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Parallel Import is Not a Defense for Trademark Infringement If the Product Sold Is Altered Without Consent



According to both Taiwan's judicial practice and administrative opinion, parallel importation without the prior consent from a domestic intellectual property owner does not necessarily constitute trademark infringement since it involves the sale of a genuine product in that product's original package. As such, the source-indicating function of the trademark to which the product is associated is not compromised. This practice does not either injure trademark owner or its licensee's commercial goodwill.

Precedent notwithstanding, parallel importation could be interpreted to be an infringing act in instances in which an imported product is not sold in the same condition as it was when it was acquired. In the recent case, 2017-IP-Sum-52, the Taipei District Court ruled that the sale of a genuine product which has undergone unauthorized processing, modification or alteration constitutes an infringement of trademark rights.

The accused party in 2017-IP-Sum-52 was a company whose scope of business includes the importation of printers, office machines and peripheral equipment thereof from the Japanese company Brother Industries. The accused party also engaged in the online sale of replaceable toner cartridges for a particular model of printer manufactured by Brother Industries. The packaging

of these cartridges was affixed with a label reading "our imported BROTHER products are of the best quality; sealed and boxed in the USA and now sold in Taiwan." However, Brother designs and manufactures its printers with different and distinguishable mechanical features depending on the country to which the printers are being sold, entailing that one model sold in one country could possess different features than the same model sold in another. As such, a toner cartridge acquired in the United States is not compatible with a printer sold in Taiwan. To overcome this problem, the accused party instructed an employee to mold the plastic casing of the toner cartridge in such a fashion as to render it compatible with a Brother printer of the same model sold in Taiwan.

The Court's reasoning was consistent with precedent, which entails that the resale of a genuine product acquired from a legitimate foreign source does not necessarily injure the commercial goodwill of the domestic trademark owner or its licensee. Furthermore, parallel import may positively impact the market. Furthermore, imported genuine products may be priced differently or lower than the same product sold by the trademark owner. The sale of these products also may decrease the likelihood of exclusivity and monopoly in the market by encouraging competition, thus benefiting consumers who benefit from lower prices and an increased range of choice.

Parallel Import is Not a Defense for Trademark Infringement If the Product Sold Is Altered Without Consent

In analyzing the facts of the case, the Court held that if an imported product is sold after processing, modification or alteration and still bears the same mark on its advertisements or packaging as if it had not undergone processing, modification or alteration, such an action is sufficient to cause a likelihood of confusion to the consumer. The consumer may wrongfully believe a sale conducted in the aforementioned manner as being authorized or permitted by the trademark owner. As such, the importer's use of the mark constitutes an infringement and an act of bad faith.

By molding the exterior of the cartridge, the accused party created a different product than that which was being advertised. By using the mark on a different product for sale without having obtained Brother's consent, the accused party's actions constituted trademark infringement.

The Court found the accused party guilty and liable to criminal detention for 50 days, convertible to NTD 1,000 per day pursuant to Article 95 of the Trademark Act.



Preliminary Injunction in Trademark Dispute Revisited

Petitioner's mark



Respondent's mark



Foreign language training has always been a profitable business in Taiwan. While Taiwan's sole official language is Mandarin Chinese, mastery of at least one foreign language is essential to the success of Taiwanese who intend to explore greater opportunities abroad, with English being the language of the most favorable choice.

TutorABC and KOJEN are two major English training services. They have been engaging in direct competition and legal disputes for years. TutorABC claims to be the first institution invests in online interactive distance English learning who owns a series of registrations for a "zero" device having a single-sided headset with microphone attached. This stands in contrast to KOJEN, which registered for a series of marks of "zero" device having instead a headphone but no microphone. During business operation, KOJEN also developed its online learning courses and used the trademarks in dispute on webpages and social media. Since the two companies engaged in direct competition, about seven years ago TutorABC filed trademark infringement lawsuit against KOJEN and won in the first instance. Pending litigation for second instance before the IP court, TutorABC moved for preliminary injunction seeking to stop KOJEN from continued use of the trademarks in dispute.

