

INTERPRETATION OF THE SUPREME PEOPLE'S COURT ON SOME MATTERS ABOUT THE APPLICATION OF LAW IN THE TRIAL OF CIVIL CASES INVOLVING UNFAIR COMPETITION

Announcement of the Supreme People's Court

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The Interpretation of the Supreme People's Court on Some Matters about the Application of Law in the Trial of Civil Cases Involving Unfair Competition, has been adopted by the 1412th meeting of the Judicial Committee of the Supreme People's Court on December 30, 2006. It is hereby promulgated and shall enter into force as of February 1, 2007. The Supreme People's Court

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Interpretation of the Supreme People's Court on Some Matters about the Application of Law in the Trial of Civil Cases Involving Unfair Competition

(Adopted at the 1412th meeting of the Judicial Committee of the Supreme People's Court on December 30, 2006)

For the purpose of correctly hearing the civil cases involving unfair competition, lawfully protecting the legitimate rights and interests of business operators, and maintaining the order of market competition, the present Interpretation is constituted in accordance with the General Principles of the Civil Law of the People's Republic of China, the Anti-unfair Competition Law of the People's Republic of China, and the Civil Procedure Law of the People's Republic of China and in combination with the experiences and actual situation of the trial practice.

Article 1

Well-known commodities as stipulated in Subparagraph (2) of Article 5 of the Anti-unfair Competition Law refer to those commodities that have certain market popularity within the territory of China and are known by the public concerned. The people's court shall take into account the time, region, volume and targets for selling such commodities, the duration, degree and scope for any promotion of such commodities, as well as the protection situation as well-known commodities, and make comprehensive judgments when affirming well-known commodities. The burden of proof for the market popularity of commodities shall be assumed by the plaintiff.

In case an identical or similar name, package or ornament with that typical to a well-known commodity is used within a different region, it will not constitute the unfair competition as stipulated in Subparagraph (2) of Article 5 of the Anti-unfair Competition Law if the later user can prove its good faith in using it. Where the sources of commodities of the earlier user are confused due to the later business activities conducted

within the same zone, the people's court shall give support when the earlier user pleads the court to order the later to add other signs to make a distinction on the sources of its commodities.

Article 2

In case the name, package and ornament of commodities is the notable characteristics for distinguishing the source of commodities, it shall be deemed as the typical name, package and ornament as stipulated in Subparagraph (2) of Article 5 of the Anti-unfair Competition Law. In case of any of the following circumstances, the people's court shall not ascertain them as the typical name, package and ornament of well-known commodities:

(1)

the commonly-used name, graphics or model of the commodities;

(2)

the name of the commodities that just directly specifies the quality, major raw materials, functions, utilities, weight, quantity or any other characteristic of the commodities;

(3)

the shape produced due to the nature of the commodities, the shape of the commodities that should be produced for the purpose of obtaining technical effects, as well as the shape that produces substantial value to the commodities; or

(4)

other name, package or ornament of the commodities that has no notable characteristic.

In case the notable characteristic occurs upon use under any circumstance as stipulated in Subparagraph (1), (2) or (4) of the preceding paragraph, it can be regarded as a typical name, package and ornament.

In case the typical name, package or ornament of a well-known commodity includes the name, graphics, or model common to the said commodity in question, or directly indicates the quality, major raw materials, functions, utilities, weight, quantity or any other characteristic of the said commodity, or involves the name of the place, if it is used by any other party for narrating commodities impartially, it shall be deemed that an unfair competition is not constituted.

Article 3

In case the ornament of the business place, the pattern of business appliances, or the

clothes of operating personnel, and etc. constitutes an overall business image with a unique style, it may be ascertained as the ornament as stipulated in Subparagraph (2) of Article 5 of the Anti-unfair Competition Law.

Article 4

In case of any confusion concerning the source of a commodity in the public concerned, including the misapprehension of such a typical relationship as licensed use or affiliation with the business operator of a well-known commodity, it shall be regarded as causing the confusion with the well-known commodity of someone else, and making the consumers mistake it to be a well-known commodity as stipulated in Subparagraph (2) of Article 5 of the Anti-unfair Competition Law.

In case any identical name, package or ornament of a commodity or the one that is no difference with the forged one in terms of visual effect is used on the same commodity, it shall be deemed as sufficiently to cause the confusion with the well-known commodity of someone else.

