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## China Releases Judicial Interpretation of Anti-Unfair Competition Law

By [Liza L.S. Mark](#) and [Tianyun \(Joyce\) Ji](#)

On March 16, 2022, China's Supreme People's Court ("**SPC**") issued the *Judicial Interpretation of Anti-Unfair Competition Law ("2022 Interpretation")* (《最高人民法院关于适用<中华人民共和国反不正当竞争法>若干问题的解释》), effective March 20, 2022. China's Anti-Unfair Competition Law ("**UCL**") (《中华人民共和国反不正当竞争法》) was first adopted in 1993 and most recently amended on April 23, 2019. For foreign businesses in China, the UCL has long been used to protect their intellectual property rights in China, especially in unregistered trademark and trade dress cases.

The SPC issued judicial interpretation to the UCL for the first time in 2007, and then slightly amended such interpretation in 2020 to reflect applicability of the 2019 amendment to the UCL. The recent Interpretation reflects SPC's comprehensive amendments to SPC's Judicial Interpretation on Issues Concerning Civil Cases Involving Unfair Competition (2007) ("**2007 Interpretation**"). The 2022 Interpretation clarifies certain issues frequently encountered by foreign business in China and therefore, we thought it might be useful to briefly summarize the notable changes of the 2022 Interpretation:

### 1. The Applicability of Article 2 of the UCL as a General Provision.

Article 2 of the UCL has long been widely invoked in various intellectual property infringement and unfair competition cases, but the demarcation between the applicability of Article 2 and specialty laws such as patent law, trademark law, and copyright law has been blurry, which creates inconsistency and uncertainty in practice. Article 1 of the 2022 Interpretation now clarifies that Article 2 of the UCL applies generally to businesses' market disruption behaviors that are not covered by specialty laws (e.g., patent laws), including special provisions on confusion, bribery, false advertising, misappropriation of trade secrets, prize-giving sales, misrepresentation, and web sales. For these types of behavior, the UCL applies and patent law, trademark law, copyright law do not apply.

### 2. Guidance on How to Determine "Business Ethics."

As a general provision, Article 2 of the UCL puts emphasis on "business ethics." It provides, in part, that businesses shall, in their production and distribution activities, adhere to the free will, equality, fairness, and good faith principles, and abide by laws and business ethics. Unlike the "implied covenant of good faith and fair dealing" principles under common law that applies mainly between contractual parties, this requirement to conform to "business ethics" appears to cast business ethics as a whole-society requirement.

According to a press conference held by the Third Civil Division of the SPC, the 2022 Interpretation intends to solve current inconsistencies by courts in deciding cases relating to novel types of unfair competitions. When courts decide if certain market competing behaviors are justified, the key is to determine if the business operator has violated business ethics. Article 3 of the 2022 Interpretation now provides clearer guidance on such determination. Specifically, it explains that unfair competition should be based on violation of "business ethics" – standards generally followed and recognized in specific business fields – rather than everyday ethical standards. The 2022 Interpretation further provides that courts should consider a variety of factors such as industry rules or business practices, subjective consideration of the business and the counterparty in the transaction, impacts on consumers, market order, and social and public interests, etc.

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### **3. Clarified “Anti-Confusion” Protection.**

Article 6 of the UCL prohibits a business from engaging in confusing behavior that will mislead the public into believing such business is associated with another business or certain products, including: (i) unauthorized use of trademarks that are the same or similar to others’ product name, packaging, decoration that are influential; (ii) unauthorized use of another influential enterprise’s name, trade name, alias, etc.; (iii) unauthorized use of another influential enterprise’s website, address, web name, etc.; and (iv) other confusing behaviors. Therefore, Article 6 “anti-confusion” is often involved in and constitutes a large percentage of anti-unfair competition cases related to trademarks/trade-dress protection.

The buzzword here is “influential,” which was not defined until the 2022 Interpretation. Article 4 of the 2022 Interpretation now clarifies the meaning and factors in determining if a name, mark, etc. is “influential.” Specifically, courts may determine a mark to be “influential” when: (i) it enjoys certain market popularity and (ii) has conspicuous characteristics for distinguishing the source of the product.

- When determining whether a mark has certain market popularity, the courts shall take into account a variety of factors such as the relevant Chinese public’s familiarity, the time, region, amount of the products sold, the duration, degree and territorial scope of the publicity and the protection of the mark, etc.
- Article 5 of the 2022 Interpretation further provides that a mark does not have the conspicuous characteristics for distinguishing the source of a product, if:
  - It refers to a product’s general name, figure, model;
  - It only identifies the product’s quality, key material, function, use, weight, quantities, etc.;
  - It is the shape produced due to the nature of the product itself, or the shape of the product that should be produced for the purpose of obtaining technical effects, or the shape that carries substantial value to the product; or
  - any other mark that lacks conspicuous characteristics.

### **4. Protection for Foreign Businesses’ Trade Name without Registration.**

According to Article 9 of the 2022 Interpretation, a business’ name legally registered overseas which is used commercially within China may be recognized by the people’s court as the “trade name” under Article 6 of the UCL.

### **5. Clarification on the Protection for Trade Dress.**

According to Article 8 of the 2022 Interpretation, in case the decoration of the business place, the pattern of business tools, or the clothes of business staff of a business operator, etc. constitutes an overall business image with a unique style, the courts may affirm it as the “decoration” prescribed in Article 6 of the UCL.

The 2022 Interpretation offers substantial updates from the 2007 Interpretation. For foreign businesses, the 2022 Interpretation provides helpful guidance with respect to their overall planning and protection of intellectual properties in China, including, for example, designing and using marks with characteristics that are more likely to be protected when competitors use confusingly similar marks, and prosecuting unregistered trademark and trade dress cases.

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Additional questions? Please contact Haynes Boone lawyers [Liza L.S. Mark](#) and [Tianyun \(Joyce\) Ji](#).