Pursuant to Article 22(2) of the Intellectual Property Case Adjudication Act, "... seeking an injunction maintaining the temporary status quo shall provide a preliminary showing proving it is necessary to prevent material harm or imminent danger or other similar circumstances with regard to the legal relation in dispute. The court shall dismiss the application if the preliminary showing is insufficient." In other words, to necessarily prevent the material harm or imminent danger or other similar circumstances with regards to the legal relation in dispute, a party of interest may petition for preliminary injunction. The legal terms of "material harm" and "imminent danger" are, however, indefinite and ambiguous, suggesting that a court is reserved with discretion to apply a substantive definition depending on facts of each specific case and the balance of interests. The court stressed that only when the Petitioner's interest that can be secured or injuries that can possibly be avoided is greater than the Respondent's disadvantage or injuries that may be incurred, will an injunction be necessary and justifiable.

Reviewing evidence and arguments from both parties, the IP Court ruled in favor of the Petitioner, granting the Petitioner injunctive relief.

The court held that the protectable subject of the Trademark Act is not a trademark itself but rather the “goodwill” that is gained through long-term use and advertising activities. The trademark owner suffers harm when there is a possibility that the functions of distinctiveness, representation of origin, quality assurance and advertisement are destroyed or likely to be destroyed, or that there is a danger that the consumers’ judgement could be compromised, or that the use of an infringing mark will affect the consumer’s recognition and association towards the goodwill of the mark (namely “likelihood of confusion”). As such, the brand’s associated value and business goodwill, which are valuable characters accumulated through the investments of time and money, will likely be depreciated or diminished. These are types of intangible harm suffered by the Petitioner.

The second instance IP Court further analyzed whether the Petitioner faced imminent danger in the present legal dispute. Based on various pieces of evidence, the Court believed that the Respondent had been using and was highly likely to continue using the trademarks in dispute. As such, the Petitioner’s trademark faces the imminent danger that it will be continuously infringed.

With respect to the balance of interest, the Court held that the granting of a preliminary injunction would not cause any harm to the Respondent on account of the Respondent still being able to use other word marks bearing the name “KOJEN” for its business operations. Most critically, the court set forth the nature of an injunction that, as an equitable relief, the grant of which is solely to prevent a non-quantifiable harm such as “confusion”. However, once there occurs confusion in the consumers, it could deeply root in consumer’s mind and undermine their decision-making ability when choosing the authentic source of intended product, which is supposedly the core, or perhaps sole, function of a given mark.

Firmly based on the above analysis, the IP Court granted the injunction, which was subsequently appealed to the Supreme Court by the unsatisfied KOJEN. On April 18, the Supreme Court dismissed that interim appeal.

The Supreme Court summarized a test used for determining whether or not to grant a preliminary injunction. The test, which largely corresponds to the IP Court’s reasoning, entails that the following requirements be met:



- The Petitioner has likelihood of prevalence in the pending suit;
- Continued use of infringing mark presents an imminent danger;
- The use of the mark in dispute negatively impacts the Petitioner's competitive advantage in commerce accumulated throughout time founded on fiscal investments and advertisement efforts;
- The use depreciates the Petitioner brand's good will, business values, and trademark distinctiveness;
- The use results in grave and irreparable injury to the Petitioner that is not recoverable by monetary damage; and that
- The injunction will not undesirably cause severe injuries to the Respondent.

The Supreme Court opined that IP Court's application of laws and fact finding were not made in error. The grant of injunction was proper and correct according to the aforementioned test. The IP Court's ruling was affirmed. The clear analysis of the requirements set forth under the test by both courts may benefit trademark owners involved in infringement suits as it can serve trademark owners a better prediction of whether or not a preliminary injunction will be granted.

Judgements Relating to Sports Broadcasts Released in China before World Cup 2018

The 2018 FIFA World Cup, which ended on July 15 with the victory of France over Croatia, is as much an economic event as it is a sports event. During the World Cup, bars and pubs in cities all over the world were filled with excited fans who were enjoying both the game as well as few drinks. While the revenue generated both from the alcohol sales from the pub-goers as well as purchases of sports lottery tickets was substantial, the royalties gained from broadcasting the World Cup is even greater. The broadcasting rights, which allowed the World Cup to be seen in areas ranging from urban pubs to rural households, are granted exclusively to one provider. As such, purchasing these rights can be a lucrative opportunity. Therefore, it is important for such provider to protect its interest by the law.

