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655 Third Avenue, New York, NY 10017-5646

Telephone: +1 (212) 642-1733 email: wknox@inta.org Facsimile: +1 (212) 768-7796

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UNDERSTANDING *MICHAEL JORDAN v. QIAODAN*: HISTORICAL ANOMALY OR SYSTEMIC FAILURE TO PROTECT CHINESE CONSUMERS?

By Laura Wen-yu Young[*]

I. BACKGROUND

In 1997, a Fujian company wanted to sell sportswear to Chinese consumers, who did not yet have a history or culture of sports. China would soon join the World Trade Organization (WTO), and was bidding to host the Olympic Games in 2008. The company selected a name that evoked energy by sounding foreign, but yet would sound familiar to consumers: the name 乔丹 (pronounced and transliterated as "Qiao Dan" in pinyin,[1] or "Ch'iao Tan" in the Wade-Giles system[2]), which translates literally as "tall red," and sounds like "bridge peony." The company registered its name as Qiaodan Sports Company, Limited (乔丹体育股份有限公司) ("Qiaodan Sports"). In 1997, the company filed to register trademark rights in 乔丹 and logo  for swim wear, shoes, and rain coats.[3] The logo showed a baseball batter with pale hands and face about to hit a floating baseball, surrounded by a baseball diamond. The company continued to add to its inventory of trademarks, and filed more than 100 applications, which include the Chinese characters 乔丹 or the pinyin word "Qiaodan."[4]

The name "Qiaodan" was attractive probably because since 1986 it had appeared in Chinese newspapers and on television broadcasts of National Basketball Association (NBA) games.[5] As many now know, it was often used as a rough transliteration of the

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* Managing Partner, Wang and Wang, LLP, Shanghai, China, and San Francisco, California, Associate Member, International Trademark Association. Ms. Young is grateful for the help of Sophia Lin and Cathy Zhou. Ms. Young has no affiliation with any of the parties discussed in this article.

1. Pinyin is a system of writing the sounds of Chinese in Roman characters. There are several such systems, but pinyin is the official system of mainland China.

2. The Wade-Giles system is the romanization system for Chinese that was used for most of the twentieth century and in Taiwan, but has now been supplanted by the pinyin system.

3. China Trademark Reg. No. 1186599.

4. In 1998, Jinjiang Mai Ke Footwear Co., Ltd., a predecessor to Qiaodan Sports, filed an exact copy of Nike's Jumpman logo with the word "QIAODAN," Registration No. 1407911. It later assigned the registration to Qiaodan Sports. The registration was later ruled invalid, presumably as a copy of Nike's Jumpman logo.

5. *CCTV Broadcast NBA History*, Baidu, http://zhidao.baidu.com/link?url=083XUg8qCP6dbttPBVX2xXxAV_0kAk9xE25ic1B6uliBgDn4npB7sFYWwzhk8PoWMgkuchKDWfnExdmGY0NZMa (last visited Feb. 12, 2016).

surname of the famous American basketball player Michael Jordan. "Qiaodan" means many things and is not the only way of writing Michael Jordan's name in Chinese. Many other characters could have been used to sound like Jordan: Jiao-er-dun, 角尔顿, Zhao-deng, 乔登, Chao-er-dan, 朝儿旦. In fact, the Chinese Wikipedia page uses a different transliteration.[6] But 乔丹 (hereinafter "Qiaodan") is the most common way of transliterating the Western name "Jordan" into Chinese in mainland China, and it was used in mainland Chinese news reporting of Michael Jordan's successful career. "Qiaodan" used in the context of basketball in China has become virtually synonymous with Michael Jordan, and is used in many online reference materials about the athlete.[7]

In 2002, Qiaodan Sports filed a trademark application for a jumping basketball player logo,  ,[8] and began to use that logo on its products. In 2006, the company registered a logo that included the number "23":  .[9] Many fans recognize the number "23" as Michael Jordan's jersey number. The company grew rapidly. By 2010, its sales revenue reportedly exceeded $460,000,000, and by 2012, it had more than 5,700 distributors around China.[10] By 2011, the company was planning an initial public offering on the Shanghai Stock Market.[11]

Furthermore, in an undeniable display of long-range thinking, Qiaodan Sports registered trademarks in Chinese characters 杰弗里乔丹 (Jie Fu Li Qiao Dan) and 马库斯乔丹 (Ma Ku Si Qiao Dan), which sound similar to "Jeffrey Jordan" and "Marcus Jordan," the names of two of Michael Jordan's sons.[12] Apparently, the company

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6. Wikipedia's Chinese page uses a different set of characters for Michael Jordan: 麥可·喬登. The page appears in traditional Chinese characters, and so is widely used by netizens in Taiwan, Hong Kong, Malaysia, etc., but is usually blocked in mainland China. [麥可。喬登] Wikipedia, https:zh.wikipedia.org/麥可。喬登 (last visited Feb. 12, 2016).

7. *See, e.g.*, 迈克尔·乔丹 (*Michael Jordan)*, Baidu http://baike.baidu.com/view/19096.htm (last visited Feb. 12, 2016). But the Baidu page also lists several other people and entities under the name "Qiaodan," including a British female celebrity and the Fujian sportswear company.

8. China Trademark Reg. No. 3018498.

9. China Trademark Reg. No. 3667082, in Class 25, subsequently withdrawn or cancelled.

10. "Qiaodan Sports... sells athlete branded basketball shoes . . . in its 5,715 retail outlets in China . . .," Laurie Burkitt, *In China, AIR cheow-DAN Cries Foul*, Wall St. J., Feb. 24, 2012. http://www.wsj.com/articles/SB10001424052970204778604577240991687647450; *Status Update*, Michael Jordan 23, http://www.therealjordan.com/en/facts-of-the-case.aspx (last visited Feb. 13, 2016) (official Michael Jordan website).

11. *See, e.g.*, *EQUITIES: Michael Jordan slams Chinese IPO*, IFRAsia, Feb. 23, 2012, http://www.ifrasia.com/equities-michael-jordan-slams-chinese-ipo/21001891.article.

12. China Trademark Reg. Nos. 4946340 and 4946342, registered in 2009 but marked invalid as of 2012. Qiaodan Sports withdrew the registrations, acknowledging in a press release that the registrations could be misleading. *Qiaodan Sports Announces Trademark*

expected the sons of a basketball legend would become famous athletes as well, and their names might become valuable brands in their own right.[13] These registrations support the allegation that the company had a deliberate intention to associate itself with, or trade on the fame and goodwill of, Michael Jordan's trademarks.

Nike has had a presence in China since 1981, and it registered trademark rights in MICHAEL JORDAN for Class 25 goods in 1991.[14] It filed many more trademarks in China over the years, including, in 1993, its "Jumpman logo"  for apparel and footwear.[15] Like most Western companies at that time, Nike focused on sourcing and product manufacture in China rather than sales to Chinese consumers.

By 2002, after China had joined the WTO and Yao Ming had joined the NBA, Chinese consumer awareness of foreign sports, particularly basketball and soccer, made them eager to buy sportswear with foreign brands. Prior to 2000, few Western companies sold products in China, and Chinese consumers were generally motivated by value and affordability rather than luxury or prestige.

By 2008, the "Great Recession" in the West had badly affected China's export-driven economy. The "Factory Floor to the World" found itself with fewer overseas buyers. China's government began to encourage its citizens to start spending their savings in order to develop a domestic consumer economy less reliant on exports to overseas markets. Furthermore, Chinese consumers were encouraged to travel, and non-Chinese companies noticed that Chinese tourists voraciously purchased authentic luxury goods during trips to the West. China's domestic consumers were now eager to purchase authentic foreign and luxury goods at home.

By 2007, Nike had successful retail stores around the world, and was expanding its retail presence in China.[16] Among other products, Nike planned to sell its genuine AIR JORDAN brand shoes in China. In 2009, Nike filed at least five trademark applications for JORDAN, including for sports bags, clothing, and footwear.[17] However, protection for its JORDAN brand in China

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Cancellation, People, June 26, 2006, 乔丹体育声明注销部分商标, http://ip.people.com.cn/n/2012/0626/c136655-18384495.html (last visited Feb. 12, 2014).

13. *See, e.g.*, *Michael Jordan Asserts Name Right Infringement; Sues Qiaodan Sports in China*, Money 163, Feb. 23, 2012 (迈克尔乔丹称姓名遭侵犯，在华起诉乔丹体育), http://money.163.com/12/0223/09/7QUI1PC4002526O3.html (last visited Feb. 12, 2014).

14. China Trademark Reg. No. 605003.

15. China Trademark Reg. No. 643806.

16. *Nike, Adidas see golden opportunity in China*," NBC News, Oct. 3, 2007, http://www.nbcnews.com/id/21116990/ns/business-sports_biz/t/nike-adidas-see-golden-opportunity-china/.

