher recognition than the common public to the personal name of 'Kate Moss'. Thus the disputed trademark had the aim to make unfair use of the name 'Kate Moss' and infringed the personal name.²⁷ In the '乔丹' case, the judgment of the SPC explicitly said the specified name shall enjoy certain popularity in China and shall be well-known to the concerned public, which shall be of great importance for the court to judge similar cases in China.

Another conflict is whether the protection of the right to personal name should consider the classification of goods or services. In practice, many

²⁴ Section 1 (8) of article 10 provided, "Those detrimental to socialist ethics or customs, or having other unwholesome influences."

²⁵ Baoqing Zang, "Some Thought on the questions Related to the Conflict between Right to Personal Name and Trademark Right," *China Trademark* 3, (2013): 41-42.

²⁶ Xiaoqing Feng, Rong Xie, "Analysis of the Case Involving the Dispute Between Yi Jian Lian Corporation and the Trademark Registration of 'Yi Jian Lian'," *Chinese Law Journal* 108 (2012):

²⁷ Beijing No.1 IPC Administrative Judgment (2010) Yi Zhong Xing (Zhi) Chuizi No. 534.

people thought the protection of prior personal names should consider the classification of goods or services.²⁸ For instance, the protection of a sports player's name right should be limited to the class of sport-related goods or services. However, this view is not accepted by all courts. In the case involving the 'IVERSON' trademark, 'IVERSON' was a famous basketball star whose work had nothing with the disputed trademark, which was to be used in respect of imitation leather, cowhide, umbrella, and animal leather. Considering that the aim of the registrant of the disputed trademark was applying this trademark to attract the attention of the relevant public and acquire unfair interests, the court held the registrant had a dishonest aim and violated the personal name 'IVERSON'.²⁹ Another trademark dispute related with Michael Jordan, although the '乔丹' mark was registered in the Nice International Classification of 32 of drinking water, soft drink, bean beverage, juice, vegetable juice, beer, cola, plant drinking, drinking preparation, which are not related with the sports industry, the SPC decides that the right to the personal name of Michael Jordan should be protected.³⁰ This decision showed that no matter what classification in which the disputed trademark was registered or used, the right to personal name should be protected by the court.

The '乔丹' judgment of the SPC is of great importance in affirming rules of protecting the right to a personal name and stopping trademark squatting. Meanwhile, the decisions have made epoch-making contributions to advancing honesty and credibility, maintaining market order of fair competition, and purifying the environment for the registration and usage of trademarks.³¹ Mark Elliot, executive vice president of the Global Intellectual Property Center of USA, said, "the court has called an intentional foul and sent a clear message of deterrence to those who file trademarks in bad faith."³²

C. FILING IN ADVANCE AND PREVENTING TRADEMARK SQUATTING

The issue of trademark squatting or bad-faith trademark filing is increasing to be a common problem in many countries across the world. Trademark

²⁸ Rui Songyan, "A Comprehensive Analysis of Adjudication of Trademark Administrative Cases by Beijing No.1 Intermediate People's Court," *China Patents & Trademarks*, no. 4 (2014): 27-37.

²⁹ Rui Songyan, "Determination of Applied for Trademark Prejudice to Prior Name Right: Comments on Administrative Dispute over Opposition and Review of 'IVERSON & Device'," *China Patents & Trademarks*, no. 3 (2015): 90-97.

³⁰ The Supreme People's Court (2016) Zui Gao Fa Xingzai No.15.

³¹ Tao Kaiyuan, Wang Chuang, "The Collegiate Bench of the Supreme People's Court, Judicial Adjudication Rules and Enlightenment on The Case Series of Administrative Disputes Over the Trademark of 'Qiaodan'," *China Legal Science*, no. 5 (2017): 137.

³² Sui-Lee Wee, "Michael Jordan Owns Right to His Name in Chinese Characters, Too, Court Rules," *New York Times*, 7 December 2016, see <https://www.nytimes.com/2016/12/07/business/international/china-michael-jordan-trademark-lawsuit.html>, last visited October 6, 2017.

squatting is an act of registering other people's marks as the squatter's own in other countries to gain benefits from original marks or real trademark owners.³³ In China today, trademark squatting can be a big roadblock for international brand owners who wish to enter the Chinese market.