The identity or similarity with the typical name, package or ornament of a well-known commodity may be ascertained with reference to the principles and methods for judging identical or similar trademarks.

Article 5

In case the name, package or ornament of a commodity is a sign that can not be used as a trademark as stipulated in Paragraph 1 of Article 10 of the Trademark Law, if the party concerned applies to the court for protection in accordance with Subparagraph (2) of Article 5 of the Anti-unfair Competition Law, the people's court shall not give support.

Article 6

A name of any enterprise registered by the enterprise registration competent authority, or a name of any foreign enterprise used within the territory of China for commercial use shall be ascertained as an enterprise name as stipulated in Subparagraph (3) of Article 5 of the Anti-unfair Competition Law. A shop name in the name of enterprise that has certain market popularity and is acknowledged by the public concerned may be ascertained as a enterprise name as stipulated in Subparagraph (3) of Article 5 of the Anti-unfair Competition Law.

The name of any natural person used in the business operation of commodities shall be ascertained as a name as stipulated in Subparagraph (3) of Article 5 of the Anti-unfair Competition Law. The pen name or stage name of any natural person that has certain market popularity and is acknowledged by the public concerned may be ascertained as a name as stipulated in Subparagraph (3) of Article 5 of the Anti-unfair Competition Law.

Article 7

As regards the commercial use within the territory of China that includes the use of the typical name, package or ornament of a well-known commodity, or use of the enterprise title or name for a commodity, commodity packages or commodity exchange documents, or for advertisements, exhibitions or any other commercial activities, it shall be ascertained as the use as stipulated in Subparagraphs (2) and (3) of Article 5 of the Anti-unfair Competition Law.

Article 8

In case of any of the following acts committed by a business operator, if it is sufficient to cause the misapprehension of the public concerned, it may be ascertained as a false or misleading promotion as stipulated in Paragraph 1 of Article 9 of the Anti-unfair Competition Law:

(1)

implementing biased or contrastive promotion of commodities;

(2)

implementing the promotion of commodities by adopting unsure scientific viewpoints or phenomena as the facts for final conclusions; or

(3)

implementing the promotion of commodities by way of using vague language or other deceptive methods.

In case the commodities are publicized by way of obviously exaggerating, if it is insufficient to cause the misapprehension of the public concerned, it shall not be ascertained as the false or misleading promotion.

The people's court shall ascertain the false or misleading promotion in light of daily life experiences, the general attention of the public concerned, the fact misunderstood, as well as the reality of the promotion objects, and etc..

Article 9

If the related information may not be aware of by the related personnel in the field therefrom and is difficult to be obtained, it shall be ascertained as unknown to the public as stipulated in Paragraph 3 of Article 10 of the Anti-unfair Competition Law.

In case of any of the following circumstances, it may be ascertained that the related

information is not unknown to the public:

(1)

It is the common sense or industrial practice as known by people in the related technical or economic field;

(2)

It only involves the simple combination of dimensions, structures, materials and components of products, and can be directly obtained by observing the products by the public concerned after the products enter into the market;

(3)

It has been publicly revealed on any publication or any other mass medium;

(4)

It has been publicized by reports or exhibits;

(5)

It can be obtained through other public channels; or

(6)

It can be easily obtained with no price.

Article 10

In case the related information has practical or potential commercial value, and can be used for enhancing the competitive advantage for the obligee, it shall be ascertained as capable of bringing about benefits to the obligee, and having practical applicability as stipulated in Paragraph 3 of Article 10 of the Anti-unfair Competition Law.

Article 11

If the obligee takes proper protection measures that is suitable for the commercial value or any other specific circumstance for the purpose of avoiding information divulgence, it shall be deemed as confidentiality measures as stipulated in Paragraph 3 of Article 10 of the Anti-unfair Competition Law.

The people's court shall ascertain whether the obligee has taken confidentiality measures in accordance with the features of the related information carrier, the willingness for keeping secret of the obligee, the identifiability degree of the confidentiality measures,

the difficulty for others to obtain it by justifiable methods and other elements.