17. China Trademark Office records show application numbers 7350128, 7752571, 7752572, 7752573, and 7752574, filed in 2009, since marked invalid.

was blocked by Qiaodan Sports' earlier filed QIAODAN registrations on the basis that JORDAN was likely to be confused with QIAODAN. They were opposed, and did not register.[18] In addition, at least thirty other companies and individuals all over China had filed at least forty different applications for QIAODAN trademarks in a variety of classes and subclasses.[19]

In 2012, newspapers reported that Michael Jordan filed to invalidate about 80 trademark registrations held by Qiaodan Sports.[20] Michael Jordan also published a video in English in which he asserted that "Qiaodan" is "his name."[21]

At least one online survey found that 51.2% of roughly 200,000 Internet users believed that the Fujian company did not infringe on the American athlete's name.[22] In contrast, another online survey showed that a majority of roughly 3,000 Chinese Internet users surveyed online believed that the QIAODAN brand should belong to Michael Jordan, but also that the respondents knew of Qiaodan Sports, and expected the American athlete would lose the dispute.[23] This latter finding indicates that consumers knew the athlete was not the registrant of the QIAODAN brand, but nevertheless felt he should have property rights to the name.[24]

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18. Some of the decisions were issued by the Trademark Review and Appeal Board, which handles appeals from the Chinese Trademark Office. The parties' arguments and the reasoning of decisions is not part of the public record. Only the final status of a registration/application is listed on the Trademark Register, [sbj.saic.gov.cn/sbcx/], therefore the author's conclusions are based on logical inference. The author concludes that some appeals were filed, but were not successful.

19. The author's search of the China State Administration for Industry and Commerce's Trademark Office Trademark Register, [sbj.saic.gov.cn/sbcx/] lists a variety of entities in Beijing, Shanghai, Wuxi, Guangzhou, and many individuals, as registrants of QIAODAN trademarks in different classes.

20. *See, e.g.*, *Michael Jordan Defamation Counterclaim,* Sina, Feb. 23, 2012, http://finance.sina.com.cn/focus/Jordan2012/; (飞人乔丹起诉乔丹体育侵权) *Jordan Sues Qiaodan Sports for Trademark Infringement*, 34 Rejections at the First Level, Sina, June 30, 2016 (last visited July 7, 2016); http://finance.sina.com.cn/chanjing/gsnews/20150414/082821949854.shtml, June 30, 2016; (乔丹告乔丹体育商标侵权一审驳回乔丹34起诉高) June 30, 2016, accessed July 7, 2016.

21. *An Official Message from Michael Jordan*, Michael Jordan 23, Feb. 23, 2012, http://www.therealjordan.com/en/MediaCenter/michael-jordan-files-lawsuit.aspx.

22. "Among 200,000 Sina.com online participants in a Sina Qiaodan Litigation opinion poll, 51.2% said they considered Qiaodan Sports did not infringe, 44.4% considered the [company's] actions constituted infringement, and 4.4% said they were unsure." *Jumpman Qiaodan sues Qiaodan Sports Infringement Case* China Legal Daily, April 27, 2013, ("飞人"乔丹诉乔丹体育侵权案开审), http://www.legaldaily.com.cn/legal_case/content/2013-04/27/content_4418427.htm.

23. *Jordan Sues Qiaodan for violation of Chinese Name Right*, Money 163, Mar. 8, 2012 (乔丹起诉中国乔丹侵犯姓名权), http://vote.money.163.com/vote2/showGroup.do?vgId=1371#result (showing about 1,400 votes).

24. *Id.* Eighty-two percent of roughly 1,400 online voters selected that they support "Qiaodan himself" over the Chinese company Qiaodan, but only 55% believed Michael Jordan would win the law suit.

However, online surveys are notoriously unreliable given the uncertainty of the survey population and the possibility of multiple votes by each participant, and so courts do not rely on them.

In December 2015, the China Supreme People's Court issued decisions rejecting Michael Jordan's claims that the Beijing High Court, Beijing First Intermediate Court, the Trademark Review and Appeal Board ("TRAB"), and the Trademark Office erred in rejecting his invalidation actions against Qiaodan Sports' registrations for QIAODAN. Each registration was handled as a separate action, and the Supreme People's Court has posted sixty similar decisions on its website.[25]

In its decision on the Class 25 registration for QIAODAN in pinyin,[26] for example, the Supreme People's Court briefly summarized the dispute and stated that the Beijing High Court did not err in its decision.[27] The Beijing High Court decision has a fuller discussion of the evidence presented by both parties.[28] It stated that Qiaodan Sports' registration of QIAODAN was recognized as a famous Chinese trademark, and that the company's nearly 200 registrations for related marks were connected to its business and did not count as trademark squatting.[29] The Court listed the evidence of the company's investment in the trademarks, and concluded that there was no violation of law or procedure in the lower court or Trademark Review and Appeal Board rulings.[30]

The Court also listed the evidence submitted by Michael Jordan, mostly dated after 2010, including a consumer survey conducted on April 10, 2015. The Court noted that Michael Jordan's evidence of fame in China and evidence of consumer confusion were not relevant to his claim that Qiaodan Sports' trademark registration was obtained by fraud, or constituted an immoral trademark.[31] To those who believe that Qiaodan Sports

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25. Decisions are accessible at http://wenshu.court.gov.cn/list/list/?sorttype=1&conditions=searchWord+QWJS+++%E5%85%A8%E6%96%87%E6%A3%80%E7%B4%A2:%E8%BF%88%E5%85%8B%E5%B0%94.%E4%B9%94%E4%B8%B9.

26. China Trademark Reg. No. 1477414.

27. China Supreme Court, Case No. 312 (2015), 知行字第312号, published Mar. 17, 2016, at: http://wenshu.court.gov.cn/content/content?DocID=b956be8e-fc3c-4223-8793-6e5435665703&KeyWord=乔丹体育|1477414. Each decision relates to a specific and separate trademark registration.

28. Beijing High Court, IP Tribunal, Case No. 1053 (2015), 高行（知）终字第1053号, citing to Trademark Registration No. 3208768, designation of QIAODAN as a Famous Mark, published at: http://wenshu.court.gov.cn/content/content?DocID=498450f3-0c22-46e0-a74c-0ea41bf0c946&KeyWord=.

29. *Id.*

30. *Id.*

31. *Id.* The statement can be read to mean that Michael Jordan's fame as QIAODAN in 2010 and later is not relevant to prove that QIAODAN was his famous trademark in 1999, when the registration issued.

engaged in deliberate free-riding on the fame of Michael Jordan, the decisions were deeply dissatisfying. The inference that must be drawn from the Court's decisions is that Michael Jordan did not have prior rights to the name and mark QIAODAN.

The High Court decision stated that "Qiaodan" is a translation of part of Michael Jordan's name but not his actual name,[32] and so registration of QIAODAN did not qualify as a fraudulent registration.[33] The Court specifically stated that it is not proper to try to apply the immoral trademark category to Qiaodan Sports' registration, and that use of a trademark causing consumer confusion does not make a trademark immoral, or qualify it as obtained by fraud or other improper means.[34]

The Court's decisions are economical in expression, but the findings are clear. The import of the finding is that there was no improper action by Qiaodan Sports even if its trademarks engaged in free-riding on the association with the American athlete. Interestingly, the Court did not mention several allegations that were reported by the media and would seem to have supported a finding of bad faith registration. These include the allegation that Qiaodan Sports registered the number "23" and the names of the athlete's sons, the exact photo of Michael Jordan from which Qiaodan Sports derived its logo, and that Qiaodan Sports made the incredible argument that the name "Qiaodan" was not meant to refer to the American athlete, but instead to a type of South Asian plant.[35] Finally, the Court made no mention of the video in which Michael Jordan claimed Qiaodan to be his "own name." The media reports could be wrong, and perhaps some of these are not true facts, or they were not raised by Michael Jordan at the Beijing

32. China Trademark Law, Article 13, prohibits registration of "a reproduction, imitation, or translation of the famous mark of another." In addition, Article 45 provides that the five-year statute of limitations shall not apply where the filing was made with "ill will."

33. PRC Trademark Law, Article 10 (8) provides:

> The following words or devices shall not be used as trademarks:
>
> . . . .
>
> 7) Those in the nature of fraud in advertising that easily confuses the public with the quality or other characteristics or origins of the goods, or the place of origin of the goods;
>
> (8) Those detrimental to socialist morals or customs, or having other unhealthy influences.

34. PRC Trademark Law, Article 44 (prior to the 2014 amendments, Article 41), provides: "Where a trademark registration violates the provisions of Articles 10, 11, and 12 of this Law, or the registration of a trademark was acquired by fraud or any other improper means, the Trademark Office shall invalidate the registration at issue."

35. *Qiaodan Sports Denies Infringement: "Qiaodan" Means Southern Plant,* Sina, Apr. 27, 2013, http://news.sina.com.cn/s/2013-04-27/173026971880.shtml (乔丹体育否认侵权："乔丹"本意为南方之草木)

High Court level. The public record is limited to the decisions published on the courts' websites.[36]

Many have criticized the court decisions, and by implication, the legal system. The intentional free-ride on the association with Michael Jordan causes Westerners to wonder why Chinese authorities don't stop Qiaodan Sports. Western media, and even some Chinese media, cried out that Michael Jordan had been denied rights to "his own name."[37] The intent here is to more fully explore the issues, as well as other cases to determine whether Chinese authorities could find in favor of other foreign brand holders in similar circumstances in the future.

II. ANALYSIS

A. Michael Jordan as Emblematic of Many Western Brands

Michael Jordan's problem symbolizes that of thousands of foreign companies in China. As China's consumers now have the freedom and money to buy global brands, foreign companies are entering the Chinese consumer market. But many are finding themselves blocked by local companies that have already registered the foreign brand in China. Although China implemented Article 6*bis* of the Paris Convention[38] in its Trademark Law prior to its accession to the World Trade Organization in 2001, its protections are not available unless a mark is famous or has at least achieved a degree of notoriety in the

36. *See supra* notes 27-28.

