



## WATSON & BAND NEWSLETTER

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## Latest on Watson &Band

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Following the selection of W&B's "Hearthstone" case (a copyright infringement and unfair competition dispute) as a landmark case for 2014, four more W&B cases have been selected as IP landmark cases by local higher courts and intellectual property research organizations -- (i) W&B's representation of rights owner Uniqlo over a trademark infringement claim concerning the "UL" trademark, which was named a 2015 Top 10 Innovative Case for the Judicial Enforcement of IP Rights by the Beijing Higher People's Court; (ii) the geographic indication certification trademark "西湖龙井" infringement case, which was named a 2015 Top 10 Landmark Case for IP Rights Protection by the Shanghai Higher People's Court; and (iii) the copyright infringement and unfair competition dispute concerning the online game "The Six Schools", which was also named a "2015 Top 10 Landmark Case" for IP rights protection by the Shanghai Higher People's Court.

Over the past two decades, W&B has implemented the philosophy of integrity, strategy, professionalism and dedication when providing domestic and foreign clients with quality legal services. In addition to its outstanding achievements in litigation, W&B has also accumulated rich experience in non-contentious commercial law areas. For example, we provide legal services such as IP rights confirmation and applications, IP strategy and management, anti-counterfeiting enforcement actions and administrative complaints, trade secret-related management of and enforcement

## Latest on Watson &Band

### GF t sj Ut nij ujhf Y frns l Js n ji Whp R fsfl jr js kt Hts fh ns nj Uj kt r ns l F si kt nj n fsl mfn Uj kt r fshj Y fi j F thf rts

On April 25, 2016, W&B Partner Cathy Wu was invited to provide a special training session entitled *Risk Management for Contracts in the Performance Industry* for the Performance Agent Qualification Examination Project organized by the Shanghai Performance Trade Association. Performance agency contracts include several types of contracts that deal with critical issues such as entrustment and agency, brokerage, commissions, performance management and labor services. The three special features of performance agency contracts include a long contract term, a priority right for renewal, and unusually high liquidated damages. Disputes centering on these issues frequently arise.

Ms. Wu vividly elaborated on risk management issues relating to the performance market characteristics of performance contracts by citing popular cases and including analysis and commentary. Specifically, she analyzed the lawsuit filed by Wei Ying against Huayi Brothers for a percentage of the box office receipts of the movie *Journey to the West: Conquering the Demons* (Chinese name “西游降魔篇”), in which the court interpreted the validity of using an email as the memorialization of a contract. Ms. Wu illustrated a dispute involving LeTV’s renewal of the TV drama *My Sunshine* (Chinese name “何以笙箫默”) and a dispute involving the right of adaptation of the movie *Color of Night* (Chinese name “迷雾围城”). She also analyzed the advantages of using an option contract during the shooting preparation period of a movie. She cited a lawsuit filed by Jie Zhang against SUM Entertainment Limited as well as a lawsuit filed by Lei Tang against Beijing Pu Xin Ji Yuan Culture Communication Co., Ltd. Ms. Wu introduced contract validity issues in cases where an agency has not acquired a Commercial Performance License as well as the subsequent handling of these cases; she also cited a lawsuit filed by Xiao Dou against Beijing New Pictures Co., Ltd. and the lawsuit filed by Huiwen Yu against Shanghai Jiushang Performance Agency Co., Ltd. She also elaborated on judicial practices relating to the priority right of renewal and high liquidated damages.



### GF t sj Ut nij jlf j rhj kt nj j 2Pst s f nj nt Lt Kl mns l

The well-known inspirational variety show “Go Fighting!” Season II (hereinafter the “Show”) was launched on April 17, 2016. With a high audience rating after the first two episodes, the Show continued to stimulate heated discussions on social issues. As permanent legal counsel for SMG’s Dragon TV Center, since last year’s Season I, W&B attorneys from Xiaosu Zhu and Yun Lou have provided comprehensive legal services for every stage all the way from initial set-up and production to the actual broadcast of the Show.

Season II spent more time on scene selection and game design in order to more realistically represent various careers and lifestyles. All of the Show guests tried the games in person, thereby necessitating some dangerous scenes. As an example, the first mission that award-winner Bo Huang faced after his “return to Earth” was to be trapped in a minibus with no option other than to escape by breaking a window and jumping directly into the water during cold weather. Numerous scenarios similar to this one were carefully designed for every detail and can be seen in Season II. Despite all this, there is no detailed legal provision covering the legal risks involved, i.e. who bears liability for any personal injury to a guest during a special performance or activities similar to the Show, or how such liability should be pursued. In order to balance the rights and obligations among the producer and the guests, Xiaosu Zhu and Yun Lou formulated an improved liability allocation plan from a contractual perspective, in order to manage the legal risks arising from the guests’ performances and the Show’s shooting process. All of this was based on their previous experience in providing legal services for entertainment projects. .

