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Dear readers,

Welcome back to our monthly appointment with the hottest legal issues in China.

We discuss 6 IP topics in 3 articles! Quite a thing.

First, the Burberry/Baneberry case, as the British fashion luxury brand got a very rare preliminary injunction against an alleged copier. As said preliminary injunctions are rare in China and so we wish to celebrate it.

Second, again on a trademark infringement, this time the iconic flag of Tommy Hilfiger: the case is quite interesting because it involves the use of colors in an already registered b/w trademark. While the IP system gets better, infringers must be more creative and sophisticate.

The third article examines 3 trademark cases from a list that the China National Intellectual Property Administration (CNIPA) released as "*guiding cases*" on December 2020: Dun & Bradstreet, Asics and CKS are the 3 chosen as exemplification for unifying the IP law enforcement standards.

It's quite difficult to understand for non-Chinese the result of the so-called Umbrellas case: the use of electronic monitoring for the protection and supervision of the working place by employers is considered legitimate, also in relation to the employees' right of privacy. Read what happened and understand why.

The last article refers to a food law related case, which can become historic: the Chinese dairy market is very competitive now, and well-known

suppliers must face many infringement cases of intellectual property rights. In addition, the food market is quite sensitive for Chinese legislators because strictly related to consumers' health.

Have a good reading you all!

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IP Law

Burberry gets Preliminary Injunction against Baneberry



Burberry is a British luxury fashion house headquartered in London. It designs and distributes ready to wear including trench coats (for which it is most famous), leather goods, footwear, etc. The most iconic Burberry check pattern has been in use as a lining in its trench coats since 1920.



Recently, in the process of examining a trademark infringement and unfair competition dispute, based on the request from the plaintiff Burberry Limited, the Suzhou Intermediate People's Court issued a rare preliminary injunction against defendants, namely 1) Xinboli Trading (Shanghai) Co., Ltd., 2) Shentu Clothing (Shanghai) Co., Ltd., 3) Kunshan Development Zone Peng Yazhong Clothing Store and 4) PENG Yazhong (natural person), which were prohibited from using the alleged infringing trademarks to conduct business operations.



According to Article 100 of Civil Procedure Law of the People's Republic of China, *in the event that the judgment on the case may become impossible to enforce or such judgment may cause damage to a party because of the conduct of the other party to the case or because of any other reason, the People's Court may, upon the request of the said party, order the preservation of the property of the other party, specific performance or injunction.*

When deciding whether to grant the preliminary injunction, it is necessary to comprehensively consider many factors mainly including the stability of rights, the possibility of infringement, the necessity of preservation, the situation of urgency (so called *periculum in mora*) and the balance of both parties' interests.

In this case, the reason why the Suzhou Intermediate People's Court made the injunction was based on the following considerations:

Malicious copying and imitation prove the likelihood of infringement

"BURBERRY" and " " owned by Burberry has been recognized as well-known to the Chinese consumers several times. The use of the disputed trademarks "BANEBERRY" and " " are highly suspected of copying and imitating the well-known trademarks.

Also, the patterns used on the alleged infringing products are suspected of constituting an infringement against the plaintiff's registered trademarks of " " and " ".



The screenshot of Xinboli website. Source: <https://www.baneberry.net/>

In addition, the defendants used similar logos in their operations and claimed that the brand "*originated from Jermyn Street, England, and its most symbolic 'British check' is a classic element in the fashion industry*" and other publicity terms. The above behaviors were also identified as constituting unfair competition to a large extent.

Injunction is of 'real urgency'

Firstly, the BANEBERRY's physical stores have expanded rapidly over the past year, opening more than 40 stores within one and a half year, which is close to the number of Burberry's exclusive stores in China.

Most BANEBERRY stores are located in large shopping malls or outlets in first-tier and second-tier cities of China, while online channels have also been rapidly extended to multiple e-commerce platforms such as T-Mall, WeChat, Pinduoduo. Obviously, this kind of expansion will continue to squeeze the market share of Burberry.

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Secondly, the alleged infringement behavior is a full-scale imitation of Burberry, which can easily raise confusion among the markets. Failure to take immediate measures will detract from the Burberry's goodwill and weaken the distinctiveness of Burberry's well-known trademark.