37. *See, e.g.*, *Michael Jordan Sues Chinese Company for Using His Name*, Inside Counsel, Feb. 23, 2012, http://www.insidecounsel.com/2012/02/23/michael-jordan-sues-chinese-company-for-using-his; *In China, Michael Jordan Does Not Hold the Rights to His Own Name*, Quartz, July 30, 2015, http://qz.com/467625/in-china-michael-jordan-does-not-hold-the-rights-to-his-own-name/; *Final Judgment—Michael! Michael Jordan v. Qiaodan Sports Company Loses Trademark Case*, Sports 163, July 27, 2015, http://sports.163.com/15/0727/14/AVHN90S400052UUC.html (终审判决！迈克尔乔丹诉乔丹体育公司商标案败诉); *Jordan Won [for] a Lifetime, But [It's] Lose, Lose Again in China,* ChinaGate, May 3, 2016, http://www.wenxuecity.com/news/2016/05/03/5177131.html (赢了一辈子的乔丹，却在中国一输再输).

38. The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith.

Paris Convention for the Protection of Industrial Property, Article 6*bis* (1), (Mar. 20, 1883; effective July 7, 1884, and amended June 2, 1934 and July 14, 1967), 21 UST 1583, 828 UNTS, http://www.wipo.int/treaties/en/ip/paris/ 305 [hereinafter the "Paris Convention"].

marketplace.[39] In the past, many world-famous brands were not distributed in China, or were too expensive for Chinese consumers, or were not marketed in a way that attracted Chinese consumers. Thus, many brands famous in the West cannot provide evidence of fame in China at an early enough date. In the meantime, Chinese adopters of the same mark can grow into full-on competitors, using the exact same name to block the foreign company from selling to consumers in China. The aggressive manner in which Chinese companies and individuals seek out foreign names and brands, and then register exclusive trademark rights in order to sell their exports, perpetuates China's reputation as the source of most of the world's pirated goods.

The claims by a foreign celebrity in China exceed these purely trademark issues and implicate other theories as well, because the situation involves the name of an individual. The dispute then raises other novel questions in the age of globalization, such as how we define and identify a name when we traverse linguistic and cultural borders. Western nations with multiethnic populations face similar questions domestically, but the shift from romanized languages to ideogram-based languages is relatively recent. In addition, the use of Romanization for foreigners' convenience in describing Chinese characters raises greater problems for transnational branding and name protection. The dispute between the American athlete (Michael Jordan) and the Fujian company (Qiaodan Sports) highlights the mismatch between phonetic and non-phonetic languages in the environment of rapid globalization. Perhaps the mismatch will become merely an anomaly from a time when China's consumers and

39. China Trademark Law, Article 14, provides:

> A famous trademark, based on the parties' request, can be defined when the facts in each case dealing with the relevant trademark support such a conclusion. The following factors shall be considered in making such a determination:
>
> 1) The degree of public recognition of the mark in its trading areas;
>
> 2) How long the mark has been in use;
>
> 3) The duration and extent of advertising and publicity of the mark, and the geographical extent of the trading areas in which the mark is used;
>
> 4) The protection of the mark as a famous trademark;
>
> 5) Other reasons for the fame of the trademark.
>
> In examining a trademark registration and in the course of investigating cases involving illegal use of trademarks, the Authorities for Industry and Commerce may, upon a claim filed by the parties involved, in accordance with Article 13 of this law, the Trademark Office may make a determination as to whether a trademark is a famous trademark.
>
> In the process of handling a trademark dispute, the parties may, in accordance with Article 13 of this law make such claims in regard to whether a trademark is famous; The Trademark Review and Adjudication Board may, in accordance with the needs of a specific case, make a determination as to whether a trademark is famous.

manufacturers opened to the world, but the rest of the world hadn't yet caught up with the changes in China.[40]

B. Available Legal Theories

Unlike most companies that can only claim rights under commercial laws, a celebrity can claim a fundamental right of personality that takes priority over trademark and other commercial rights. Under China's General Principles of Civil Law, a subject-matter-specific statute should be applied wherever possible, and if not possible, the next most applicable statute should be applied, and if none are applicable, the General Principles of Civil Law should be applied.[41] A celebrity therefore has five different potential arguments to try to reclaim prior rights in a Chinese version of his or her name or brand from a Chinese brand usurper:

1. Trademark Law Claims:
    a. Famous Trademark;
    b. Bad Faith Registration;
    c. Immoral Trademark.
2. Civil Law Claims:
    a. Right Against Anti-Unfair Competition;
    b. Right of Personality.

1. Trademark Law Claims

Given the popularity of Michael Jordan in China, and his assertion that his name in China is "Qiaodan," many people are puzzled why the dispute wasn't resolved in his favor. It might seem sufficient that Qiaodan Sports registered with the intention to refer to the famous American athlete in the knowledge that the athlete had multimillion dollar licensing deals for his name on sportswear and shoes. But the issues are complex and intertwined.

a. Famous Trademark

In accordance with China's obligations as a member of the World Trade Organization and the Paris Convention, famous

40. In the author's opinion, translation between non-phonetic languages and phonetic ones is more complex and less direct than between two phonetic languages.

41. China's Legislation Law, Article 92, provides:

> In the case of national law, administrative regulations, local decrees, autonomous decrees and special decrees, and administrative or local rules enacted by the same body, if a special provision differs from a general provision, the special provision shall prevail; if a new provision differs from an old provision, the new provision shall prevail.

trademarks are protected, even absent registration.[42] However, marks that are famous in other countries are not necessarily famous in China. The Trademark Law provides for means to invalidate registrations of a famous mark by someone other than the original rights holder.[43]

Unusual names with high levels of publicity have received trademark protection against local opportunists who seek to own a foreign name, even for goods or services not marketed by the celebrity. For example, Beyonce successfully opposed BEYONCE for clothing and BEYONCE COFFEE for restaurants, based on her famous unregistered trademark in musical performances.[44] The fact that she advertises her performances in China by the single name, in very significant volumes and scale, appears to have been accepted as evidence of fame allowing protection beyond musical performance services.[45] However, it is more difficult to challenge Chinese versions that sound similar but are not the exact name or mark, as in the QIAODAN case.[46] If registrations that are not successfully challenged later become successful, the owners will be in the same position as Qiaodan Sports; the Chinese company could claim in the future that their own investment, not the foreign celebrity's efforts, built the brand in China.

As a counter-example, a local company tried to build a business on a famous foreign trademark, using a lawful

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42. China Trademark Law, Article 13, provides:

> Should any rights of a trademark well known to the relevant public be infringed, the trademark holder can follow the relevant provisions in this law to request the protection of the said famous trademark.
>
> Where a mark is a reproduction, imitation, or translation of a third-party's famous trademark that has not been registered in China and where the goods are identical or similar, which may cause public confusion and damage the interests of the registrant of the famous mark, no registration shall be granted and the use of the mark shall be prohibited.

43. China Trademark Law, Article 45, provides:

> Where a trademark registration violates the provisions [on protection of famous marks, bad faith, geographic descriptiveness, etc.], any holder of prior rights or any interested party may, within five years from the date of registration, request that the trademark Review and Adjudication Board make a ruling to invalidate the trademark's registration. Where the registration was obtained with ill will, the owner of a famous trademark shall not be bound by the five-year limitation. . . .

44. For example, China Trademark Applications No.: 6080044 in Class 25, marked "Invalid," and No.: 6853164 in Class 43, marked "Invalid."

45. Decisions are not usually publicly available, and generally contain limited reasoning. This is the logical inference from the note that the application/registration is "invalid."

46. There are currently two common transliterations of Beyonce (碧昂丝 and 碧昂斯, both pronounced Bi Yan Si, although others are possible, and Bei Yang Sai sounds more like the American pronunciation of the singer's name). As of spring 2016, there were 15 trademark applications for 碧昂丝 and 8 more for 碧昂斯 in various classes. Some applications have been rejected, but others have been approved to various owners.

registration of a trade name registration, but the case was decided in favor of the foreign company on Trademark Law grounds. In 2007, the Shanghai Intermediate Court found that a local company that incorporated and operated a chain of coffee shops as 星巴克 (pronounced "Xing Ba Ke," written "Hsing Pa Ke" in Wade-Giles), violated the registered Chinese trademark of Starbucks.[47] The local company had lawfully registered a corporate name, invested in its copycat business model, and established cafes in Shanghai.[48] It claimed that it had followed the letter of the law and registered an available company name, not a trademark.[49] However, the Shanghai Court found that the company used its trade name on menus and signboards, as a trademark, to mislead consumers.[50] The Court ordered the company to change its company name registration, and awarded damages of RMB500,000 to Starbucks.[51]

Nevertheless, it is important for a foreign celebrity or brand owner to take control of a Chinese version of their name by registering and using it. It can serve as the basis for opposing future imitations using Chinese characters.

b. Bad Faith Registration

To claim bad faith registration in China, one must show either objective evidence of violation of agency and duty,[52] or the usurpation of prior rights.[53] In Michael Jordan's example, Qiaodan

47. Shanghai Intermediate Court, IP Tribunal, 2004 No. 1. (Hu Er Zhong Min Wu (Zhi) Chu Zi No. 1（2004）(沪二中民五（知）初字第1号). Accessible at: http://www.shezfy.com/view/jpa/flws_view.html?id=151. The amended Trademark Law of 2014 specifically addressed this situation with a new prohibition: "Where a party uses a famous trademark . . . as an enterprise name and confuses the public, if it constitutes unfair competition, it shall be handled under China's Anti-Unfair Competition Law." China Trademark Law, Article 58.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. China Trademark Law, Article 15, provides:

> Where an agent or representative, without the authorization of the principal, seeks to register in the agent's name the principal's trademark, and where the principal objects, registration shall be refused and the use of the mark shall be prohibited.
>
> Where a trademark used on an identical or similar product that is considered for registration and that is identical or similar to a prior use of an unregistered trademark, where no prior contractual agreement or business relationship exists between the registrant and the prior user, [the applicant] may not register its trademark where the prior user files an opposition, and the prior user's mark is clearly in use.