W&B is one of the first professional law firms ever to practice in the Chinese cultural industry, leading to a profound understanding of the current environment and circumstances surrounding the Chinese cultural and entertainment industry, as well as an understanding of advanced developments in the industry both at home and abroad. On that basis, W&B has provided customized legal risk management services, policy analysis and commercial information to entertainment enterprises that engage in TV, film, music, performance and new media.



a) Uniqlo's "UL" Trademark Case named a "2015 Top 10 Innovative IP Case" for the Judicial Protection of IP Rights by the Beijing Courts

"Company A" (hereinafter the "Plaintiff") is the operator of a large trademark assignment website. It acquired the exclusive right to use the registered trademark "UL" under Class 25 "clothing, shoes and hats, etc." in China. Our client (hereinafter the "Defendant") is the operator of the popular Japanese fashion brand "UNI-QLO".

The Plaintiff sued the Defendant, alleging that the clothing product manufactured and sold by the Defendant used the "UL" trademark. According to the P.R.C. Trademark Law, where a party, without authorization from the registrant, uses a trademark similar to the registrant's registered trademark on the same goods, such party shall be deemed to have committed an infringement of the exclusive right to use the registered trademark. Consequently, the Defendant was in a rather unfavorable position.

After being retained by the Defendant, W&B collected a large amount of evidence and thoroughly debated issues such as whether or not the parties' trademarks were similar, whether or not they might cause confusion among consumers, whether the Defendant's use was in good faith, and whether the Plaintiff's lawsuit was malicious. The court ultimately ruled that since the allegedly infringing trademark and the disputed trademark are not similar and will not easily cause confusion, the Defendant did not commit the alleged infringement.

The Beijing Higher People's Court provided its commentary on the case, noting that it involved a typical trademark infringement dispute. Although the court applied the old Trademark Law to the trial, it upheld the spirit of the new Trademark Law and took into full consideration elements such as the appearance of the mark, the actual use of the disputed trademark, whether or not the defendant intended to "take a free ride" on the plaintiff's rights, and the degree of recognition by the general public. The court ultimately ruled that the allegedly infringing mark and the disputed trademark should not be deemed similar under the Trademark Law, and that their co-existence would not easily cause confusion. Consequently, the court found that the defendant did not commit the alleged infringement. To some extent, this case dealt with the issues of malicious trademark squatting and lack of credibility. The court dealt comprehensively with the legal and social effects of these issues, thereby allowing enterprises to regulate their own conduct and receive judicial guidance for standard business operations within the entire commercial market.

b) Trademark Infringement Case Involving "西湖龙井" (Geographical Indication) named a "Top 10 Landmark Case" for Judicial Protection by the Shanghai Higher People's Court

"龙井" (hereinafter "LONGJING") is a famous type of green tea in China, and LONGJING tea, originating in the West Lake area, represents the highest quality green tea.

Our client, Hangzhou West Lake Longjing Tea Industry Association (hereinafter the "Plaintiff") obtained registration of the No.9129815 geographical indication certification trademark "西湖龙井" (hereinafter "West Lake LONGJING") under Class 30 (tea). In the Chinese tea market, however, since the tea merchants overlooked geographical indications and used packaging bags and boxes affixed with relevant product names to pack various loose-packed tea products with no clear source of origin before it sold the products, it was difficult for the rights owner to enforce its trademark rights.

After being retained by the Plaintiff, W&B started from the features of the product and conducted an investigation of the tea market to learn about the characteristics and conditions of the infringing acts.

Meanwhile, W&B conducted a detailed analysis of the case based on (i) the definition and function of geographic indication and certification trademarks and (ii) the reputation and protection status of the Plaintiff's trademark. W&B then selected a representative infringing party as its investigation target, and ultimately named Company B as the defendant (hereinafter the "Defendant") because of its involvement in several infringing acts. W&B sued the Defendant before a competent court, which court ultimately ruled that the Defendant's acts infringed the Plaintiff's trademark rights and that the Defendant should bear corresponding civil liability by ceasing its infringement and paying damages.