In China, whether the content of sports game can be protected under the Copyright Law has been a disputed issue for several years. There are two key issues in this regard:

- (i) Whether or not the live stream/broadcast of a sports game can fulfill the fixation requirement. This requires that a protectable work must be fixed in a tangible medium. Unlike a video file for a completed sports game, whether the live stream of sports game is fixed on a tangible medium is up to debate.
- (ii) Whether or not the content of sports game is a cinematographic work. This requires higher originality, or is a video recorded product, which requires lower originality. The key difference between the protection

of a cinematographic work and a recorded video product is that, the proprietor of a cinematographic work possesses all of the 17 categories of rights, including moral rights, as listed in Article 10 of the Copyright Law; however, the proprietor of a recorded video product only possesses 5 categories of economic rights such as the right of communication of information on networks.

Recently two Chinese judgements were released by Beijing Intellectual Property Court (“Beijing IP Court”) that provide clearer guidelines on the above two issues.

Sina v. TYJZ

Beijing Sina Internet Information Services Co. Ltd. (“Sina”) was the sole licensee to live broadcast the regular season games of the Chinese Super League (“League”), the nationwide top-tier professional football association in China. Tianying Jiuzhou Network Technology Co., Ltd. (“TYJZ”), a related subsidiary of Hong Kong’s Phoenix Television, was accused of streaming the League’s games on its website without authorization from 2012 to 2014. Therefore, Sina sued TYJZ for copyright infringement and unfair competition,¹ claiming that the streamed games were under the category of “cinematographic works and works created by virtue of an analogous method of film production,” and were therefore protectable under the Copyright Law². At the First instance in 2015, Beijing Chaoyang District People’s Court ruled in favor of Sina’s claims of copyright



infringement. TYJZ appealed. Few years later on March 30, 2018, Beijing IP Court released the judgement of 2nd instance vacating Chaoyang court's judgment.

The core issue in the case was whether game streaming, in which a work is presented by a series of successive pictorial images, is a cinematographic work or a work created by virtue of an analogous method of film production, namely a cinematographic work, defined by Article 3(6) of the Copyright Law. Sina asserted that this was the case. However, the Beijing IP Court disagreed.

Over the course of reviewing the case, Beijing IP Court analyzed that a protectable cinematographic work must possess at least two elements: fixability and originality. To meet the requirement for fixability, a cinematographic work must be incorporated stably on a tangible medium. The requirement for originality instead entails that a documentary work is created via the selection and filming of the content as well as the post-game editing and arrangement of the footage, thereby demonstrating personal endeavors of the author.

Unlike the rerunning of a recorded game, where the transmission signal is already fixed on a tangible medium, live streaming does not fix the signal. On the other hand, owing to restrictive circumstances such as the objectiveness of reporting on a sport game, realtimeness of a live game, the demands of event viewers and the standardization of the transmission signal., the broadcaster has almost no freedom in choosing the shooting materials at live and little

freedom in post-game editing and arrangement. Those restrictions prohibit the live broadcast of a sports game from reaching the level of originality required for a cinematographic work.

To short conclude, a live broadcast of football game lacks fixability and originality. As such, it cannot be protected as a cinematographic work. Therefore, Sina's copyright infringement claims were not sustained.

CCTV v. Baofeng

On the same date (March 30, 2018), the Beijing IP Court released another Second instance judgment in a dispute between CCTV Int'l Network Co., Ltd. ("CCTV") and Beijing Baofeng Tech. Stock Co., Ltd. ("Baofeng"). CCTV was the sole entity licensed to broadcast matches of World Cup 2014. Baofeng made public more than 3,900 video segments from the 64 matches on the Internet for on-demand streaming. CCTV argued that its broadcast programs were works created by quasi-filming process or at least recorded products under the Copyright Law and that Baofeng's video segments severely infringed upon CCTV's exclusivity in providing games to viewers. The Court of First instance did not recognize CCTV's programs as cinematographic works, but instead recognized them as recorded products. The court granted a monetary damage of RMB 0.67 million. CCTV appealed.