53. China Trademark Law, Article 15, provides: "No trademark application shall infringe upon another party's existing prior rights. Nor shall an applicant rush to register in an unfair manner a mark that is already in use by another party and enjoys substantial influence."

Sports and its founder had no relationship to him, and so had no duty to him not to use the mark. Prior rights include those created by investment and promotion of a trademark to create fame or "substantial influence." A trademark registered in order to unfairly take a free ride on the "substantial influence" of another can be invalidated. Absent a prior relationship, or trademark registration, prior rights are most likely to stem from the fame of a trademark. The courts in Michael Jordan's cases found no evidence that QIAODAN was the famous trademark of Michael Jordan prior to the registration by Qiaodan Sports. Therefore, the athlete's claims of bad faith registration were rejected.[54]

While it is clear that as early as the 1980s there has been an association between Michael Jordan the basketball player and the name "Qiaodan," the difficulty is to demonstrate that the fame of QIAODAN should accrue trademark rights for him. As Michael Jordan never directly used or licensed the name "Qiaodan," he could only provide evidence for the similar mark JORDAN, not QIAODAN. He could claim that he provided basketball services under the name "Qiaodan," but a Chinese court is likely to find that the player was contracted for services in the United States under the name "Michael Jordan," not under the name "Qiaodan." There was no transaction for basketball services by the athlete in China under the name "Qiaodan" and therefore no trademark.

In another example involving Nike in China, Nike filed to register the trademark LEBRON JAMES in Chinese 勒布朗.詹姆斯 (pronounced LEBULANG ZHANMUSI) in 2005,[55] but found that a squatter had already beat them to it.[56] Nike successfully opposed the blocking mark, eventually allowing Nike's own registration to proceed, but only after Nike won the highest and final level of court appeal with China's Supreme People's Court in July 2015.[57]

Similarly, the Beijing High Court upheld a decision by the Beijing First Intermediate Court to overturn the TRAB and Chinese Trademark Office decisions against FACEBOOK's opposition to a Chinese individual's registration of FACEBOOK for beverages in 2011.[58] The TRAB decision found that since FACEBOOK was not famous for beverages, it was available to the

54. *See supra* note 28.

55. China Trademark App. No. 4903847.

56. China Trademark App. No. 4001053. The China Trademark Register shows that the registration was opposed by Nike in 2010, opposition was granted, then unsuccessfully appealed by the registrant.

57. China Trademark Reg. No. 4903847 for LEBRON JAMES in Chinese. Supreme People's Court decision (2015) Xing Ti Zi No. 7 available at: http://wenshu.court.gov.cn/content/content?DocID=5e74db08-3b47-46d2-8f72-0522db986fba&KeyWord=%E5%8B%92%E5%B8%83%E6%9C%97.%E8%A9%B9%E5%A7%86%E6%96%AF.

58. China Trademark Reg. No. 9081730.

local company. The First Intermediate Court's reversal did not explicitly find fame for Facebook Inc.'s China registrations,[59] but the finding is implied in upholding the opposition on the grounds of the need to protect the principle of good faith dealing in the Chinese market.[60]

Since China follows the Civil Law system, the decision is not binding precedent. However, the difference with Michael Jordan's actions are obvious. First, there is no dispute that FACEBOOK is exactly the trademark and service mark of Facebook, Inc. Second, and most importantly, the registrant had not built up a business making open and obvious use of his registrations for many years before Facebook filed its action. Also, the registrant's many registrations for "other famous trademarks" were noted as a factor in ruling that the FACEBOOK registration was invalid. However, similar evidence of intent raised against Qiaodan Sports appears to have been ignored as not relevant to a company that made open and long-standing use.[61] Such cases demonstrate that vigilant enforcement under the Trademark Law is needed to protect even Chinese transliterations of famous foreign names.

However, a finding that Qiaodan Sports had registered the QIAODAN trademark in bad faith after so many years of use would have been surprising. As a first-to-file jurisdiction, where many foreign companies have no interest in paying to register a trademark that they don't plan to use in China, China's Trademark Office has registered many famous foreign brands to local companies. If a brand is famous in China, and ideally, famous and unusual, the owner can invalidate the infringing registration, as demonstrated by cases like Beyonce's and Facebook's. However, fame in China is a very high bar, and most brands cannot achieve it. If a brand is famous in its home jurisdiction but not famous or used in China, a domestic company may claim registration for itself and develop the brand.

While Western media have generally expressed outrage over the trademark decisions against Michael Jordan, the decisions have parallels with U.S. reasoning for treatment of foreign famous trademarks. The laws of China are designed to protect consumers in China, not distant foreigners. The U.S. Patent and Trademark Office and the U.S. Court of Appeals for the Federal Circuit have also consistently declined to protect distant foreigners who failed to use their marks in U.S. commerce but later seek to remove the U.S. registrations of competitors.

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59. China Trademark Reg. Nos. 5251161 and 5251162.

60. (2015) Jing Xing Zhong Zi No. 475, ((2016) 京行终475号) (available at http://www.ciplawyer.cn/article.asp?articleid=18827). The Court did not mention that Facebook's website has been blocked in China for many years.

61. *See supra* text accompanying note 30.

In the 1980s, a U.S. company registered a U.S. trademark in a mark copied from a Japanese supplier.[62] The Japanese company first registered PERSON'S as a trademark for clothing in Japan in 1977.[63] (The record does not tell us whether or how the name was presented in Japanese.) The company's sales grew and it began selling to U.S. wholesalers, and eventually planned to enter the U.S. market in the 1980s.[64]

Mr. Christman, a U.S. clothing wholesaler, visited the Japanese company's retail shop on a trip to Japan.[65] Upon return to the United States, after consulting with U.S. legal counsel, he planned his own business for PERSON'S brand jeans.[66] He apparently copied the designs of the products he purchased from the Japanese company, and used the same mark on clothing he produced and sold as early as 1982.[67] In 1983, both Christman and the Japanese company applied for trademark registration for PERSON'S.[68] Christman received a registration of PERSON'S for apparel in 1984, and the Japanese company received the trademark registration for PERSON'S for luggage, clothing, and accessories in 1985.[69]

In 1986, the Japanese company's U.S. advertising made Christman aware of its activities, and Christman filed to cancel its U.S. registration.[70] The Japanese company alleged that it had begun selling to U.S. resellers in 1982, seven months prior to the earliest U.S. sales by Christman.[71] However, the TTAB decided that Christman was the good faith senior user of the trademark in the United States.[72] "The Board found no evidence to suggest that the PERSON'S mark had acquired any notoriety in this country at the time of its adoption by Christman," and absent such evidence, the Japanese company did not have senior rights to the mark in the United States.[73] The Court noted, "[k]nowledge of a foreign use

62. Person's Co., Ltd. v. Christman, 900 F.2d 1565 (Fed. Cir. 1990). The Court of Appeals for the Federal Circuit upheld an appeal from a Trademark Trial and Appeal Board ("TTAB") decision cancelling the Japanese company's U.S. trademark registrations in the brand it had created. As many will remember, the TTAB found that the Japanese company's registrations of PERSON'S for clothing were confusingly similar to prior registrations by American Larry Christman.

63. *Id.* at 1566.

64. *Id.* at 1567.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at *1568.*

does not preclude good faith adoption and use in the United States."[74] The Board adopted the view that copying a mark in use in a foreign country is not bad faith use unless the foreign mark is famous in the United States or the copying is undertaken for the purpose of interfering with the prior user's planned expansion into the United States.[75] The Court declined to find that the Japanese company planned expansion into the United States, despite evidence of sales to U.S. wholesalers in 1982.[76]

In another U.S. example, a foreign company unsuccessfully asserted that its famous foreign trademark should preclude a U.S. squatter. In *ITC v. Punchgini, Inc.*,[77] an Indian company that owned a chain of restaurants in India sued a New York company operated by the former employees of a closed U.S. location.[78] The New York restaurant copied ITC's trademark BUKHARA, its logo, as well as much of the trade dress of its restaurants, including the décor, menus, and uniforms.[79] The Court of Appeals for the Second Circuit found that the Indian company had abandoned its trademark in the United States.[80] The Second Circuit further held that Article 16(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights[81] and Paris Convention 6*bis* are not self-executing, and that there was no basis in the Lanham Act for protection of BUKHARA on the grounds of its use or fame in India, and to do so would exceed the fundamental principle of territoriality.[82]

In contrast, in *Grupo Gigante S.A. de C.V. v. Dallo & Co.*,[83] the Court of Appeals for the Ninth Circuit took a global view, perhaps influenced by the high rate of travel and immigration of the population of the Western states. The Court evinced a desire to ensure that consumers were not misled by U.S. knock-offs of overseas brands,[84] a concern not expressed by the Federal Circuit

74. *Id.* at 1570.

75. *Id.* at 1570.

76. *Id.* at 1567.

77. 482 F.3d 135 (2d Cir. 2007).

78. *Id.* at 144.