Thirdly, when requesting the preservation, it was the golden period of clothing sales during the Spring Festival holiday. Since the defendants already has a certain sales scale, failure to take immediate measures will not only cause the squeeze in market share, but also increase the cost of rights protection on Burberry. Therefore, it is urgent to order to stop the alleged infringement.

✓ **The advantages of involving act preservation outweigh the disadvantages**

Burberry has already enjoyed high reputation. Its rights are stable and part of trademarks are recognized as well-known for several times. The defendant is likely to constitute an infringement. The possible damage to the defendant caused by the preservation is controllable.

On the contrary, if not ruling preservation decision, it may cause irreparable damage to the plaintiff and cause consumer confusion.


✓ **Taking act preservation measures will be favor to protect the public interest**



The evidence in this case shows that the alleged infringement results in a large number of consumer complaints. Therefore, ordering the defendant to stop the relevant act is favor to maintain the normal market transaction order and the consumers' interests.

✓ **The plaintiff provided corresponding guarantees**

The court ordered the plaintiff to provide corresponding guarantees. At the same time, during the execution of the injection, if there is evidence that the defendant causes greater losses by stopping relevant act, the court shall order the plaintiff to increase corresponding guarantees.

Based on the above considerations, the court supported the plaintiff's application and issued the preliminary injunction in a timely manner. In details:

✓ Xinboli Trading (Shanghai) Co., Ltd. shall immediately stop using the "BANE BERRY" and "  " trademarks, and cease production and sales of products bearing identical or similar pattern of trademarks

"  " and "  ".

✓ Shentu Clothing (Shanghai) Co., Ltd. and Kunshan Development Zone Peng Yazhong Clothing Store shall immediately stop selling the products bearing the aforementioned trademarks and identical or similar pattern.

✓ Xinboli Trading (Shanghai) Co., Ltd. shall immediately stop using the "  " logo on its product tags, and cease to declare in its business activities that "BANE BERRY" originated from Jemin Street, London, and its most symbolic "British check is a classic element of the fashion industry" and other publicity behaviors.

The preliminary injunction is a temporary measure to remedy infringement of IP rights, which has the function of "timely rain" for rights protection.

In term of the regulation, act preservation is defined in Chinese IP laws. However, preliminary injunctions are much rarer applied since many issues shall be taken into consideration in actual ruling. The permanent injunctions are common in China in IP infringement cases.

Article 68 of Patent Law	Right holders or interested parties who have evidence to prove that others are committing or about to commit an infringement against patent rights, and if they are not promptly stopped, their legal rights and interests will be irreparably damaged, they can apply to the People's Court for an order to stop the relevant behaviors before the lawsuit.
Article 65 of Trademark Law	Where a trademark registrant or any interested party could prove that the infringement in process or to be conducted on the exclusive right to use the registered trademark will cause irretrievable losses to their legal interests if lack of prevention in a timely manner, they may apply to the People's Court for taking such measures as ordering the infringer to cease relevant behaviors and property preservation before filing any lawsuit.
Article 50 of Copyright Law	In order to stop the infringement, in the case of evidence may be lost or difficult to obtain in the future, the copyright owner or the copyright-related right owner may apply to the People's Court to preserve the evidence before the lawsuit.

As the issuance of "Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in Examining Cases Involving Act Preservation in Intellectual Property Disputes" on December 12, 2018 and later taking effective on January 1, 2019, it provides a clearer legal basis for the implementation of preservation in IP disputes.

Under the background of strengthening the protection of Chinese IPs, we can see the Courtis suggested to be more incline toward injunctions from the supports on Burberry case.

Even if the evidence collection is not easy to be done, we believe applying for the preliminary injunction in the case of real urgency and necessity could be a good measure for the IP disputes in the future.

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IP Law

Tommy Hilfiger's flag: The color make the difference




It frequently happens to walk in a mallor just around the street to bump into a store logo that not-barely remind the most famous flag of Tommy Hilfiger (TH).

Maybe it's because it's becoming a trendy-trademark, maybe just because a flag is easy to copy. However, what is clear is that the brand owned by the Apparel Company PVH Corp's whose portfolio includes many famous brands, among which also Calvin Klein, is recently facing an increasing number of copycats.

When finding the common aspect of the copies, the infringers usually register a mark that bears some similarity to TH's lines of the device marks and deliberately altered the based part or coloring the device part to heighten the similarity.