Unlike the United States, which requires proof of prior use or intent-to-use in commerce before applying for registration, China follows the first-to-file system for trademark applications.³⁴ This means that a new trademark may lose legal protection if a similar trademark has already been registered in China.

In the decision of the '乔丹' case, the SPC discussed an extremely important question, is there any bad faith in registering the disputed trademark of Qiaodan Sports? According to the decision, the presence of any bad faith is an important factor to decide whether the registration damaged the right to the personal name of Michael Jordan. The SPC decided that the evidence is enough to prove that Qiaodan Company had a clear understanding of the high popularity of the retrial petitioner and his name and registered a group of trademarks closely related to the retrial petitioner without lawful authorization, turning a blind eye on misleading the concerned public to associate the commodities with trademarks to the retrial petitioner.³⁵ This judgment reflects the legislative aim of Chinese Trademark Law and the judiciary's effort to combat bad faith filings in China.

Just one month after the '乔丹' decision, on 10 January 2017, the SPC issued "Provisions on Several Issues Concerning the Hearing of Administrative Cases Involving the Granting and Affirmation of Trademark Rights" (hereinafter referred to as the Provisions), which entered into force on 1 March 2017. Article 5 of the Provisions said,

"Concerning those signs or the signs whose components that may have negative or adverse effects on China's public interests or order, the Court may determine that such signs fall under the category of signs 'having other unhealthy influences' as provided in Article 10.1.8 of the 'Trade-

³³ Kitsuron Sangsuvan, "Trademark Squatting," *Wisconsin International Law Journal* 31, no. 2 (2013): 253.

³⁴ Trademark Law of P.R.C. (2013), Article 31 provided, "Where two or more applicants apply to register identical or similar trademarks for use in connection with the same or similar goods, the Trademark Office shall first examine and approve for publication the mark with the earliest application date. Where the applications are filed on the same date, the Trademark Office shall first examine and approve for publication the mark with the earliest date of use. Registration of the other trademark applications shall be refused, and the marks shall not be published."

³⁵ Tao Kaiyuan, Wang Chuang, "The Collegiate Bench of the Supreme People's Court, Judicial Adjudication Rules and Enlightenment on The Case Series of Administrative Disputes Over the Trademark of 'Qiaodan'," 141- 142.

mark Law.'

Where the name of a public figure in the political, economic, cultural, religious, ethnic, or other field is filed to be registered as a trademark, the Court shall find such action constitutes 'other unhealthy influences' as provided in the preceding paragraph."

Based on this article, the court shall affirm the registration of a public figure's name in the political, economic, cultural, religious, ethnic, or other fields that constitute '*other unhealthy influences*'. In other words, if someone uses a political figure's name to register a trademark in China, that will constitute '*other unhealthy influences*'.

International corporations should pay attention to their trademark strategy in China. Even if there is no immediate plan to enter the Chinese market, the company should consider filing in advance before trademark squatters if the trademark is or is becoming well known.³⁶

It is worthwhile that international companies pay great attention to registering their trademark in Chinese character and pinyin. In the Qiaodan series of cases, the SPC still favored the Qiaodan Sports' registration of 'Qiaodan' (Jordan in Chinese Pinyin), and thus Michael Jordan's case failed. Like Michael Jordan, many foreign companies neglected their trademark registration in Chinese character form or pinyin and failed to be protected by Chinese law.

A suggestion for international companies to protect their brand is to exercise their rights more actively. In the Qiaodan series of cases, most disputed trademarks were registered between 2002 and 2010. However, according to Article 45³⁷ of the Trademark Law 2013, if one does not request that the Trademark Review and Adjudication Board make a ruling to invalidate the trademark's registration within five years from the date of registration, he will lose the right. The laws aid the vigilant, not the negligent. The Chinese government has paid increasing attention to protecting the right of a personal name for famous figures worldwide. The right of the name of a famous person can be protected when it meets several requirements.

³⁶ Sunny Chang, "Combating Trademark Squatting in China: New Developments in Chinese Trademark Law and Suggestions for the Future Comment," *Northwestern Journal of International Law* 34, no. 2 (2014): 337, 357.