79. *Id.*

80. *Id.* at 153.

81. Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of Marrakesh Agreement Establishing the World Trade Organization, art. 16(2) (Apr. 15, 1994), 1869 U.N.T.S. 299, 33 I.L.M. 1197, http://www.wipo.int/treaties/en/text.jsp?file_id=305907.

82. *Id.* at 163. *But see infra* note 92 and accompanying text discussing Belmora LLC v. Bayer Consumer Care AG, 819 F.3d 697 (4th Cir. 2016), which may complicate this position.

83. 391 F.3d 1088 (9th Cir. 2004).

84. *Id.* at 1098. ("The court should consider such factors as the intentional copying of the mark by the defendant, and whether customers of the American firm are likely to think they are patronizing the same firm that uses the mark in another country.")

in *Person's*.[85] The Ninth Circuit found that without such an exception, an absolute territoriality rule "would promote consumer confusion and fraud."[86]

The China Supreme Court's view in the QIAODAN case is consistent with the decisions in *Christensen* and *ITC*. The local company that invested in and developed the brand was found to be the rightful owner of the brand, despite evidence of a foreign party with conflicting claims. Mr. Christman was more clearly an imitator since he copied the exact trademark of the Japanese company, while there is still a question of whether QIAODAN was a name or mark owned by Michael Jordan.

Also, the argument that QIAODAN is a person's name does not necessarily strengthen trademark rights. Not all jurisdictions accept that celebrity fame increases trademark rights. For example, in the United Kingdom, the common law position has been the greater the fame of a name, the less distinctive it is as a trademark.[87] The cultural expectation in the United Kingdom is that consumers buy items because they like the celebrity, not because they believe the celebrity is the source of the product, or stands for a consistent quality of manufacturing. This reasoning can be applied to Chinese consumers, particularly in the past. However, consumer expectations are changing. Chinese consumers are learning to expect that purchase of celebrity licensed goods is a form of economic support for the celebrity.

Usurpation of another's brand may seem peculiar to China, but it is legally possible in most jurisdictions, including the United States, under the fundamental principle of territoriality. The difference between China now and most Western countries on the one hand, and China of 20 years ago on the other hand is the participation in and awareness of global consumer society. Thus this conflict may still be replayed many times in other developing countries with non-phonetic languages.

c. Immoral Trademark

In China, trademarks containing obscenities or references to illegal substances have been regularly rejected on the basis of immorality. The standard is stringent. Occasionally, a naive examiner misses an obscenity attached to a mark, and allows registration. But when such a mark is brought to the TRAB's attention, the board will usually invalidate the obscene registration.

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85. The *Person's* decision has been cited favorably in 33 subsequent published federal trademark court decisions from 1990 to 2014.

86. *Grupo Gigante*, 391 F.3d at 1094.

87. *See, e.g.*, the discussion in *Robyn Rihanna Fenty v. Arcadia et al.*, EWCA Civ 3 (2015), A3/2013/2087 & A3/2013/2955, para. 41-47.

In the Qiaodan trademark cases, the Court found no immorality in being the first to file a trademark where trademark rights are granted on a first-to-file basis, and the registrant was closely connected to the trademark by virtue of its use and investment.[88] However, "trademark squatting," where authorities deem the registration was made only for the purpose of interfering with the rights of the foreign owner, not for use of the trademark in legitimate business, can result in loss of registrations. While the determination of squatting can seem subjective, two key factors are the similarity of the marks and the amount of use and development by the local registrant. Protection of Chinese transliterations of a foreign-language mark can be very difficult.[89]

The Beijing High Court's decision[90] essentially requires a mark to be inherently immoral, rather than the result of opportunistic registration. In the United States, under Lanham Act Section 2(a),[91] the test is similarly limited to the inherent nature of the trademark itself. For example, in *In re McGinley*,[92] the Court of Appeals for the Federal Circuit ruled that the TTAB acted improperly in rejecting a trademark application on the ground that it indicated immoral services.[93]

2. Civil Law Claims

In addition to actions on trademark grounds, a foreign celebrity or brand owner can consider filing a civil action to claim rights in a name under the Anti-Unfair Competition Law, or the Civil Code's Protection of Personality.

a. Unfair Competition

China's Anti-Unfair Competition Law protects individual or enterprise names and unregistered trademarks from use by another that causes confusion or misleads consumers.[94] Proving

88. *See supra* note 28.

89. *See supra* note 57.

90. *See supra* text accompanying notes 33-34.

91. United States Trademark Act of 1946, as amended ("Lanham Act"), § 2(a), 15 U.S.C. § 1052(a) (2012).

92. 660 F.2d 481 (C.C.P.A. 1981).

93. *Id.* at 485. The Court affirmed rejection of the trademark on the grounds that the trademark's portrayal of male genitalia was inherently scandalous, but said it would be improper to consider the services provided by the applicant.

94. Anti-Unfair Competition Law, Article 5: Managers should not use the following unfair methods which can damage their competitors: . . .

> 2. to use the specific name, package, or decoration of a famous or well-known commodity, or to use a similar name, package, decoration of a famous of well-known commodity, which may confuse consumers;

unfair competition requires showing that the name is used on famous products or services. In the QIAODAN case, even accepting that QIAODAN was famous in 1997, and showing Chinese media reports from the 1980s and 1990s to argue that Chinese media attention for "Qiaodan" is proof of Michael Jordan's fame, Section 2 of the statute still requires the use of QIAODAN as a mark on commodities or services.[95]

Article 5, Section 3 seems to provide an alternative as it does not require fame. However, this section is interpreted to still require fame in order "to cause confusion between its commodities and those of the other enterprise. . . ."[96] According to the Supreme People's Court, "The pen name or stage name of any natural person that has a certain [degree of] 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."[97] Unless a celebrity can demonstrate that the stage name had some degree of fame in China at the time a local registrant began its competition, a claim of confusion under Section 3 will not succeed either. Many foreign companies have found that China's Anti-Unfair Competition Law provides so little protection as to constitute none at all because it also requires fame in China, leaving the same problem as the Trademark Law. In the Michael Jordan case, even assuming fame for QIAODAN, there is the question of whether Michael Jordan can be said to have used "Qiaodan" as a stage name. Like a pen name, a stage name should be used by the nominee. The fact that Mr. Jordan never used the name for himself until 2012 seems a key weakness in such a claim. In contrast, the Lanham Act asks only that a plaintiff believe he or she has suffered harm. Section 43(a) of the Lanham Act does not require a trademark registration in order to prove a right to protection but asks if the accused user of a mark or name has made any misleading representation of fact.[98]

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3. to use the name of another enterprise, or individual, to cause confusion between its commodities and those of the other enterprise or individual. . . .

95. *Id.* Further, Michael Jordan provided athletic services in the United States under the name "Michael Jordan." An argument that he provided services in China by virtue of news reports or even re-broadcasts is weak; even if he played a few exhibition games in China, any related contracts would likely have used the official name "Michael Jordan," not "QIAODAN." In the future, foreigners performing in China will know to use their official name but also to support their name rights by including the Chinese character name associated with them.

96. *See supra* note 94.

97. Sup. People's Ct., Interpretation on Issues Concerning the Application of Law in Hearing Civil Cases Involving Unfair Competition, Fa Shi [2007] No. 2. (最高人民法院关于审理不正当竞争民事案件应用法律若干问题的解释) Supreme People's Court Interpretations are advisory opinions providing binding guidance to lower courts in China.

98. "(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any

In a recent U.S. circuit court opinion, the Fourth Circuit ruled that the Lanham Act applies to protect consumers from misleading associations and advertising even when made by a U.S. trademark registrant, where it usurped the goodwill of a foreign trademark. *Belmora LLC v. Bayer Consumer Care AG*[99] describes a situation parallel to the QIAODAN case. Bayer Consumer Care AG ("Bayer") has owned the trademark FLANAX in Mexico since 1976, and marketed sodium naproxene under the mark.[100] Bayer did not use the FLANAX brand in the United States, instead marketing the same medicine in the United States under the name "ALEVE."[101] In about 2004, an American company, Belmora LLC ("Belmora") began to market sodium naproxene to the Spanish-speaking community in the United States under the FLANAX trademark.[102] Belmora obtained a U.S. trademark registration for FLANAX.[103] In advertising, Belmora stated, "For generations, FLANAX has been a brand that Latinos have turned to for various common ailments."[104]

The Court did not find that Bayer has trademark rights to FLANAX in the United States.[105] However, it did note that Belmora's trademark rights do not extend to deceiving consumers, and such deliberate efforts to mislead Mexican tourists visiting the United States, and Mexican-American consumers familiar with Bayer's product, constituted a violation of Lanham Act § 43(a) protections against unfair competition.[106] This decision is more similar in global outlook to the Ninth Circuit's *Grupo Gigante* case, although that case was based on the Lanham Act's unregistered trademark rights grounds rather than its unfair competition grounds.

Since the Lanham Act does not specifically require that the mark be famous before it can be protected, Bayer was able to

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combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act." Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2012).

99. 819 F.3d 697 (4th Cir. 2016).

100. *Id.* at 702.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 703.

105. *Id.* at 710.