In its analysis of the case, the Beijing IP Court determined that on-demand streaming is available after live broadcasting and that signals of each game are fixed to a medium. However, taking from a

similar case, *Sina v. TYJZ*, the court determined that sports games do not reach the required higher level of originality and therefore the 64 matches which were released by the defendant as video segments cannot be classified as cinematographic works. Despite this, their level of originality still qualifies them as recorded videos. As such, CCTV was entitled to the producer's rights for the recordings, a right which is one of neighboring rights enumerated in the Copyright Law. The Beijing IP Court ruled that Baofeng infringed CCTV's "right of communication of information on networks."³ Considering the relevant facts in the dispute, the court ordered Baofeng to indemnify CCTV RMB 4 million, including attorney's fee, which was the entirety of CCTV's monetary claim.

Conclusion

From the two cases, it can be inferred that the court attempted to make manifest an assertion that copyrighting the live streaming of games as a cinematographic work is not feasible under the copyright law system since it cannot fulfill the requirement for fixation. Therefore, the live streaming of games may not be protected by the Copyright Law. However, video recordings of games, which are produced when the game is finished and fixed on certain tangible medium, may be protected by neighboring rights. Fortunately, under Articles 41 and 42(1)(1) of the latest draft amendment of the Copyright Law, broadcast stations and TV stations have the right, among others, to license others to rebroadcast their programs, or broadcast signals for the first time bearing sound and images either by wire or wireless mediums. Hopefully, through the

enactment of the amendment of the Copyright Act, live broadcast signals will soon enjoy protections.

- ¹ Court of 1st instance did not review unfair competition claim where Sina argued that game broadcasting is a legitimate business operation worthy of lawful protection and that TYJZ's use of transmission signal adversely undermined competition and breached commercial ethics. Plus Sina did not appeal the court's omission, so the Beijing IP Court did not review the same accordingly.
- ² Article 3(1)(6) of the Copyright Law
- ³ Article 10(12) of the Copyright Law



Divergence in What Constitutes “Well-Known” in the Trademark Act



A Chinese term can encompass multiple meanings. “著名”, pronounced as “zhu-ming,” is acknowledged as either meaning “famous,” “celebrated,” “outstanding,” or “well-known” according to Google Translate. As “著名” appears in Article 30(1)(11) of the Trademark Act with respect to the protection of the well-known trademarks, the Chinese term was therefore translated into “well-known.” Notably the degree of fame and the corresponding level of protection were not persistent throughout time, which can be seen throughout the judicial opinions in several rulings of the Supreme Administrative Court (“SAC”).

Article 30(1)(11) of the Trademark Act reads that an application for trademark registration shall be refused if it -

[be] identical with or similar to another person’s **well-known** trademark or mark, and hence there exists a likelihood of confusion on the relevant public¹ or a likelihood of dilution of the distinctiveness or reputation² of the said **well-known** trademark or mark, [...];

For some years, “well-known” in the Trademark Act was understood to mean a degree that a mark is known to the relevant consumers or enterprises in the same industry. This entails that there is a uniform level of protection against a junior registration on the grounds that the registration is either likely to cause confusion or dilution, despite the fact that the same term appears twice respectively on the former

and latter paragraphs in the foregoing provision. This definition was raised in SAC’s opinions in judgments 2012-Judge-No.47 and 2012-Judge-No.48.

The SAC’s judgements back in 2012 adhered to the “literal” definition (the plain meaning) of Article 31 of the Enforcement Rules of Trademark Act (“Enforcement Rules”) which provides that -

[t]he term [well-known] as prescribed in the Trademark Act refers to the circumstance where there is objective proof of a sign capable of being commonly recognized by **the relevant enterprises or consumers**.

As such, SAC opined that a lower degree of fame was sufficient to protect a well-known trademark in either a situation involving a likelihood of confusion or a likelihood of dilution.

