

INTA Suggested Modifications to the Draft Unfair Competition Law

Introduction

The International Trademark Association (INTA) thanks the National People's Congress of China for the opportunity to provide suggestions to the draft Unfair Competition Law. In 2013, the Association was proud to submit comments to the National People's Congress of China for the Revised Trademark Law and in 2017 submitted comments to the Draft E-commerce Law. INTA hopes to continue this relationship with the National People's Congress of China by submitting some suggested modifications to the draft Unfair Competition Law.

Since the law of China against Unfair Competition became effective in 1993, after almost 23 years, it has guided and regulated market, and also protected market competition and lawful rights that plays an important role in the economic development. INTA applauds these efforts to improve the current regulations. On behalf of our global membership, INTA would like to offer some recommendations to the draft Unfair Competition Law.

INTA is a membership association of more than 7,000 trademark owners and professionals from more than 190 countries. In China, we have 240 members, including many global Chinese brands across several industries, including finance, transportation, technology and consumer goods. INTA total membership collectively contribute almost US \$12 trillion to global GDP annually. The Association's member organizations represent some 30,000 trademark professionals and include brand owners from major corporations as well as small- and medium-sized enterprises, law firms and nonprofits. INTA undertakes advocacy work throughout the world to advance trademarks and related rights, and offers educational programs and informational and legal resources of global interest. A key objective of INTA's work is to protect consumers and to promote fair and effective commerce.

Recommended Changes to the Draft E-Commerce Law

Recommendation: **Modify Chapter I, Article 2 to clarify provisions in the draft law that that apply to violators and to specify the definition of a “business operator”.**

Policy Rationale:

INTA suggests that Chapter I, Article 2 of the Draft Unfair Competition should be modified to include the language “provisions of this Law” in order to make clear that all provisions of the law apply to violating business operators:

“Unfair competition acts as mentioned in this Law refers to a business operators violating the provisions of this Law, through unfair market transaction, infringing upon the lawful rights and interests of another business operator and disturbing competition order.”

Additionally, Chapter I, Article 2 of the Draft Unfair Competition Law should have a more specific definition of what person or entity applies as a “business operator”.

“A business operator” mentioned in this Law refers to a natural or a legal person or any other organization engaged or involved in commodities manufacturing, marketing or services providing, including those that operate exclusively online (“commodities” referred to hereinafter includes such services).”

The rationale behind this modification is to include those natural, legal persons, or organizations that may have involvement in the manufacturing, marketing or services of commodities. This modification makes the definition of “business operator” more broad and includes more parties including those on the online realm. This could include social media platforms, online sellers and that doing business on those forums can include advertising and promotion even if sales transactions cannot be fulfilled through the social media or trading platform.

Recommendation: **Modify Chapter I, Article 4 to include more general language as to what activities the departments can perform.**

Policy Rationale:

INTA suggests that Chapter I, Article 4 expands on the powers of the Administrative Departments for industry and commerce:

“Administrative departments for industry and commerce of the people’s governments at or above the county level shall exercise supervision, inspection or raid against unfair competition acts; where laws or administrative rules and regulations provide that other departments shall –exercise supervision, inspection or raid.”

The rationale behind this amendment is to expand the powers of the department officials by providing them with the ability to supervise, inspect and perform raids in order to better enforce the law.

Recommendation: **Modify Chapter I, Article 5 to include a description of what is forbidden and should include a definition of what market confusion is.**

Policy Rationale:

INTA suggests that this article be expanded to clarify exactly what is forbidden and to clarify what constitutes market confusion. This explanation would make it easier for the Court to interpret when a logo is misused by another undertaking. Further, when assessing the goodwill of a mark (well-known mark), examiners from the China Trademark Office should look at the reputation of a mark not only in China but on a larger scale (worldwide). With the widespread use of the internet, Chinese authorities now ought to take into consideration the overall reputation of a mark and prevent future trademark ‘squatters’ to use any loopholes in the law.

Recommendation: **Modify Chapter II, Article 6 to make the burden a likelihood of confusion and to clearly define what constitutes “well-known” goods.**

Policy Rationale:

INTA suggests that the burden on the first paragraph of Article 6 be a “likelihood of confusion” and not actual confusion:

(1) Using the characteristic names, packaging, or decoration of well-known goods without authorization; or using names, packaging, or decoration similar to those of well-known goods, causing a likelihood of confusion with others’ well-known goods and leading people to mistake them with those well-known goods;

The purpose of this amendment is to lower the burden of showing actual confusion and instead making it easier for business operators to bring a claim by showing a likelihood confusion with other’ well-known goods. Additionally, what constitutes a “well-known” good should be clearly defined. Finally, the draft Unfair Competition Law should not be restricted to merely goods, services, as previously mentioned should be included, as well as a prohibition on any false claims of affiliation, sponsorship and authorization.

Recommendation: **Modify Chapter II, Article 9 to better define what constitutes a “commercial secret”.**

Policy Rationale:

INTA suggests that the definition of a “commercial secret” be more specifically defined. For example, it should provide more detail on what is prohibited, such as unlawful acquisitions, and what the measures and legal proceedings allowed to obtain trade secrets are. The article should have a better definition of trade secrets and give the general expectations on how they shall be used, disclosed and obtained.

Recommendation: **Add two clauses to Chapter II, Article 14 that cover user access to network services of other business operators and other activities that damage the business operator’s lawful interests.**

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Policy Rationale:

INTA suggests that two clauses be added to Chapter II, Article 14 which prohibits access to other network services and activities that may damage other business operator's lawful interests:

"(5) Without user's agreement, through technical means, block users to access to the network services provided by other business operator

(6) Other activities that disturb or damage user's or other business operator's lawful interests."

The rationale behind these additions is to prevent a business owner from blocking a user's access to another business owner's services without express agreement from the user. This clause would prevent the unknowing regulation of information and services that the user would receive which could lead to a monopoly on the user's choices. Additionally, a more general clause should be added to Article 14 which prohibits disturbing or damaging another business operator's lawful interests.

Recommendation: Amend Chapter IV, Article 20 to include specific calculations of damages for compensation to others.

Policy Rationale:

INTA suggests that Article 20 be modified and expanded to include specific details on how exactly compensation should be calculated, limitations there are on the amount, and who may bring an unfair competition claim to the people's court:

Where business operators violate the provisions of this Law and thus harms the lawful rights and interests of others it shall stop the infringement; if it causes damages, it shall bear civil liability of compensation for the damage.

If the losses of the infringed business operator are difficult to estimate, the damages shall be two times the profits derived from the infringement by the infringer during the period of infringement; the infringer shall also bear the reasonable expense paid by the infringed business operator for investigating the infringer's unfair competition acts violating his lawful rights and interests and the reasonable expense for enforcement. If both the losses of the infringed business operator and the profits of the infringer during the period of infringement are difficult to estimate, the damages shall not exceed RMB 3,000,000.

A business operator or a consumer or other relevant parties whose lawful rights and interests are infringed upon by unfair competition acts may bring a suit in a people's court.

The rationale behind the expansion of Article 20 is that compensation for violating the law must be clearly defined as to how damages will be compensated and to provide a limit on the amount of compensation. Additionally, the parties that may bring an unfair competition claim under this law should be expanded to include consumers and other relevant parties. This would ensure that business operators are not the only parties that can bring a claim, as they may not be the only party effected.