106. "Trademark rights do not include using the mark to deceive customers as a form of unfair competition, as is alleged here." *Id.* at 713.

protect its Mexican brand, Flanax, in the United States, at least to some degree. Unfortunately for Chinese consumers, such protection is not extended in China unless a mark qualifies as made famous on commodities or services in China.[107]

b. The Right of Personality

China's Principles of Civil Law provide that a citizen has the right to use his or her name and prevent others from usurping it or using it for false representation.[108] As a fundamental protection under Civil Law, as opposed to a commercial right under the more specific Trademark Law, the right to one's name takes precedence over trademark rights. This right is broader than the right to protection from unfair competition and does not impose any commercial requirement. A well-publicized case from 1999 illustrates the use of the concept in Chinese society.[109] A high-school student's name was usurped by a classmate when the classmate's father, a village Communist party official, used the student's name and exam score for his own daughter.[110] The high-scoring student, with the unusual name "Qi Yuling," was informed that she did not qualify for university and went on to a life of low-wage jobs.[111] The official's daughter went on to university and a job at a bank.[112] The case came to light nearly 15 years later, after Qi Yuling learned of a bank official with the same unusual name and age as herself, who had attended the same school to which Qi Yuling had been denied entrance.[113] Qi Yuling sued, and won an award for damages after appeal to the Shandong High Court.[114]

The right to one's name in China begins with the inquiry as to the definition of someone's name. For example, since many Chinese only know Michael Jordan by the name "Qiaodan," it can be understood to be his name. But courts are tasked with enforcing the law strictly.[115] With more than one billion people in China,

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107. *See supra* notes 99-100 and accompanying text.

108. Principles of Civil Law, Article 99: "Citizens enjoy the right to their personal name and are entitled to determine, use, or change their personal names in accordance with relevant provisions. Interference, usurpation, and false representation of personal names are prohibited." The statute extends to non-citizens by virtue of the Law on Choice of Law for Foreign-related Civil Relations, Articles 5 and 10.

109. Shandong High Court, Case No. 258 (1999), Lu Min Zhong Zi No. 258 (1999); [1999] 鲁民终字第258号.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. PRC Statute on Judges, Article 7(2): "Judges shall perform the following duties: 1) to strictly observe the Constitution and laws; 2) to take facts as the basis, and laws as the criteria when trying cases. . . ." In addition, the PRC Household Registration Ordinance,

there are many names shared by many people. The statute does not provide examples of types of names other than personal names, nor does it include nicknames in its definition. Thus courts will normally interpret someone's name to be the name on their identity card, or the name given at birth.[116] Since the law states that everyone has the right to use his or her own name, the law does not contemplate a right so broad as to prevent others from the normal, non-commercial uses of their own names.

(1) Nicknames

This right is recognized as a growing area of economic rights. Some Chinese scholars suggest that nicknames, pseudonyms, and other associated names should be included in the definition of "name."[117] Reasoning from the function of a name, as that by which one is known to others, nicknames and other associated names should be included in protection as names.[118] Given that many famous people are known by either a nickname or a portion of their full name, the absence of such protection could allow many third parties to free-ride on famous names to mislead the public. This is especially true given that China is building a consumer culture and foreign brands and foreign celebrities are now of great interest.

Foreigners' names are often transliterated into Chinese characters to make them legible to average Chinese consumers. The transliterations often come from a standard reference dictionary, such as the one that lists "Jordan" as equivalent to "Qiaodan."[119] The translation dictionary evidence would also reveal that anyone else with the same foreign name would receive the same transliteration, so such evidence could undercut a foreign celebrity's argument. For example, in Michael Jordan's case, there

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Article 18: "Where a citizen wants to change his or her name, the following rules must be observed: 1) when under 18 years of age, the application should be filed to the authorities by a parent or guardian; 2) when over 18 years of age, the application should be filed to the authorities by the applicant."

116. The PRC Law on Resident Identity Cards, Article 3, lists the items to be registered including, "name, gender, nationality, date of birth, address of permanent domicile, identity number," etc., but does not define "name."

117. Cheng Xiao, Torts, Vol. 2, China: Law Press, pp. 137-139 (程嘯著, *侵权责任法*, 第二版, 法律出版社, 2014.)

118. Yang Lixin, The Right of Personality, China: Law Press, 2012, pp. 334-335. 杨立新，*人格权法*， 法律出版社， 2012; Liu Wenjie, Civil Law Right to Names, China Academic Journal Electronic Publishing House, pp. 65-76, accessed at www.cnki.net. (刘文杰， 民法上的姓名权，

119. The transliteration is set forth in the commonly used reference work *Dictionary of English Names*, which lists foreign names and suggested transliterations for them. *Dictionary of English Names* (Li & Gao, eds., Beijing: Foreign Language Teaching and Research Press 2002).

are several U.S. professional athletes with "Jordan" as either a first or last name. In the NFL, there are such players as Cameron Jordan, Dion Jordan, and Jordan Reed. In the NBA, the very association in which Michael Jordan spent his career, other players bearing the name "Jordan" include DeAndre Jordan and Jerome Jordan.[120]

In determining a foreign celebrity's "name," a Chinese court would examine official documents that list the name of the foreign celebrity, which will be in Roman characters.[121] It is therefore unlikely that Chinese character transliterations will qualify as a foreigner's name under the narrow language of Article 99, even though blanket denial of protection for Chinese character versions of foreign names amounts to a license to squatters and those who will mislead Chinese consumers.

On the other hand, Americans have the sense a name, even if common to others, should nevertheless belong to a foreign celebrity because the extensive use and publicity around their activities created the value of the name. This acceptance of the notion of created association is part of unfair competition law, but is increasingly reflected in American concepts of the right of personality and publicity. In the United States, the right is governed by state laws, and varies from state to state. For example, Washington State's law defines names to include "the actual or assumed name or nickname . . . that is intended to identify that individual. . . ."[122] By using the language "intended to identify that individual," the statute recognizes that an association created by others can create a right for an individual, and implies the individual can assume the name without officially registering such name.

The broad definition in Washington state law conceives of the name and personality as a property right.[123] New York State's Civil Rights Law sets forth a similarly broad concept linked to commercial exploitation.[124] Under California's statute, names are

120. *See NBA Players – Letter J*, Land of Basketball.com, http://www.landofbasketball.com/nba_players_index/letter_j.htm (last visited Feb 20, 2016)

121. Legal transactions for foreigners in China rely on passports and use the foreigner's name in roman letters. If not a European name, a foreign name is expected to be spelled out in romanized form. The government does not use customary Chinese transliteration, or Chinese nicknames, for official actions related to foreigners.

122. Wash. Rev. Code Ann. § 63.60.020(6) (LexisNexis 2016) ("'Name' means the actual or assumed name, or nickname, of a living or deceased individual that is intended to identify that individual.")

123. Wash. Rev. Code Ann. § 63.60.010 (LexisNexis 2016) ("Every individual or personality has a property right in the use of his or her name, voice, signature, photograph, or likeness.")

124. N.Y. Civ. Rights Law § 50 (2016) ("A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living

protected from use for commercial purposes by a third party.[125] Under California common law, such protection is not limited to names, but extended to a person's identity.[126]

A question of ownership of identity arose for the New Orleans Saints football team, whose fans customarily cheer "Who Dat?" When the football team reached the Superbowl in 2009, 5 years after Hurricane Katrina destroyed much of New Orleans, the football cheer "Who Dat?" became famous around the United States. A poor understanding of trademark law and a desire to "get rich, quick" motivated many Americans to file numerous applications to the USPTO to register WHO DAT as their trademark, particularly for apparel and items to be sold at the Superbowl.[127] Nearly all of the over fifty applications have been rejected or abandoned.[128] One company, Who Dat? Inc., was able to prove that it had, in fact, used the trademark in interstate commerce, so it has emerged as the owner of several registrations.[129]

Many Saints fans were angered that one company obtained exclusive rights to a collective, spontaneous chant.[130] Many felt that the cheer belonged to all the football team's fans, and should not be the exclusive property of one company. Some felt the mark should belong to the team or the NFL. However, under U.S. trademark law, since one company was able to prove that it had used the mark as a designation of source of origin, before others, it

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person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.")

125. (a) Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent . . . shall be liable for damage sustained by the person . . . injured. . . .

(e) Rather it shall be a question of fact whether or not the use of the person's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under subdivision (a).

Cal. Civ. Code § 3344(a) (Deering 2016).

126. Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 415 (1996): "Identity is a more flexible proposition and thus more permissive than the statutory 'laundry list' of particular means of appropriation." The Federal Court for the Sixth Circuit similarly found that identity was not limited to a person's name or image, in *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F 2d 831, 836 (1983).

127. *Who Dat Owns 'Who Dat'?, Dat's Us, Sez da NFL*, Wall St. J. (Jan. 29, 2010) http://www.wsj.com/articles/SB10001424052748703389004575033504283711006.

128. Search of U.S. Patent and Trademark Office Trademark Register, tmsearch.uspto.gov (last visited Mar. 1, 2016) (running search query "("who dat")[COMB]").

129. *See, e.g.*, U.S. Trademark Reg. Nos. 4310960 and 4385857.

130. *See supra* note 127.

acquired trademark rights.[131] Despite the collective cheer's association with, and arguable identification of, the football team, the trademark rights belong to the one company who made trademark use of the phrase.