This is what happened in a recent case the Beijing High Court came to learn.

A Chinese company started to use a trademark composed by girdles,  no. 12396976 – registered on goods “girdles (clothes)”, which by itself was not considered infringement, since the American Brand does not have any protection for the mere girdles – but they suddenly decided to fill the girdles up with the same color used in the Tommy Hilfiger's Flag logo.



Counterparty's trademark

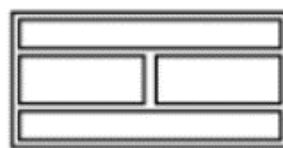


Color form of Trademark
No 12396976 in actual use

Immediately, Tommy Hilfiger filed an invalidation against the Chinese competitors before the Chinese Trademark Office (CNIPA).

For the American Brand, it was pretty clear that the two flags had to be considered similar marks on similar goods.

Specifically, even though the visual appearance of the disputed trademark and device seems distinguishable, when the black and white mark is colored with the same colors as Tommy Hilfiger's Flag, then the similarity becomes clear.



The Chinese mark black and white



Tommy Hilfiger's mark

As legal ground, TH affirmed that the prior use of their mark should have been recognized as similar and therefore, as established by the article 30 of the Trademark law, which says Where a trademark [...] is identical with or similar to the trademark of another person that has, in respect of the same or similar goods, been registered or preliminarily approved, the Trademark Office shall refuse the application without announcement.

Moreover, the intentional choice of goods was a proof of bad faith since it was finalized to lower the possibility that the goods of the disputed mark being found similar to the key goods of TH's cited trademarks.

The Chinese registrant argued that the slight difference among the goods should have allow to distinguish the companies and therefore to avoid the misleading of the consumer and this argument seemed working before the CNIPA, which rejected the request on invalidation filed by Tommy Hilfiger.

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However, the decision has been quickly overturned by the Beijing Court first and then by the Beijing High Court in the decision issued in 2020 which, on the contrary, recognized the violation of the articles 30 and 32 of the trademark law, stating that:

- ✓ Tommy Hilfiger's mark has a certain reputation on the clothes field in China;
- ✓ "Girdles (clothes)" shall be deemed as a similar item to "apparel";
- ✓ Tommy Hilfiger's mark had acquired certain influence on "girdles" through extensive use in China, and
- ✓ The Chinese company was in bad faith.

Following to the decision, on June 17, 2020, the CNIPA issued the "Criteria for Determination of Trademark Infringement", in which Article 24.1 provides that:

The registrant of a registered trademark without specifying any colors may color his/her trademark freely.

However, where the coloring aims to free-ride other's registered trademark in respect of same or similar goods/ services so that the colored trademark is similar to the latter's registered trademark, thus is likely to cause confusion, it falls under the trademark infringement act as prescribed by Article 57.2 of the Trademark Law.



It is still not certain if the above reported issuance is a consequence of the Tommy Hilfiger case. What is certain is that Tommy Hilfiger will finally have the chance to lower more and more flags in the future.

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IP Law

CNIPA guiding cases: we examine 3 trademark cases



For unifying IP law enforcement standards, improving consistency of case handling, and guiding authorities for IP administrative enforcement, the China National Intellectual Property Administration (CNIPA) released five guiding cases on December 14, 2020 (guiding cases No. 1 to No. 5).

The first three cases are about trademark infringements, the fourth is about divisional patent application, and the fifth is for integrated circuit layout design.

In this article, we have summarized the first three trademark cases for your reference.



Case No. 1 - “DUN & BRADSTREET” Trademark Infringement Case

Case highlights: The use of another's registered trademark in keywords advertising and the display of another's registered trademark in the search result page constitute trademark use.

Stakeholder: Shanghai Huaxia Dun & Bradstreet Business Information Consultation Company (Shanghai Dun & Bradstreet)

Infringer: Shanghai Zhangyuan Information Consultation Company (Shanghai Zhangyuan)

Shanghai Dun & Bradstreet is the subsidiary of the US Dun & Bradstreet. It is authorized to use the disputed trademark “邓白氏” (Deng Shi Bai in Pinyin; Dun & Bradstreet in Chinese). Shanghai Zhangyuan is an ex-franchisee of the US Dun & Bradstreet.