Later, in 2016, the SAC held a Joint Conference for Chief Judges in which these judges voted on a Resolution (“2016 SAC Resolution”) regarding the degree of fame in the former and latter paragraph of Article 30(1)(11). The 2016 SAC Resolution analyzed the definition of “well-known” from the perspective of fair and free competition. As majority vote explained, when the markets of the junior and senior marks’ goods or services are differentiable, and the commercial conflicts thereof are not significant, consumers are not likely to hold the misconception that the goods or services come from the same source or an associated source. However, when

¹ Similar to Article 6bis of the Paris Convention

² Similar to Article 16(3) of the TRIPs Agreement

permitting registration of a junior mark leads to a negative consequence in that it lessens the distinctive characteristics of the senior mark or weakens reputation of the same, dilution protections shall also be invoked. Moreover, protecting a senior mark in risk of dilution demands enforceability to crossover to another market with lighter commercial conflict, which may potentially produce significant risks over free competition, or result in exclusivity for a specific word, symbol, device, or a combination thereof. As a result, dilution protection shall only be limited to those enjoying higher degree of fame, namely that which goes beyond the scope of the same or similar goods or services designated by the well-known trademark, so as to reduce potential harm and risk to the public.

The 2016 SAC Resolution clearly states that the degree of fame for a well-known trademark in the former and latter paragraphs of Article 30(1)(11) shall be interpreted differently. The provision in Article 31 of the Enforcement Rules regarding the definition of fame should be interpreted narrowly by the purpose of application; it is not applicable to “well-known trademark” stipulated in the latter paragraph of Article 30(1)(11) of the Trademark Act.

Subsequently, in 2017, in the SAC’s Judgment 2017-Judge-No.608, the court confirmed the definition of “well-known” in the latter paragraph of Article 30(1)(11) of the Trademark Act as being different from that in former paragraph. The court reasoned that the former paragraph aims to protect

“relevant consumers” from being confused as to the genuine source of goods or services, an interpretation which is in line with the definition stipulated in the Enforcement Rules. On the contrary, the latter paragraph was so devised to protect the trademark per se to avoid the distinctiveness or reputation of that mark from being diluted among the perceptions of the general public. The scope of protection is therefore not limited within the scope of identical or similar goods or services. In other words, it is Justifiable to demand a higher degree of fame from the trademark in order to endow the protection to a mark beyond its designated class(es). When a mark is known to consumers of some specific class(es) of goods or services, the mark shall not be entitled to an expansion of protection to dissimilar goods or services. In short, to defend a junior registration that is likely to dilute a senior mark, the senior mark must be “well-known” to more than relevant consumers but to the general public. Article 31 of the Enforcement Rules does not apply. The foregoing ruling echoed the 2016 SAC Resolution.

Some later judgements from the lower courts, including those of the Taiwan IP Court, are in consistent holding with the bifurcation of interpretation for the term “well-known” stipulated in Article 30(1)(11) of the Trademark Act. Trademark owners should be more prepared to present sufficient evidence in cases based on the grounds of dilution.

Shanghai Gaotong's Core Trademark "GOTOP" Cancelled by Qualcomm

Trademarks owned by Shanghai Gaotong



Source: China Intellectual Property News

The decision regarding the administrative dispute over the re-examination of Registration No. 4305050 has at last been made. Shanghai Gaotong Semiconductor Co., Ltd. ("Shanghai Gaotong") and the American firm Qualcomm have entered into a dispute over infringement and unfair competition arising from the use of the "GOTOP and 高通" trademark ("高通" is the Chinese name used by Qualcomm and is pronounced as "gaotong"). The lawsuit lodged by Shanghai Gaotong against Qualcomm had been going on for more than three years, a lawsuit which began when Qualcomm filed an application to cancel a series of Shanghai Gaotong's trademarks, including "GOTOP 高通" and "高通 (gaotong)" trademark (TM Registration No. 4305050). (Beijing Final Decision [2008] No. 850)

The suit ended with the Beijing High People's Court rejecting Shanghai Gaotong's appeal. Thus, the disputed trademarks were invalidated.

■ The Course of Events Regarding the Dispute Over Trademark No. 4305050 高通

Shanghai Gaotong was formed on July 21, 1992. It mainly focuses on digital and telecommunications devices, instruments, cultural products for offices as well as research and development, technology transfer, technical consulting, technical services and sales for software, hardware and external computer devices.