(2) Names in the Global and Multicultural Context

Washington and California's state statutes make use of broad definitions of "name,"[132] rather than requiring the determination of a "real name." This is appropriate in a society where there are many people with names from all around the world. Names in the United States are no longer uniformly composed of a Christian name and surname. Immigrants and foreign celebrities used to select a name that would fit into American society. Now it is common for people to retain a foreign name, but spell it in romanized form. Contrast the name of Chinese-American actress Joan Chen with the younger actress Zhang Ziyi. To stay with only Chinese examples, and leaving aside the many other examples of non-phonetic languages, the geographic and linguistic range of Chinese names from many different dialects of Chinese, plus immigration from different parts of Southeast Asia, create a wide variety of legitimate possible names for individuals of Chinese ancestry.[133] It can be difficult to determine exactly the "real" or definitive version of a Chinese name in a foreign country. For example, celebrities from Chinese-speaking regions who are famous in the United States include martial arts and comedy actor Jackie Chan (成龙 pronounced "Cheng Long" in mainland China, and written as 成龍 in all other Chinese-language jurisdictions), or martial arts actress Michelle Yeoh (杨紫琼 pronounced "Yang Zi-qiong" and written as 楊紫瓊 outside of mainland China, but pronounced "Yu Chih-kheng" in her native Hakka dialect).

Each of these famous people was born with an official name, but each is known to the public in different countries by a different name.[134] When travelling to the United States, for work or immigration, they must convert their name into a romanized form. Such version becomes their official name in the United States. However, some U.S. consumers who read Chinese, or speak

131. *Cf. Who Dat? Sues Saints, NFL and Louisiana*, Courthouse News Service (Mar. 9, 2010), http://www.courthousenews.com/2010/03/09/25378.htm (describing lawsuit Who Dat!, Inc. filed asserting that the trademark was not in the public domain).

132. *See supra* notes 122, 125.

133. Phonetic languages, such as Arabic, Russian, etc. generally have a clear translation into English, even if regional pronunciations vary. With non-phonetic languages, the dilemma is whether to translate the meaning or transliterate the sound into the phonetic language.

134. Celebrities famous before 2000, or from Taiwan, Hong Kong, Malaysia, etc. often selected a Western first-name. However, many from mainland China do not select a Western name, and are only known by a pinyin Romanization of their Chinese name.

various dialects,[135] could be deceived by a third party's use of another version of the famous name, and arguably, such use could qualify as the use of a name under some state laws.

This issue of multiple names is not new, however. It has been common for writers and actors to use pseudonyms to protect a writer from critics or to enhance acceptance of a work (George Eliot, born Mary Ann Evans[136]) or due to Hollywood studio or Screen Actor's Guild requirements (Frances Ethel Gumm to Judy Garland,[137] or Marion Morrison to John Wayne,[138] or Julie Ann Smith to Julianne Moore[139]). Under a strict reading of the Chinese statute, they likely would not receive protection for their pen names or stage names under Article 99.[140]

In contrast, under statutes such as those of California or Washington, any version of the name that is recognized as the name of that person, as long as the name is used in U.S. commerce, can be protected. Thus a celebrity in California or Washington State doesn't need to choose between protecting, for example, "Jackie Chan," or "Cheng Long." Both are names by which the celebrity is known in commerce. And, as long as there is a commercial use of a name in interstate commerce, the Lanham Act may also apply, allowing for protection across the United States for a range of translations associated with the person, if used to mislead the public.[141] Furthermore, even before there was a substantial Chinese-literate community in the United States, foreign language characters could be protected under U.S. law as a "symbol or device."[142]

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135. The U.S. Census Bureau reports that as of 2011, there were 2.31 million U.S. residents born in China. *The Foreign Born from Asia*, U.S. Census Bureau (Oct. 2012), https://www.census.gov/prod/2012pubs/acsbr11-06.pdf. In addition, there were roughly 300,000 mainland Chinese students studying in the United States by 2015, and additional Chinese readers from Hong Kong, Taiwan, and other Southeast Asian countries. *Chinese Students in America: 300,000 and Counting*, Foreign Policy (Nov. 16, 2015), http://foreignpolicy.com/2015/11/16/china-us-colleges-education-chinese-students-university/.

136. *George Eliot*, Encyclopedia Britannica (Jan. 8, 2016) https://www.britannica.com/biography/George-Eliot.

137. *Judy Garland*, Encyclopedia Britannica https://www.britannica.com/biography/Judy-Garland (last visited June 30, 2016).

138. *John Wayne*, Encyclopedia Britannica, https://www.britannica.com/biography/John-Wayne, and http://www.biography.com/people/john-wayne-9525664 (last visited June 30, 2016).

139. *Julianne Moore*, Encyclopedia Britannica (Nov. 20, 2015) https://www.britannica.com/biography/Julianne-Moore.

140. *See supra* note 112. However, pen names used commercially to provide services or goods in China would receive protection under the Anti-Unfair Competition Law. *See supra* note 98.

141. *See supra* note 98.

142. *Id.*

U.S. individual states' laws' often include a commercial element and focus on confusion to the public, reflecting more consumer protection than a law that defines "name" as strictly a person's official name. This commercial element in U.S. state laws helps to narrow the protection so as to avoid prohibiting other people from using their own names for ordinary purposes. Thus the California name right, for example, is akin to a trademark right in one's name. Would Michael Jordan be able to prevent others from using "Jordan" altogether as a name in the United States under the California law? It is clear that he could not, absent other factors. "Jordan" is not his name, only a portion of it. He cannot even prevent others who share his exact full name from using "Michael Jordan" for ordinary activities of regular life.[143] However, if another individual named "Michael Jordan" sought to commercialize sportswear under the name "Michael Jordan," after the athlete had already made it famous for related goods or services, such use would likely be found a violation of the California statute.[144]

(3) Protection of Name Rights in Other Regions

There is another approach to name protection, followed for nearly forty years in Central America, for example. Four Central American nations signed a regional treaty in 1968 that created a registry of individuals' names.[145] The treaty required trademark offices to obtain authorization from living individuals whose name was the subject of third-party trademark applications.[146] On this basis, Guatemala invalidated third-party trademark squatting registrations to RALPH LAUREN and CALVIN KLEIN, after years of litigation.[147] If China had belonged to such a treaty,

143. There are nearly 4,000 individuals named "Michael Jordan" in the various U.S. telephone directories, according to a search of Whitepages.com.

144. This concept is not unique to California or even U.S. states. *See, e.g.*, Decision of the Head of the Department of Industrial Property of Chile, August 23, 2002, Case No. 2637/01, *Marco A. Pinochet et al. v. Augusto Pinochet H.*, where a man named "Augusto Pinochet" was prevented from using his birth name for a Chilean trademark in light of the similar name of the famous former leader.

145. Central American Agreement for the Protection of Industrial Property, June 1, 1968. The treaty was abrogated by the signatories on January 1, 2000, to be replaced in the future with another treaty. Thomas Andrew O'Keefe, Latin American and Carribean Trade Agreements: Keys to a Prosperous Community of the Americas 239 (Martinus Nijhoff Publishers, 2009).

146. "The following may not be used or registered as trademarks or elements thereof . . . (h): names, signatures, patronymics and portraits of persons other than those applying for registration without the consent of such persons or, in the event of their decease, of their ascendants or descendants in the nearest degree. . . ." *Id.*, at art. 10.

147. Antonio Malouf Gabriel v. Calvin Klein, Guatemala Supreme Court of Justice (1999); *see also* Exclusividades Finas, Sociedad Anonima v. Inversiones San AugustÌn, Sociedad Anonima, Case 59-94, Guatemala Supreme Court of Justice (1994).

applying the regional approach might change the result in the QIAODAN case, if Michael Jordan could have proved that QIAODAN was his name.

There are other jurisdictions with arguably broader protections for rights of personality. For example, in Italy, the concept has extended from name and image to the broader indicia of persona. In a famous case from 1984, *Dalla v. Autovox SpA*, the court found a knit cap and small, round glasses to be so closely associated with a certain celebrity as to prohibit the use of a similar hat and glasses in advertising by others.[148] However, a Chinese lower court is unlikely to reason by analogy from the narrow definition of name in the statute to protect clothing and accessories, as did the Italian Court in *Dallo*.[149]

(4) Protection of Names in Domain Name Disputes

The issue of name protection has also arisen in the international context, with Internet domain name disputes brought by famous persons before a domain name arbitration body. Where the complainant can show trademark rights infringed, or consumers misled, the success rates have been higher.[150] Even so, domain name arbitration panels have ruled that celebrities do not have exclusive rights to their names, and may have to allow use of their name for domain name registrations by others. Third parties can have legitimate interests in a celebrity name, such as operating a fan club or website.[151] However, diverting business away from a celebrity's business is not recognized as a legitimate purpose. For example, in an Internet domain name dispute proceeding before the World Intellectual Property Association ("WIPO"), the actor Pierce Brosnan was able to protect his name. He did so, however, on trademark grounds, demonstrating that his name was a famous, although unregistered, trademark because of his many product endorsement contracts.[152] His name is composed of relatively unusual elements, unlike "Michael Jordan."

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148. Silvio Martuccelli, *Symposium International Right of Publicity: The Right of Publicity under Italian Civil Law*, 18 Loy. L.A. Ent. L.J. 543, 549-551 (1998), citing *Dalla v. Autovox SpA*, Pret di Roma, 18 Apr., 1984, Foro, It. I, 2030.

149. However, it is conceivable that such a claim could succeed, in a very unusual case, under China's Anti-Unfair Competition Law.

150. Even domain name disputes over celebrity names rely on a finding that the name used is the celebrity's actual name. *See, e.g.*, Vanessa Minnillo v. Mike Morgan, WIPO Case No. D2005-0813 (Sept. 27, 2005), http://www.wipo.int/amc/en/domains/decisions/html/2005/d2005-0813.html.