After the franchising relationship finished, Shanghai Zhangyuan used “[Official] DUN & BRADSTREET Coding-internationally recognized-global common enterprisecoding system” as keywords to promote its own business.

Consequently, there were eight enterprises that mistakenly believed that Shanghai Zhangyuan is the franchisee of the US Dun & Bradstreet International Ltd.

By the time the case was examined, Shanghai Zhangyuan had received almost 180,000 RMB service fees.

The MSA decided that Shanghai Zhangyuan should stop infringement actions, and should be fined for about 540,000 RMB based on Article 57.2 and 60 of the Trademark Law.

It is hard to define “use” in the environment of the Internet. There are still many disputes about whether the use of other's trademark as keywords should constitute trademark infringement.

This case sets a standard for defining “use” in regards to keyword search. The standard is that when keywords can lead internet users to a website of a third party, and make relevant consumers mistakenly believe that the website has a relationship with the trademark rights owner, the use of the keywords should belong to the “use” of trademark prescribed by Article 48 of the Trademark Law.



Case No. 2 “Tiger” Trademark Infringement Case

Keywords: vendor exemption; Infringement defense; knowing; should know

Case highlights: The seller and the supplier have a shareholder cross-employment materially related relationship, and the supplier used to file trademark applications that similar to the real trademark owner's trademark.

Thus, the authority implied that the seller knew or should know the disputed trademark, and cannot be exempted.

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Right holder: Asics Corporation

Infringer: Beijing Hongyuanli Trading Company

On January 9, 2018, in a raid action, Beijing City MSA found counterfeit goods bearing below trademarks or logos sold by Beijing Hongyuan Lide Co., Ltd.



Beijing Hongyuanli Trading Company signed a Franchise Contract with Quanzhou Qishi Keshi Sporting Goods Co., Ltd. for selling ASICS Tiger brand sport shoes.

When MSA examined the case, the infringer tried to argue that it did not know the goods are counterfeits and thus should be exempted.

However, the officers have found that the infringer has an essential relationship with Quanzhou Qishi Keshi Sporting Goods Co., Ltd, namely its supplier.

There is cross-employment between shareholders, and the supplier tried to apply for trademarks similar to ASICS's trademark. Thus, the infringer's argument for not knowing the goods are counterfeits is untenable.

The total amount of illegal business of the infringer is 11,154,707.24 RMB. Consequently, the MSA confiscated 6,687 pairs of shoes, fined the infringer 55,773,536.20 RMB, and requested the infringer to stop the infringement immediately.

Infringer's trademark	Right owner's trademark
	
	
	
	
	

In this case, the infringer tried to argue for vendor exemption by claiming that it does not know the goods are counterfeits.

However, not knowing is not enough for claiming vendor exemption.

According to Article 60 of the Trademark Law, vendor exemption needs to satisfy the following three conditions:

first, the vendor does not know the goods are counterfeits;

second, the vendor can prove that the goods are lawfully acquired;

third, the vendor can provide the information about the provider of the goods.

Thus, even if the infringer does not know that the goods are counterfeits, it still constitutes trademark infringements; let alone in this case that the infringer knew the goods are counterfeits.



Case No. 3 “CKS 科顺” Trademark Infringement Case

Case highlights: In the contracting work, the contractor's purchase and use of goods that infringe the exclusive rights of others' registered trademarks constitutes an act of selling counterfeit goods.

Infringer: Wuhan Keshun United Waterproof Engineering Co., Ltd. (Wuhan Keshun)

Right holder: Keshun Waterproof Technology Co., Ltd.

During a regular inspection, Wuhan MSA has found 60 rolls of suspected counterfeit Keshun waterproof coils at the construction site.

The infringer is a contractor in a labour and materials processing project in the field of construction, who purchased counterfeit “CKS 科顺”(CKS Keshun) products. These products have not been paid for and are not in use.

The MSA decided that although the contractor has not actually used those products, purchasing counterfeit material, and intending to use these products in the project are deemed as selling behaviour.

The authority decided that the infringer should immediately stop the infringement, confiscate and destroy the counterfeit goods, and be fined 200,000 RMB.