In case of any of the following normal circumstances that is sufficient to prevent the divulge of any classified information, it shall be ascertained that the obligee has taken the confidentiality measures:

(1)

To limit the access scope of the classified information, and the contents shall only be notified to related personnel that must be aware of the information;

(2)

To take such preventive measures as locking the carrier of the classified information up;

(3)

To tag a confidentiality sign on the carrier of classified information;

(4)

To adopt passwords or codes on the classified information;

(5)

To conclude a confidentiality agreement;

(6)

To limit visitors to the classified machinery, factory, workshop or any other place or bring forward any confidentiality request; or

(7)

Any other reasonable measure for guaranteeing the confidentiality of information.

Article 12

As regards obtaining business secrets through development and research by itself or reverse engineering, it shall not be ascertained as an infringement upon business secrets as stipulated in Subparagraphs (1) and (2) of Article 10 of the Anti-unfair Competition Law.

Reverse engineering referred to in the preceding paragraph means to obtain the related technical information on the products in technical methods by way of disassembling, mapping or analyzing the products gotten from public channels. Any party concerned that

knows the business secrets of someone else by unjustifiable methods and then claims its acquisition as lawful in excuse of reverse engineering shall not be supported.

Article 13

The name list of clients among business secrets generally refers to the special client information that is different from related public information, including the name, address, contact information, business habits, intent, and contents of the clients and comprise the name roll of clients that collects lots of customers as well as the specific customers that have kept a long-term and stable transaction relationship.

In case a client develops market transactions with the entity due to relying on an employee thereof, after this employee leaves his post, if it can be proved that this client voluntarily chooses to perform market transactions with the said employee or the new entity he works for, it shall be ascertained that no unfair methods has been adopted, except it is otherwise stipulated between this employee and the former entity.

Article 14

As regards any party concerned that claims that someone else has infringed upon its business secret, it shall be responsible for providing proof to verify that its business secret satisfies the statutory requirements, the information of the other party concerned is identical or substantially identical with its business secret, and the other party concerned has adopted unfair methods. Among others, the evidence for proving that its business secret satisfies the statutory requirements shall comprise the carrier, specific contents, and commercial value of this business secret as well as the specific confidentiality measures taken for this business secret.

Article 15

If the licensee of the license contract for sole use of the business secret raises an action as regards infringement upon any business secret, it shall be accepted by the people's court in accordance with related laws.

If the licensee of the license contract for exclusive use, jointly with the obligee, raises an action, or the licensee raises an action independently under the circumstance that the obligee may not do so, it shall be accepted by the people's court in accordance with the related laws.

If the licensee of the license contract for common use, jointly with the obligee, raises an action, or the licensee raises an action independently upon authorization of the obligee in written form, it shall be accepted by the people's court in accordance with the related laws.

Article 16

When the people's court make an adjudication of the civil liability to stop the infringement on any business secret, the time for stopping the infringement shall generally be prolonged to the time when this business secret has been aware of by the general public.

In case the time for stopping the infringement arbitrated in accordance with the preceding paragraph is clearly unacceptable, if it is under the circumstance that the competitive advantage of the obligee to this business secret is protected, the infringer may be ordered to stop using this business secret within a certain period or scope.

Article 17

As regards determining the damages for the acts infringing on business secrets as stipulated in Article 10 of the Anti-unfair Competition Law, it may be performed with reference to the methods of determining damages for patent infringements, and as regards determining the damages for the unfair competition acts as stipulated in Article 5 , 9 or 14 of the Anti-unfair Competition Law, it may be performed with reference to the methods of determining damages for infringing upon registered trademark rights.

If any business secret has been aware of by the general public due to any tort, the damages shall be determined subject to the commercial value of this business secret. The commercial value of this business secret shall be ascertained in light of such elements as the research and development costs, the income from implementing this business secret, possible benefits, and the time for maintaining the competitive advantage, and etc..

Article 18

The power to adjudicate the civil cases of the first instance concerning the unfair competition as stipulated in Article 5 , 9, 10 or 14 of the Anti-unfair Competition Law shall generally remain with the intermediate people's court.

Each higher people's court may determine some grass-roots people's courts to accept the civil cases of the first instance concerning unfair competition in accordance with the actual situation of its jurisdiction and upon approval of the Supreme People's Court, and those grass-roots people's courts that have been approved to hear civil cases regarding intellectual property may continue the acceptance of cases concerning unfair competition.

Article 19

The present Interpretation shall enter into force as of February 1, 2007.

The Supreme People's Court 2007-01-12