151. Bruce Springsteen v. Jeff Burgar and Bruce Springsteen Club, WIPO Case No. D2000-1532 (Jan. 25, 2001), http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1532.html.

152. Pierce Brosnan v. Network Operations Center, WIPO Case No. D2003-0519 (Aug. 27, 2003) http://www.wipo.int/amc/en/domains/decisions/html/2003/d2003-0519.html.

Another WIPO domain name dispute proceeding panel found that the famous singer known as "Sting" did not have a superior right to the name "Sting" used in a domain name.[153] While the case ruled for the defendant on other grounds, the panel noted that "sting" is a common word, and that twenty U.S. trademark registrations already existed in the word, none of them belonging to the man who performed under the stage name "Sting."[154] Sting had never registered a trademark to the name, and it is not his real name.[155] There was also no evidence that the user intended to take a free-ride on the fame of the singer known as Sting.[156] Therefore, his effort to invalidate the domain name registration failed.

(5) Modifying the Definition of Name for Foreigners in China

The Chinese statute does not use a broad definition of "name," and does not mention commercial uses of a name.[157] So under the narrow language of China's Principles of Civil Law, Michael Jordan could not take exclusive ownership of the name "Qiaodan." Expanding "names" to include commercial rights may cause the fundamental right of personality to lose its supremacy over economic rights like trademark rights and the right of protection against unfair competition.[158] Furthermore, as China is a civil law jurisdiction, judges are responsible to make rulings based on statutes as promulgated, without regard to other courts' precedents as under the common law system.[159] The right to expand the right of personality belongs to the National People's Congress, although guidance from China's Supreme People's Court could clarify the proper scope of the right. It is highly unlikely that many Chinese judges would extend the right of personality beyond the statute based on their own reasoning, without guidance from the Supreme People's Court or legislative amendments. Under a narrow reading of China's Principles of Civil Law, foreign celebrities will have difficulty claiming a right in a Chinese name.

The cost of such a narrow reading, however, is high. It effectively eliminates the right of personality as a form of protection available to foreigners, since most foreigners in China

153. Gordon Sumner, p/k/a Sting v. Michael Urvan, WIPO Case No. D2000-0596 (July 20, 2000), http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0596.html.

154. *Id.*

155. *Id.*

156. *Id.*

157. *See supra* note 108.

158. See discussion around footnotes 41 and 115.

159. *Id.*

will become famous under a Chinese transliterated name, not their legal foreign name. The lack of such protection may result in continued deception and in Chinese consumer confusion. Only foreigners with sufficient fame in China will be able to receive protection, under the Anti-Unfair Competition Law, but not Article 99. On the other hand, the cost of granting a right to one person is to foreclose the public from use in the future. In general, China has been wary of granting private rights. Consumer confusion may be deemed an acceptable price.

There is another complication in applying the Chinese right of personality to a foreign plaintiff. The statute grants the right to citizens, but allows foreigners to assert the laws of their domicile.[160] If foreign laws cannot be ascertained or there are no provisions in the laws of that country, then the laws of the People's Republic of China should apply.[161] If that provision is interpreted to mean that the definition of a foreigner's name should follow their home jurisdiction, it could include nicknames and could potentially change the outcome of the case in China. A foreign celebrity who can show that his or her home jurisdiction recognizes a broad definition of "name," including multiple languages, might be able to claim several names "belong" to him or her. However, extra-territorial application of such an expansive standard in China is difficult to envision.

III. CONCLUSION

A fundamental principle of the rule of law is predictability. Citizens should be able to guide their own behavior by knowledge of right and wrong according to their social customs and legal system.[162] China's society and its legal regime have experienced so much dramatic change over the past forty years that it is not surprising that standards of behavior are unclear. Only forty years ago, the Great Proletarian Cultural Revolution was under way, capitalism and material wealth were reviled, China's per capita

160. Law on Choice of Law for Foreign-related Civil Relations, Article 15: "The content of personality rights is governed by the law of the principle's habitual residence."

161. Law on Choice of Law for Foreign-related Civil Relations, Article 10, The foreign Law applicable to a foreign-related civil relation will be ascertained by the relevant people's court, arbitration body, or administrative agency. Where the parties have chosen foreign law to apply, they shall adduce the law of that country. Where the foreign law cannot be ascertained or the law of that country does not have a relevant provision, PRC law shall apply.

162. The World Justice Project, endorsed by the American Bar Association, has a four-part standard for the Rule of Law: . . .

> "The laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property.

GDP was $158,[163] and Chairman Mao still ruled the nation. In just four decades, per capita GDP increased to $13,206,[164] and in recent years China has become an economic powerhouse, sending over 100 million tourists out of China to see the world's sights and to purchase foreign products.[165]

The Chinese Trademark Law seeks to protect Chinese consumers by ensuring that they know the source of origin of products they purchase. It provides for a territorial first-to-file system with protection of unregistered trademarks famous in China.[166] Under the principle of predictability, trademark registrations, if lawful when made, should be protected. In the QIAODAN case, when QIAODAN was first registered in 1997, it was reasonable to believe that foreign brands were too expensive to sell to Chinese consumers, and a local company using a Chinese transliteration of "Jordan" in the local market was not worth pursuing. Now China's economic growth and more open markets allow Chinese consumers to purchase foreign brands, so they may be deceived by knockoffs made by local brand usurpers who follow the rules and are the first to file trademarks that sound like foreign brands.[167]

If a foreign celebrity can demonstrate a certain degree of notoriety in China and takes action quickly before a squatter can turn into a competitor, the name can be protected.[168] Vigilance by foreign brand owners is required to assert infringement of a famous but unregistered trademark, bad faith registration, or registration by fraudulent means under China's Trademark Law. In the alternative, a foreign celebrity or brand owner can try to show that their unregistered name, trade dress, or mark has been used in commerce on goods or services, in order to claim rights under China's Anti-Unfair Competition Law.[169] Finally, a foreign celebrity or brand owner can try to claim the right of personality in China, under Article 99 of the General Principles of Civil Law. The right to one's own name is a fundamental right, inscribed in the Civil Code, and so has priority over trademark rights, unfair

163. *GDP per capital (current US$)*, The World Bank http://data.worldbank.org/indicator/NY.GDP.PCAP.CD (last visited Feb. 15, 2016).

164. *GDP Per capita, PPP (current international $)* The World Bank http://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD) (last visited Feb. 15, 2016); *International Tourism, Number of Departures*, the World Bank, http://data.worldbank.org/indicator/ST.INT.DPRT last visited Feb. 15, 2016).

165. China Outbound Tourism in 2015, Travel China Guide https://www.travelchinaguide.com/tourism/2015statistics/outbound.htm (last visited Feb. 15, 2016). (citing China Tourism Research Institute).

166. *See supra* Section II.B.1.

167. *See supra* Section II.B.1(a).

168. *See supra* Section II.B.1(a).

169. *See supra* Section II.B.2(a).

competition, and other specific commercial rights. If China follows international trends it will protect nicknames as part of the protection of names. But it is likely that the right will not be expanded, especially for commercial purposes, absent guidance from the National People's Congress, State Council, or Supreme Court.[170] So the question is whether a name applied by third parties for convenience when referring to a foreigner can qualify for protection as property of the foreigner.[171]

If the Court had accepted Michael Jordan's claims, it would mean that the long and open promotion of a trademark in China would not strengthen trademark rights.[172] It would have sent a strong message that technical compliance with the Trademark Law is insufficient, and would subject marks that potentially infringe on a foreign mark to challenge for an unlimited time. This might be desirable to some brand holders, but would seem to contradict other trademark principles. Such a decision would also contradict the principle of territoriality as shown in the U.S. decisions *Persons* and *ITC*,[173] and instead follow the more globally oriented decisions in *Grupo Gigante and Belmora*.[174] On the other hand, it appears that the Court ignored much of the evidence of intent to free-ride on the fame of Michael Jordan, in order to issue a clean decision on the grounds of use and investment in trademarks.

The case is an example of many that arose in the context of a rapidly changing Chinese consumer economy. American audiences and consumers are culturally accustomed to see a connection between athletes and sportswear. However, consumer culture is relatively new to Chinese consumers, so the connection is not as clear. Globalization has increased Chinese consumers' awareness of foreign celebrities and brands in a greater shared culture. More Chinese consumers can now afford to buy foreign brands, so there is a greater chance that such brands can demonstrate fame in China. So while Michael Jordan and others had few sales in China on which to base a claim of fame in the past, the problem should ameliorate in the future.

However, this historical disparity is not entirely eliminated. Since the law in China favors the first to register, and foreign brands are only beginning to learn about Chinese consumers, it is likely Chinese consumers will be misled by trademark squatters for some years to come. Smaller foreign companies without the

170. *See supra* Section II.B.2(b)(v).

171. *See supra* Section II.B.2(b)(i). However, the use of the word "property" is loaded with undesirable connotations and should be reformulated by a potential plaintiff.

172. *See supra* Section II.B.2(b).

173. *See supra* notes 62 and 77.

174. *See supra* notes 83 and 99.

resources to enter the China market will still face the *Person's* dilemma. Small companies will need to consider registration and licensing in China as soon as they achieve some success in Western markets, even if they do not desire global expansion themselves. Among the different grounds to protect a variety of property rights, trademark protection still offers the best means for foreigners to protect their names, brands, nicknames and any other associated names or symbols. The QIAODAN case is a reminder to foreign brand holders that early registration in China is an essential investment to protecting their rights in the future, and that China is a market and export platform that can't be ignored.