According to Article 57 of the Trademark Law, infringement behaviour includes using, selling, manufacturing etc. Purchasing behaviour itself is not recognized as a trademark infringement action. However, in the “CKS 科顺” case, purchasing behaviour itself is deemed as a trademark infringement.

The MSA explained that first, in the field of construction and decoration, the contractor is in charge of purchasing and construction. The use of counterfeit goods by a contractor is with a selling purpose. Thus, contractors are different from general consumers.

Second, contractors plan to use counterfeit goods in construction, and the outcome of the construction will be handed to the client. The relationship between client and contractor is purchasing and selling relationship. Thus, the disputed action violates Article 57.3 of the trademark law.

The PRC has a law system based on statutory law, which means the court and other authorities are not usually bound by judicial precedents.

Nevertheless, in the field of IP law, it is note worthy that the PRC in recent years begins to stress the importance of precedents.

It is safe to predict that the PRC will encourage IP law practitioners to use the reference of precedents in making consistent judgments.

Tech Law

The Umbrellas case: protect your privacy but lose your job



With the development of technology, more and more employers use electronic monitoring facilities as a means of workplace management.

The use of electronic monitoring as a means of management enhances the supervision and protection of the workplaces meanwhile such monitoring measures, to a certain extent, also intervene with the privacy of employees.

How to balance the employer management and the employee privacy?

Let's take a look at a recent case - Guangdong Provincial Higher People's Court (2020) Yue min Shen No. 8843 (November 4, 2020).

On June 24, 2019, the company where Ms. Zhang was working for installed multiple cameras in the workplaces. Ms. Zhang thought that one of the cameras was just above her work cubicle which could capture her privacy, so she put two umbrellas on the cubicle to block the camera.

On June 26, the HR department of the company gave two verbal warnings to Ms. Zhang, asking her to take the umbrellas back. On July 4, the HR manager of the company issued another two written warnings to Ms. Zhang, asking her again to take back the umbrellas.

However, Ms. Zhang thought that her behavior did not violate any regulations, and she refused to take back the umbrellas as requested by the company.

On July 17, the company issued a written notice of termination of the labor contract to Ms. Zhang, and informed the labor union that the reason for termination was that Ms. Zhang's behavior seriously violated labor discipline and rules of the company. Ms. Zhang believes that the company's termination is illegal, and filed for labor arbitration and litigation claiming economic compensation for the termination.

The labor arbitration, courts of first instance, second instance and retrial all held that Ms. Zhang's behavior lasted for more than ten working days despite of repeated warnings and requests by the company, which had severely and negatively affected the normal working order and management of the company. It constitutes a serious violation of discipline.

The cameras are intended to monitor the whole work area, which is in line with the reasonable measures of employer to exercise its right of supervision. In conclusion, it is not improper for the company to terminate the labor contract accordingly, and there is no need to pay any compensation.

The preceding judgment can basically represent the current opinion of Chinese judicial practice, that, in general and brief, camera monitoring is a reasonable measure of employers.

We would like to point out that, as confirmed by the PRC Civil Code, the right of privacy is a legal right enjoyed by every individual, thus the right of privacy of an employee – as an individual - should also be protected.

When exercising the right of management, employers should not violate the law and impose excessive restrictions on employees' right of privacy, while employees cannot arbitrarily expand their privacy rights as well.

Employees should abide by the legitimate and reasonable management of the employers and actively obey the necessary supervision of the employers in the workplaces during working hours.

Regarding the balance of camera monitoring between the protection of employees' privacy rights and the exercise of employers' management rights, we would like to give some compliance suggestions to employers as follows:

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1 Due Purpose and Reasonable Scope

When employers implement electronic monitoring in the workplaces, it should be carried out for the legitimate interests of the employers such as protecting the safety of the properties and working environment.

Employers should also pay attention to the legality of the monitoring equipment, to avoid using the equipment that has not been approved by the authorities or prohibited by laws and regulations.

The implementation scope of electronic monitoring should be limited to reasonable workplaces and working hours. For instance, the washrooms, as well as employees' off-duty hours, should not be within the scope of electronic monitoring implemented by employers.

2 Prior Notice and Written Regulation

On the basis of the above legitimate purpose and reasonable scope, employees, as the monitored objects, should have the right to be informed of the purposes, scale, time and space scope of the electronic monitoring, and the employers should notify the employees in advance through employee handbook, labor contracts or other written forms.