According to the China Trademark website, Shanghai Gaotong applied to the Trademark Office for the disputed trademark on October 12, 2004. Registration was approved on March 28, 2008. The trademark was approved for use in Class 42 services such as computer software design and research and development products (See below table to details).

Believing that the disputed trademarks were not in use between August 2010 and August 2013 ("designated period"), on August 12, 2013, Qualcomm requested that the Trademark Office cancel the disputed trademark. The Trademark Office rendered its decision in April of 2014. The result was that Qualcomm's request was denied.

During the examination period, Shanghai Gaotong submitted evidence including the company's registration status, promotional materials and product images to the Trademark Office. This was done in order to prove that Shanghai Gaotong had in fact used the disputed trademark during the designated period.

Qualcomm appealed the Trademark Office's decision. In May of 2014, Qualcomm applied to the Trademark Review and Adjudication Board ("TRAB") for a re-examination. Qualcomm argued that the evidence submitted by Shanghai Gaotong could not sufficiently prove that the disputed trademarks were in commercial use during the designated period or that they were used for the services for which they

registered. This being the case, Qualcomm believed that Shanghai Gaotong's registrations should be cancelled.

On December 22, 2015, TRAB rendered its decision for TRAB Re-Examination No. 101767 (2015). TRAB held that Shanghai Gaotong would retain its protection of the use of the disputed trademark in services such as computer software design and maintenance ("specified services"), but Shanghai Gaotong's registrations for packaging and interior design services would be cancelled. Qualcomm appealed TRAB's decision and filed an administrative suit at the Beijing Intellectual Property Court in which it requested that TRAB's decision be revoked.

During the first trial, Shanghai Gaotong did not submit any new materials as evidence during the period for producing evidence. After the first trial and upon receiving permission from the court, Shanghai Gaotong was given 15 days to produce its business license, pictures of its offices, building leases and other documents containing basic information on which the name "上海高通 (Shanghai Gaotong)" could be seen. Furthermore, Shanghai Gaotong was given permission to submit evidence such as any awards and introductory information for its products or solutions bearing the name of Shanghai Gaotong.

Qualcomm believed that Shanghai Gaotong had submitted evidence without proper justification and at too late of a date and that the evidence submitted by the latter could not prove that the existence of the

contested trademark, or its use during the designated period of time, or use for the specified service that the trademark was in effective.

■ Final Decision of the Beijing Intellectual Property Court

The Beijing Intellectual Property Court held that none of the evidence presented by Shanghai Gaotong proves that the disputed trademarks were used during the designated period and for the specified services. As such, the Beijing Intellectual Property Court revoked TRAB's decision and ordered TRAB to render a new decision.

Shanghai Gaotong appealed Civil Judgement No. 1672 [2016], First, Civil Division, 73, Beijing, of the Beijing Intellectual Property Court and filed suit in the Beijing Higher People's Court. The case was heard on February 8, 2018.

After its deliberations, the Beijing Higher People's Court held that Shanghai Gaotong's submission of its business license, pre-approval notice for the change of the company's name, its trademark statistics and its advertisements which were placed on automobiles during the administrative stage were irrelevant to the question of whether or not the disputed trademark had been used. As such, the evidence presented could not prove that the disputed trademark was used during the designated period and for the specified use. Furthermore, the "solution" that Shanghai Gaotong often referred to during its



presentation of evidence of use did not fall under Category 42, the category for which the disputed trademark was to be used. As such, the existence of the solution could not prove that Shanghai Gaotong had used the trademark commercially, within the designated period and for the specified use.

Furthermore, Shanghai Gaotong's business license, the images of its office, its lease as well as other basic company information do not show the disputed trademark, were not used during the specified period and are irrelevant to the question of whether or not the disputed trademark was used. Furthermore, Shanghai Gaotong's awards have the same issue. None of the information presented by Shanghai Gaotong as evidence proves that Shanghai Gaotong has ever provided any of the specified services.

Thus, Shanghai Gaotong's appeal was rejected and the earlier judgement was maintained. In other words, the contested trademark registration no. 4305050 was cancelled on May 9, 2018 because Shanghai Gaotong had not used it for three consecutive years.





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