

## **TRADEMARK APOLOGETIC JUSTICE: *China's Three Laws on Trademark Reputation***

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Will Apple be ordered to apologize for its unauthorized use of the trademark “iPad” in Shenzhen, China? Will Apple face massive confiscation of infringing “iPad” products in China?

Appropriation of another's name and reputation without authorization has long been recognized as an injury. Trademark law does not tolerate usurpation of the reputation embodied in a trademark or name that misleads or confuses the public. The injured person or business can seek remedies in the form of injunctive relief and monetary damages, which are rooted in property interest theory and damages in torts liability rules, respectively. Even if the plaintiff was successful in obtaining both injunctive relief and monetary damages, the remedies received do not truly address the harm to trademark reputation because they do not consider that the public was also harmed by the defendant's misleading conduct. What remedy may be appropriate *in addition* to injunction and monetary damages? What remedy may be appropriate that would take the harm to done to both the public and the plaintiff into consideration? The answer lies in China's jurisprudence on trademark reputation and apologetic justice. It is rather an ironic assertion given that most of the attention to China has been negative, focusing overwhelmingly on the piracy of U.S. intellectual property rights.

China has continued to surprise the international community in its efforts to transform the country from being the factory of the world into the global innovation center. While foreigners look at China as a piracy epicenter, China has unleashed its power to develop a new trademark jurisprudence through statutes, judicial directives from the Supreme People's Court, and written decisions published by the lower people's courts. China's trademark jurisprudence treats injuries to trademark reputation as harmful to *both* the plaintiff and society. Accordingly, Chinese law gives the court discretion to order the defendant to make a public apology in a newspaper or trade journal in cases where the defendant intentionally or maliciously harmed the plaintiff's reputation by misleading the public through unauthorized use of the plaintiff's trademark or name. In a public apology, the defendant admits to the infringing conduct, acknowledges the trademarks or names owned by the plaintiff, apologizes for the wrongdoing, and promises not to engage in the unauthorized use of the trademark or name in the future. Generally, the content of a public apology must be approved by the court. If the defendant fails to make the public apology in a timely manner, the court may authorize the plaintiff to publish a public apology in the defendant's name and charge the expenses to the defendant. A public apology is not in lieu of but in addition to injunction, damages and litigation cost remedies, as China has already fully embraced property and liability rules by directing the defendant to cease the infringing conduct and pay monetary damages.

A closer look at China's trademark jurisprudence reveals a robust and complex development of these laws and the increasingly important judicial role concerning trademark reputation harm. Unlike the United States wherein the comprehensive trademark statutes provide all the answers relating to the unauthorized use of a trademark or name, China has *three* separate bodies of laws: Trademark Law, Unfair Competition Law and Civil Law. When pieced together, these laws present a rich body of law, including trademark reputation law. China's three laws cannot be analyzed separately and in isolation from the Supreme People Court's judicial directives. Judicial directives—official interpretations—of these three laws, in combination with lower courts' published opinions applying the three laws, show the making of a dynamic trademark jurisprudence, which addresses the harm done to trademark reputation caused by the defendant's willful conduct misleading the public. A public apology as a remedy is evidence of China's trademark jurisprudence's consideration for the public; the public has a part in the remedy of the harm because the public has been misled by the defendant's conduct. Thus, justice has been achieved for the plaintiff and the public.

China's trademark jurisprudence and apologetic justice forces US scholars and policymakers to contemplate Judge Learned Hand's keen observation about trademark reputation and focus on the question of remedy. This does not mean that the United States will import Chinese trademark jurisprudence and apologetic justice. However, in the age of globalization and the rise of China's Century, knowledge of China's legal system is indispensable. After all, contrary to misunderstandings about China, the country is no stranger to trademark concepts. Names and symbols, along with their associated reputations, are an integral part of Chinese social fabric.

The article will proceed as follows. Part I discusses the three bodies of law constituting China's trademark jurisprudence by tracing the development of Trademark Law, Anti-Unfair Competition Law and Civil Law. All of these laws contain relevant provisions pertaining to trademark reputation and remedies, including injunction, damages and public apology to eliminate any bad effects. As China Supreme People's Court has a significant role in shaping trademark jurisprudence and apologetic justice, Part I also analyzes judicial directives that provide guidance and instructions to the lower courts in addressing trademark reputation remedies.

An analysis of only statutes and judicial directives, however, does not provide an accurate understanding of China's vibrant development of trademark jurisprudence on reputation and apologetic justice. Part II studies judicial decisions rendered by the Chinese courts in trademark reputation cases. Judicial decisions from different levels of the people's court explain the facts, describe the injuries, apply the law and provide the reasoning for appropriate remedies. If the finding establishes that the infringer did not willfully or maliciously use the trademark or name to mislead the public, the courts will not order a public apology. In this type of case, only injunction and damages are warranted. In other words, if the public has not been harmed, there is no need to have the public involved in healing through reading apologies in newspapers or trade publications.

What does a public apology entail? What is the content of a public apology in a trademark case? Part III provides several actual apologies published by individual and entity infringers in newspapers and trade journals. They are illuminating examples, as the infringers, in writing and in the public forum, acknowledge the plaintiff's exclusive right in a trademark or name, admit the wrongdoing, apologize for the conduct, and promise not to commit infringing conduct in the future. These newspapers and trade journals are available in print and online for the public to read.

Learning how China's trademark jurisprudence treats reputation and develops apologetic justice can serve as an opportunity to reflect on Judge Learned Hand's astute observation on injury to trademark reputation. Part IV inspects U.S. law and its treatment of injury to trademark reputation. Compared to China wherein injunction and damages are routinely granted to the prevailing plaintiff, U.S. law does not authorize the courts to grant an automatic injunction upon finding that the plaintiff has succeeded on the merits. Damages are difficult to prove in U.S. trademark cases. In addition, only 2% of U.S. trademark cases advance to trial and only some of those cases receive damage awards. Most significantly, U.S. law does not recognize harm to the public. The courts only provide, if any, injunctive relief and damages. Harm to trademark reputation, particularly in cases wherein the infringer maliciously or willfully misleads the public, is harmful to both the plaintiff and the public. China's trademark jurisprudence and apologetic justice certainly offer a model for the United States to contemplate.

Whether the United States will consider apologetic justice in trademark reputation cases is a question for further debate. At the very least U.S. businesses should not be surprised that the plaintiff in a trademark infringement action, which was filed by a Chinese company, Proview Technology, against Apple for the use of the name "iPad," is demanding an apology in addition to injunction and damages. Knowledge of China's jurisprudence is essential in our globally competitive and fast-changing world today.