³⁷ Article 45 provided, "Where a trademark registration violates the provisions of Articles 10 Paragraph 2 and Paragraph 3, Article 15, Article 16 Paragraph 1, Article 30, Article 31 or Article 32 of this Law, any holder of prior rights or any interested party may, within five years from the date of registration, request that the Trademark Review and Adjudication Board make a ruling to invalidate the trademark's registration. Where the registration was obtained with ill will, the owner of a famous trademark shall not be bound by the five-year limitation."

Meanwhile, a natural person should endeavor to protect his own right positively. Otherwise, according to Chinese trademark law, the right of name may not be protected after the trademark is registered for five years. Thus, foreign companies should monitor their trademark registration in all forms, including Chinese characters and pinyin. When their trademarks or similar marks were registered, foreign companies should cancel the disputed trademark without delay.

V. A NEW WAY TO PROTECT RIGHT TO NAME IN CHINA: GERMAN OR UNITED STATES MODEL?

There are two typical models for the protection of merchandising rights³⁸ of celebrity names. First is the model of ‘general right of personality’³⁹ protection represented by Germany, and the other is the ‘right of publicity’⁴⁰ represented by the United States.

China mainly adopts the ‘right to name’ for protecting celebrity names, which often leads to controversy among scholars and practitioners. Many scholars do not agree with using the right to name. For this instance, some scholars disagree with the court decision in the ‘乔丹’ case because it is not appropriate to improperly expand the scope of the prior rights.⁴¹ Moreover, some scholars believe that the property right in celebrities’ names is not a personal right but a kind of right of unfair competition.⁴² Some scholars also believe that the retrial judgment of the ‘乔丹’ trademark case is more in name than reality, as it protects the merchandising right of names in the name of protecting the right to name.⁴³ The author strongly agrees that it is not appro-

³⁸ United States academy usually use the term “Mechandising right”, which includes the publicity right of natural persons and the image right of the name and role of works. See Stacey L. Dogan, Mark A. Lemley, “The Mechandising Right: Fragile Theory or Fait Accompli?” *Emory Law Journal* 54, (2005): 461.

³⁹ The “general right of personality” was developed by the Federal Court of Justice of Germany and the German Constitutional Court in the cumulative development of a personality right case decision. Germany’s “general right of personality” is a “frame-based right” created by virtue of the “other rights” stipulated in article 823, paragraph 1 of the German civil code. There is a lot of controversy because of the uncertainty of its content. The general right of personality cannot be applied directly as other civil rights but must be used in specific cases through a measure of interest, because it is in the specific case, scope can be finally determined. See Hui Yao, *Theory of Human Rights*, (Beijing: China Renmin University Press, 2011), 212-213.

⁴⁰ Broadly defined, the right of publicity is the right to own, protect, and profit from the commercial value of an individual’s name, likeness, activities, or identity. See Randall T.E. Coyne, “Towards a Modified Fair Use Defense in Rights of Publicity Cases,” *William & Mary Law Review* 29, no. 4 (1998): 781.

⁴¹ Jianyuan Cui, “Name and Trademark: Review of Path and Methodology –The Interpretation of The Supreme People’s Court (2016) Zui Gao Fa Xingzai No.27,” *China Legal Science*, no. 2 (2017): 286-288.

⁴² Mingtao Chen, “Protection Boundary of The Right to Name of Celebrity,” *Market Information Network*, http://www.scxxb.com.cn/html/2017/tzty_0525/297202.html, last visit: May 23, 2018.

⁴³ Xiangjun Kong, “Right to Name and Merchandizing Right of Name and Their Protection: A Review of ‘Jordan’ Trademark Case and Related Judicial Interpretations,” *Law* 3 (2018): 165.

priate to adopt ‘infringement of the right to name’ to protect celebrity names’ merchandising rights in China’s current judicial practice. The right to name is a kind of personal right, and it is difficult to use it to protect the economic benefits derived from celebrities’ names. The merchandising rights of celebrities are related to protecting their own interests and the healthy development of the industry. Therefore, it is necessary to separate the merchandising right and adopt a protection model different from the right to name.

A. GERMANY’S EXTENDED PROTECTION MODEL OF PERSONALITY RIGHTS

The civil law system’s ideology was deeply influenced by Roman law, and it has always insisted on the dualistic division of the separation of personality rights and property rights. However, with the development of modern society and the economy, the relationship between personality and property is becoming more and more blurred. Personality rights can often produce or bring about huge property interests, and the traditional dual structure of personality and property has encountered many challenges. In response to this dilemma, after the Second World War, the Federal Court of Justice of Germany and the German Constitutional Court jointly created the general right of personality according to the German Basic Law (constitution).⁴⁴ On this basis, the commercialized use of names and portraits in Germany is regarded as an infringement of personality’s general right.

