



**INTA’s comments on the State Administration for Market Regulation’s *Draft Anti-Unfair Competition Law***

**December 22, 2022**

The International Trademark Association (INTA) is pleased to submit these comments for consideration in promulgating the *Draft Anti-Unfair Competition Law*.

INTA, as a global organization of 6,500 brand owners and professionals from over 185 countries, including 229 members in China, is a not-for-profit membership association dedicated to supporting consumer confidence, economic growth and innovation. Founded in 1878, INTA is a leader in global trademark research, policy development, and education. The Association's member organizations represent some 34,350 trademark professionals and include brand owners from major corporations as well as small and medium-size enterprises, law firms and non-profits, government agencies, academics and students. For more information please visit our website at [www.inta.org](http://www.inta.org).

The following comments were prepared by INTA's Unfair Competition Committee and staff. We would welcome the opportunity to discuss these issues in-depth and to answer any questions. We hope you will find our comments helpful.

**I. General Comments**

---

INTA commends the initiative and resolve of the Chinese judiciary to standardize the current practice and rules established in the trial adjudication of unfair competition cases, which enhances the predictability of the application of Anti-Unfair Competition Law (AUCL) in China. We applaud the efforts to clarify the new and cutting-edge issues, such as the anti-competitive behaviors arising out of digital era and internet, as well as the increased penalties in punitive damages and administrative fines.

**II. Specific Comments**

---

Article	Content of the Article	Comments	Suggestions
<b>General rules</b>			
Article 2	Business operators shall follow the principles of voluntariness, equality, fairness, and good faith, abide by laws and observe business ethics in carrying out	The Draft confirms aiding and abetting in unfair competition activities is	

	production or business activities, and <b>shall not commit or assist others in committing unfair competition practices.</b>	violation of the law, which is in line with Patent Law and Trademark Law etc.	
<b>Specific rules</b>			
Article 7	<p>A business operator shall not perform any of the following confusing acts that will enable people to mistake its products for another business's products or to associate its products with any business's products,</p> <p>1. unauthorized use of a logo or packaging or decoration that is identical with or similar to the name, <b>packaging or decoration</b> of another business's commodity, which is influential to a certain extent;</p> <p>(II) unauthorized use of a mark <b>identical with or similar to the name</b> (including its shortened name, trade name, etc.) <b>of any market entity</b>, the name (including its shortened name, etc.) of a social organization, or the name (including its pen name, stage name, translated name, etc.), which has influence to a certain extent;</p> <p>(III) unauthorized use of a mark or page identical with or similar to the main part of others' domain name, <b>website name, page design, name of self-media, name of application software or icon</b>, which has influence to a certain extent;</p>	<p>Paragraph1(II) clarifies "identical or similar to" may constitute unfair competition, which is in line with the current practice in adjudication.</p> <p>The second paragraph provides a clear legal basis for prohibiting the sale of confusing goods and aiding and abetting confusion.</p> <p>"explicit keyword searches" in IV (where both keyword and webpage contain another person's trademark) constitute trademark</p>	<p>It needs clarifying the "search terms" in paragraph 1(IV), particularly whether the "commercial label" contains registered marks.</p>

	<p>(IV) <b>setting without authorization others' business logo, which has influence to a certain extent, as search keywords, to mislead the relevant public;</b> and</p> <p>(V) other confusing acts that are sufficient to enable people to mistake its products for another business's products or to associate its products with any business's products.</p> <p><b>A business operator shall not sell confusing commodities which constitute the commodities stipulated in the first paragraph of this Article, and shall not provide convenience such as warehousing, transportation, mailing, printing, concealment, business premises, etc. for implementation of confusing acts.</b></p>	<p>infringement, but it is controversial whether "implicit keyword search" (where keyword contains another person's trademark and webpage does not) constitutes trademark infringement or unfair competition.</p>	
<p>Article 9</p>	<p>A business operator shall not make false or misleading commercial promotions for the relevant information of commodities or <b>commodity business operators</b> such as the performance, function, quality, <b>category, source,</b> sales status, user review, accolades, <b>transaction information, business data, qualification and qualification,</b> attempting to cheat or mislead the <b>relevant public.</b></p>	<p>It clarifies by way of example the scope of application of false publicity and the scenarios of its application.</p> <p>The third paragraph further clarifies aiding unfair competition,</p>	

	<p><b>Commercial promotion referred to in the preceding paragraph shall mainly include commercial promotion activities which do not constitute advertising such as displaying, demonstrating, describing, explaining, promoting or marking words for commodities through business premises, exhibition activities, websites, self-media, telephone, flyers, etc.</b></p> <p>A business operator shall not help any other business operator make false or misleading commercial promotions by organizing false transactions, <b>fictitious reviews</b> or any other means, <b>nor shall it provide services such as planning, production and release for false promotions.</b></p>	<p>in consistent with the new provision in Article 2.</p>	
<p>Article 27</p>	<p>Business operators that violate this Law and thus causes damage to others shall bear civil liability for such damage in accordance with the law.</p> <p>A business operator whose legitimate rights and interests are infringed upon by unfair competition conduct may file a lawsuit with a People's Court.</p> <p>The amount of compensation for damage caused by any unfair competition conduct to a business operator shall be determined depending on the actual losses suffered by</p>	<p>It clarifies punitive damages are applicable to all acts of unfair competition, which facilitates the aggrieved party to obtain a high award.</p>	