The Shanghai Higher People's Court provided its comments on the significance of this case, noting that it is a typical case involving an infringement of a geographical indication certification trademark. The trademark "West Lake LONGJING" enjoys an extremely high reputation and popularity, represents traditional Chinese culture, and utilizes unique production techniques for tea products. The Defendant's misuse of the trademark for the production and sale of the infringing product not only adversely influenced the reputation of the trademark and the products using the trademark, but also harmed the rights and interests of the public. By prohibiting the Defendant from using the certification trademarks on products not originating from the designated production area and not possessing special quality, the judgment in this case effectively protected the reputation of the disputed trademark as well as the interests of the consumers. It therefore represented a victory in the struggle to maintain good market order.

c) Copyright Infringement and Unfair Competition Case Involving Online Game *The Six Schools* is Recognized by the Shanghai Higher People's Court as a "Top 10 Landmark Case" for Judicial Protection

Mr. Jin Yong is a famous contemporary Chinese writer whose martial arts novels enjoy a total global circulation of 500,000,000. Over dozens of years, his novels were adapted into various television and film works. Company A (hereinafter the "Plaintiff"), upon authorization from Mr. Jin, acquired the right of adaptation of four of Jin's novels for a mobile terminal game in mainland China.

Company B (hereinafter the "Defendant") used elements of the four Jin novels in both a mobile game called *The Six Schools* that it developed and operated and in related advertising and promotion. Since the Defendant's infringing acts not only involved different carriers, and since the infringing content involved reorganization and combination of the characters, relationships and plots of different novels, Mr. Jin and Company A experienced great difficulty in enforcing their rights.

After being retained by Mr. Jin and Company A, W&B fully explained to the court the substantial similarity between the characters, relationships and plots of the infringing game and Jin's novels through careful comparison and in-depth legal analysis. The court ultimately ruled that the Defendant's acts constituted adaptation of the disputed Jin novels, and that the Defendant's expropriation of the Plaintiffs' gamer groups constituted unfair competition. Consequently, the court ordered the Defendant to compensate the Plaintiffs for their economic losses and reasonable expenses in the amount of 500,000 RMB and to eliminate the adverse influence of the infringement.

The Shanghai Higher People's Court commented on the significance of this case, noting that it was a representative case involving infringement of the right of adaptation of a copyrighted work. The key issue for determining whether or not a game constitutes adaptation of a literary work lies in the issue of whether or not the characters, the relationships between the characters and the game plot are substantially similar to the equivalent elements in the literary work. Although mobile gamers have become the largest gaming population in China, consid-



## 5.1.5.1 China's IP Rights Cases

The Supreme People's Court recently published its lists of the "2015 Top 10 IP Rights Cases" and "50 Illustrative IP rights Cases". The Top 10 IP Rights Cases list included eight civil cases involving IP rights, one case involving an administrative dispute over patent invalidity and one criminal case involving trademark counterfeiting. The eight civil cases include (i) three patent cases, including a case involving a declaration of non-infringement and a case in which an e-commerce platform was held jointly liable for patent infringement; (ii) three trademark cases, including a case involving non-infringement by prior use and other cases involving disputes over trademark licensing contracts; and (iii) two copyright cases, including a case in which an injunction was issued during litigation.

The number of IP rights cases in China has been increasing annually. According to data published at a press conference on China's IP rights development status in 2015, the People's Courts (i) accepted 109,800 IP-related first trial civil cases, for an annual growth rate of 13.5%; (ii) accepted 3,510 IP-related first trial administrative cases; and (iii) concluded 10,800 IP-related first trial criminal cases. The procuratorates approved the arrest of 4,445 suspects in 2,615 cases involving criminal IP rights infringement, prosecuting 8,025 criminal suspects in 4,484 cases.

In addition, the types of Top 10 Cases published by various cities and provinces are shown in the table below:

Province/City	Copyright	Patent	Trade-mark	Unfair Competition	Other
Shanghai	3	1	4	1	1 case involving pretrial provisional preservation
Beijing	5	2	2	1	
Guangzhou	0	2	5	1	2 cases involving preservation during the proceedings and 1 case involving a franchising contract
Shenzhen	3	4	2	0	1 case involving patent administrative litigation
Tianjin	2	2	5	1	
Ningbo	1	5	2	2	
Hangzhou	3	1	2	3	1 case involving a technology contract
Nanjing	0	2	2	4	2 cases involving technology contracts
Qingdao	2	2	4	1	1 case involving a technology contract
Jinan	1	3	3	2	1 case involving a franchising contract
Chongqing	3	1	6		

As shown in the foregoing table, trademark is still a first priority among all IP-related disputes in China, although in some cities the proportions of copyright and patent-related cases are relatively high. This state of affairs to some extent reflects the need for IP rights as well as the key characteristics of economic development in the various locations. In addition, an increase in new-type cases and the application of provisional judicial protective measures supporting IP rights also indicates an enhancement in China's legislation, judicial practices and law enforcement in connection with IP rights.