Additionally, Germany has reached a consensus to protect the property interests of personality rights, such as the property value embodied in names, portraits, sounds, private data, etc. However, there are still different views on the rights of aggrieved persons when others forcibly commercialize their personal characteristics such as names and portraits to promote goods and services.⁴⁵ It is generally accepted that the aggrieved persons can exercise the right to claim damages.

It should be noted that as a civil law state, Germany has not recognized the ‘right of publicity’. Instead, the creation of the ‘general right of personality’ and the protection of property interests of names and portraits is only a passive response to the dilemma of the traditional binary division of “personality and property” in modern society. German courts do not distinguish between the right of privacy (not suitable for commercial exploitation) and a right of publicity, allowing one to control his commercial use. The primary purpose of the German ‘general right of personality’ is not to protect property and com-

⁴⁴ Zejian Wang, *Civil Law Theory and Case Study* (Beijing: Peking University Press, 2009), 74.

⁴⁵ Zejian Wang, “The Topic and Prospect of Personality Right Protection -- the Nature and Structure of Personality Right: The Protection of Spiritual Interests and Property Interests,” *RUC Law Review*, (2009): 80.

mercial values but to guarantee human dignity and the right of free development of personality. The general right of personality is nontransferable limits celebrities' possibilities to exploit their identities commercially. In the first place, courts are reluctant to award serious monetary damages.

Moreover, licensees cannot prevent others from unauthorized use. The fact that the right is not descendible also influences the value of the right.⁴⁶ It can be seen that the name protection under the theoretical framework of the general right of personality limits the use and reduces the value of rights holders' legal rights. If this theory is used for reference, it is not conducive to commercial use and celebrity name protection.

B. UNITED STATES MODEL OF RIGHT OF PUBLICITY

The right of publicity, defined as an individual's right to exclusive control over the commercial exploitation of their name and likeness, originates from the United States. This right is most often asserted by or on behalf of professional athletes, actors, actresses, comedians, and other entertainers.⁴⁷ The right of publicity in the United States has always been attached to privacy rights protection. The right of privacy mainly protects the spiritual rights of natural persons to be alone. At one time, the US courts generally did not believe that celebrities' privacy right, such as sports athletes and entertainers, was protected. Therefore, the economic value brought by the commercialized use of celebrity names, portraits, etc., has not always been well protected. This was the case until 1953 when Jerome Frank, Judge of the Second Circuit Court, first admitted the right of publicity in the *Helen Case*, a landmark case in US justice history. Judge Frank pointed out, "in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture. This right may be called a right of publicity."⁴⁸ In 1954, Melville B. Nimmer systematically elaborated the right of publicity in his article "The Right of Publicity."⁴⁹ Subsequently, the right of publicity was gradually recognized by the US courts and recognized by scholars. In 1977, the US Supreme Court decided the *Zacchini case*, which became a sign that the right of publicity was widely recognized in the United States.

Does the US need to create an independent system of the right of publicity

⁴⁶ Susanne Bergmann, "Publicity Rights in the United States and Germany: A Comparative Analysis," *Loyola of Los Angeles Entertainment Law Review* 19, no. 3 (1999): 251.

⁴⁷ David Keitel, "Right of Publicity," *Loyola of Los Angeles Entertainment Law Review* 4, no. 1 (1984): 229.

⁴⁸ United States Court, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

⁴⁹ Melville B. Nimmer, "The Right of Publicity," *Law and Contemporary Problems* 19, no. 2 (1954): 203-223.

outside the privacy rights system? This issue has been controversial since the rise of the right to publicity. Critics argue that the public right infringes both the public domain and the right to free expression by limiting the public's right to use the rights discussed above; publicity rights facilitate private censorship of popular culture.⁵⁰ Those who are in favor of the right of publicity present three reasons. First, it links to the labor theory of value. Celebrities work hard to create their famous identities, and thus they should have the right to exploit their publicity rights without having them stolen by others. A second basis for supporting publicity rights is to provide economic incentives. For example, one could argue that publicity rights are necessary to induce people to seek fame or enhance the fame they already have achieved. Finally, lack of protection will lead to overexploitation of a given celebrity's identity and utilizing it until it becomes worthless.⁵¹