3 Confidentiality and Lawful Use

The recordings of employees obtained by the employers through electronic monitoring shall be kept confidential, and the necessary security measures must be taken to protect the privacy and personal information of the employees.

Employers shall not disclose such information without express authorization of the employees unless otherwise requested by law or competent authorities.

In addition, employers should restrict the use of the recordings collected, only for the purpose originally announced by the employers to the employees. The employers should not use such recordings for commercial purposes without permission.

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Food Law

Punitive damages: the Wyeth vs. Wyeth case



With intensified competition in the Chinese dairy market and changes in consumer demand, the intellectual property rights of well-known dairy suppliers have become the main targets of infringement.

Last January 6th, the Hangzhou Intermediate People's Court has ruled on a trademark infringement and unfair competition dispute between Wyeth LLC and Guangzhou Wyeth Maternal and Child Supplies Co, Ltd. ("Guangzhou Wyeth").

The Court awarded Wyeth LLC with 30.55 Million RMB (~\$4.7 million USD) in damages. This is the first IP case in Zhejiang Province to which punitive damages are applied.

Wyeth LLC was incorporated in the United States on February 4, 1926. The company leads in the research, development, manufacturing and marketing of infant milk powder, and is the owner of trademark "Wyeth" and "惠氏" in China.

Since the 1980s, infant formula products using the Wyeth trademark have been sold in the Chinese market, and Wyeth (Shanghai) Trading Co., Ltd. and other affiliated companies are authorized to use the "Wyeth"/"惠氏" trademark in China.

After long-term promotion and use, the "Wyeth" and "惠氏" trademarks have gained a high reputation for infant milk powder and related products. In 2015, the sales revenue of Wyeth's milk powder business in China exceeded 10 billion yuan.



U.S. Wyeth on left vs. Guangzhou Wyeth on right

According to Wyeth LLC, since 2010, Guangzhou Wyeth has engaged in long-term, large-scale production and sales of infant products with trademarks such as "Wyeth", "惠氏" and "惠氏小狮子 (Wyeth Little Lion)", and filed opportunistic registrations such as "Wyeth" and "惠氏" on goods of toiletries and other categories.

Guangzhou Wyeth was also accused of false propaganda, suggesting its partnership with Wyeth LLC.

Although Guangzhou Wyeth's assigned trademarks were declared invalid and the Supreme Court determined that Guangzhou Wyeth's use of "Wyeth" and "惠氏" had constituted trademark infringement and unfair competition, it continued to use "Wyeth", "惠氏", and "惠氏小狮子 (Wyeth Little Lion)" trademarks on maternal products, and even authorized a number of dealers to sell such products through online avenues.

Wyeth LLC and its affiliates filed a lawsuit with the Hangzhou Intermediate People's Court, requesting that Guangzhou Wyeth and the other five co-defendants to stop trademark infringement and unfair competition, and claiming a punitive compensation of 30 million yuan for economic losses and 550,000 yuan for reasonable expenses.

The Court ascertained that the use of the trademarks "Wyeth", "惠氏", and "惠氏小狮子 (Wyeth Little Lion)" by the six defendants on the alleged infringing products, product packaging, brochures and online publicity has constituted the use of trademarks that are identical or similar to Wyeth LLC's registered trademarks on similar goods, which easily confuses the relevant public about the origin of the goods, as well as infringes on the exclusive rights of Wyeth LLC's registered trademarks.

With respect to the amount of compensation, the Court took into consideration that the Wyeth trademark enjoys a high reputation in the industry, the defendants' malicious infringement of the plaintiff's goodwill and brand name was obvious, the scale of the defendants' infringement was serious in terms of time, geographical scope and circumstances.

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More importantly, the products involved in the case are closely related to the health and safety of infants and young children.

After calculation the amount of illegal profits of each defendant, the total sum exceeded 10 million yuan. Therefore, the Hangzhou Intermediate Court fully supported Wyeth LLC's claim for punitive damages.

Dairy products, or the entire food industry, are closely related to consumers' health. In this sense, free-riding of well-known brands does more harm than causing confusion for consumers, which provides the rationale for the application of punitive damages in this case.



We believe that this historic compensation will deter trademark infringement in the food industry and boost foreign brand owners' confidence in China's intellectual property system.

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