	<p>such operator as a result of the infringement; if it is truly difficult to work out the actual losses, such amount shall be determined based on the benefits obtained by the infringer from the infringement. The amount of compensation shall also include the reasonable expenses paid by the business operator to stop the infringement.</p> <p><b>For serious violation of this Law by a business operator, the amount of compensation may be one to five times the amount determined using the aforesaid method.</b></p> <p><b>Where it is truly difficult to determine the actual losses suffered by the business operator due to the infringement or the benefits obtained by the infringer from the infringement, the People's Court shall award damages of less than 5 million yuan to the right holder, depending on the extent of the infringement.</b></p>		
<p>Article 28</p>	<p>Where a business operator violates the provisions of Article 7 of this Law in carrying out confusing activities, the supervision and inspection authorities shall order the business operator to stop the illegal activities, and <b>confiscate illegal income as well as illegal commodities and manufacturing tools</b>. Where the amount of illegal business income exceeds</p>	<p>"confiscate the proceeds of the offence, the goods and means of production", increases the penalties to deter profits from</p>	

	<p>50,000 yuan, a fine of not more than five times the amount of illegal business income may also be imposed; where there is no illegal business income or the amount of illegal business income is less than 50,000 yuan, a fine of not more than 250,000 yuan may also be imposed; in serious cases, the business licence shall be revoked.</p> <p><b>Where a business operator is or should be aware that another person has carried out confusing activities but still sells confusing commodities, or intentionally provides convenience for implementing confusing activities, or assists others in implementing confusing activities, the provisions of the preceding paragraph shall apply.</b></p> <p><b>Where a business operator who sells confusing commodities unknowingly can prove that the commodities are obtained legitimately and can state the supplier, the supervision and inspection authorities shall order the business operator to stop selling the commodities.</b></p> <p>Where the market entity name registered by a business operator violates the provisions of Article 7 of this Law, the business operator shall complete name change registration formalities <b>within 30</b></p>	<p>committing unfair competition.</p> <p>The second paragraph clarifies the legal liability of selling is comparable to that of using, leading to commercial confusion, and distinguishing between subjective intent. Legal origin is added as sellers' defence, namely those who can provide and prove the legal origin of the confusing goods shall be exempted from punishment, yet legally obligated to stop selling them.</p> <p>The third para specifies the time limit for changing the name of a business that</p>	
--	---	--	--

	<p><b>days from the date of making of the handling decision</b>; prior to the name change, the original registration authorities shall use the unified social credit code to replace its name.</p>	<p>constitutes unfair competition, which reduces the damage suffered by right holders.</p>	
Article 30	<p>Where a business operator violates the provisions of Article 9 of this Law in carrying out false or misleading commercial promotion for its commodities and <b>the manufacturers and business operators of the commodities</b>, or helps another business operator to carry out false or misleading commercial promotion through organising false transactions or <b>fictional reviews</b> etc, the supervision and inspection authorities shall order the business operator to stop the illegal act, <b>confiscate items used in the illegal act</b> and illegal income, and impose a fine ranging <b>from RMB100,000</b> to RMB1 million; in serious cases, a fine ranging from RMB1 million to RMB2 million shall be imposed, and the business licence may be revoked.</p> <p><b>A business operator which provides planning, production, publishing services etc when it is or should be aware that the promotion is false shall be punished pursuant to the provisions of the preceding paragraph.</b></p>	<p>The minimum administrative fine in the first paragraph is reduced from RMB 200,000 to RMB 100,000.</p> <p>The second para, linked to article 9, addresses assistance in committing false publicity, and clarifies that the legal liability is comparable to that of direct perpetration under the first paragraph, distinguishing between subjective intent.</p> <p>The third para, linked to Article 9, clearly stipulates</p>	

	Where a business operator violates the provisions of Article 9 of this Law in publishing of false advertisements, it shall be punished pursuant to the Advertising Law of the People's Republic of China.	the Advertising Law shall be applied where false publicity and false advertising overlap.	
Article 37	<b>Where a business operator carries out unfair competition conduct that seriously disrupts the competition order and it is indeed necessary to investigate into and penalize it, but there are no specific provisions in this Law and the relevant laws or administrative regulations, the administration for market regulation under the State Council shall determine such conduct, and the administration for market regulation at or above the provincial level shall order the business operator to stop the illegal act, confiscate illegal income, and impose a fine ranging from RMB100,000 to RMB1 million; in serious cases, a fine ranging from RMB1 million to RMB5 million shall be imposed.</b>	It provides the legal basis for administrative penalties for unfair competition in breach of Article2 (general principle).	