The right to publicity plays a very important role in protecting the names of American celebrities. In *Hogan v. A. S. Barnes & Co.* case, the plaintiff is a well-known professional golfer, and the defendant used the plaintiff's name and photograph on a jacket and was subsequently sued.⁵² The court decided that the plaintiff's claim could not be protected by privacy rights. However, the court finally decided that the plaintiff could obtain compensation. The reason was that the defendant's actions caused damages to the plaintiff's property rights in the commercial value of his or her name and photographs, which resulted in unfair competition and infringed the plaintiff's right of publicity.⁵³ Starting from the pragmatism theory, the US flexibly created the right of publicity outside of the privacy right system, separated it from personal rights, and protected it as a pure property right, effectively promoting the commercialized use of celebrity names and portraits.

C. THE CHOICE FOR CHINESE MODEL OF RIGHT OF PUBLICITY

In China, how should utilizing the merchandising right of celebrity names and portraits be constructed? With the German model of "general right of personality" or the US model of "the right of publicity"? There have been several different views on this issue. Some scholars believe that "the German model should be adopted, that is, the protection of the commercialization of person-

⁵⁰ Michael Madow, "Private Ownership of Public Image: Popular Culture and Publicity Rights," *California Law Review* 81, no. 1 (January 1993): 125-240.

⁵¹ David Westfall and David Landau, "Publicity Rights as Property Rights," *Cardozo Arts & Entertainment Law Journal* 23 (2005): 71-117.

⁵² *Hogan v. A. S. Barnes & Company, "Incorporated," Trademark Reporter* 1358, (1957).

⁵³ Randall T.E. Coyne, "Toward a Modified Fair Use Defense in Right of Publicity Cases. Minan Zhang, Taisong Lin, Research on the Liability of Right of Publicity Infringement: Infringement of Portrait, Privacy and Other Personality Characteristics, 375(Guangzhou: Zhongshan University Press, 2010).

ality right should be solved within the scope of personality right.”⁵⁴ Some scholars advocate adopting the US system of “the right of publicity”: China’s civil law and related special laws have already distinguished the right to name from the merchandising right and interest of name. The merchandising right and interest of name have been independent of the right to name, and the two rights and interests are respectively included in two types of civil rights and interests. That is, the right to name belongs to the category of a personality right, but the merchandising right and interest of name belong to the category of property rights, protected by special laws such as anti-unfair competition law. Moreover, the merchandising right and interest is often classified as intellectual property right (or quasi-intellectual property) and is adjusted by anti-unfair competition law most of the time.⁵⁵ Therefore, it is believed that considering from the perspective of protecting the commercial interests of celebrity names, China should refer to the US the right of publicity theory and establish a protection mode of merchandising right and interest for celebrity names.

VI. CONCLUSION

The judgment of the SPC is a turning point decision in the right to the personal name protection in China. It made detailed explanations to some of the complex questions about the conflict between the registered trademark and prior right to a personal name. It defined China’s position in protecting the right to personal name. This ruling in favor of Michael Jordan is (hopefully) symbolic of changes in The Supreme People’s Court’s policy-making approach.⁵⁶

Some lessons can be drawn from the ruling, not only for famous international figures but also for Chinese companies. For well-known international figures, they should learn how to protect their right to a personal name. As for Chinese companies, it is not a longstanding strategy to squat on a trademark similar to a famous person. Companies should value the development of their brands. Many companies have recognized the importance of developing their own original brands and adhere to developing their original trademark, such as Huawei, ZET, TCL, Media, etc. Furthermore, we can introduce the United States model of the right of publicity to protect the celebrity name’s right in China.

⁵⁴ Liming Wang, “On Commercialization of Personal Right,” *Legal Science* 4, (2013): 60.

⁵⁵ Xiangjun Kong, Right to Name and Merchandizing Right of Name and Their Protection--: A Review of “Jordan Trademark Case” and Related Judicial Interpretations, 3 *Law*, 165(2018).

⁵⁶ Michele Ferrante, “Strategies to Avoid Risks Related to Trademark Squatting in China,” *Trademark Report* 107, (2017): 742.

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