

Misrepresentation and Misinterpretation of Intellectual Property

Review on NECCS 2017 and Donald Trump's Ten-year Trademark Case in China

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Abstract

The present article on intellectual property rights (IPR) takes recourse to Chinese Trademark Law in addition to two juxtaposed case-studies centered on the plaintiff Donald J. Trump versus the Trademark Bureau of State Administration for Industry and Commerce in the People's Republic of China, and the test paper of the 2017 NECCS, in order to explicate specific ways in which both the judicial concept of IPR and its philology can be misapprehended. Based on a statutory interpretation of consequential versions of the Trademark Law in the People's Republic of China as well as through so-called 'internal aid' consultation, the paper ultimately concludes that the Trademark Bureau ought to have issued judgment in favor of the plaintiff's claims. By quoting dictionary definitions on the key words of the test paper and referencing subject textbooks and official documents of WTO and China, the paper unambiguously concludes that the test paper is wrong on the concept of intellectual property, and wrong again on distinguishing the membership of NPC and CPPCC. Going into the test paper first then along its mental route to retrospect the Trump case, the paper establishes a conviction that blunders on IPR can be in judicial practice the same as in academic learning.

Keywords: college students, NECCS, intellectual property, Donald Trump, trademark

JEL Classification Code: K11, K13, K15

Introduction

The Summary of Section D, Part I, of the 2017 National English Competition for College Students (NECCS) Level B-Preliminary contained a significant cognitive distortion with respect to the concept of intellectual property. This official English test is taken by over one million college students in China annually, while the 2017 NECCS Level B-Preliminary serves as a reference point for annual NECCS contests (Future Education Teaching and Research Center, 2020). Therefore, it is of paramount academic importance to critically examine the 2017 NECCS test paper.

During the development of the 2017 NECCS, the legal verdict on 18 May 2015 concerning the ten-year intellectual property rights (IPR) case involving DONG Wei and Donald Trump received notable media attention in light of Donald Trump's then status as President-elect of the United States. The following discussions explicate precisely in which ways the judicial concept of IPR and its philology were misapprehended during this specific case, both by the administrative organs of the judiciary and the National College English Competition Organizing Committee.

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1. The NECCS Contest

The 2017 NECCS Level B-Preliminary contest was one of the four levels of A, B, C, D held at 9:00-11:00, 9 April 2017 in over 1,300 colleges in 31 provinces (autonomous territories, province-level municipalities) nationwide, with nearly 1,200,000 participants (Liu, 2017). The NECCS began its journey in 1999 and by the end of 2019 the nationwide accumulated participants reached over twenty million (Wu, G., 2020).

The preliminary contest of NECCS had been held in April for 21 times by 2019, but in 2020, during the Coronavirus Covid-19 pandemic, the 22nd time was postponed and held in October (Office of National College English Competition Organizing Committee. 2020), with an unspecified number of participants. The 23rd preliminary NECCS in 2021 was resumed to be held at its normal time in April (Office of National College English Competition Organizing Committee. 2021).

The National English Competition for College Students (NECCS) is a comprehensive English ability contest for college students nationwide with the largest scale and the largest number of participants in China. Under the continuous development of the reform of college English teaching in China and the increasingly challenging employment situation for college students in China, this contest has become more and more popular to various colleges and the students in all regions across the country. The scores and awards from the contest have been the important evidence for the assessment of college administrative departments, teaching and research departments and for the performance appraisal, post promotion and professional evaluation of teachers, and have been a significant reference for students to go abroad, pursue higher study and seek employment (Liu, 2018).

2. What Is the Problem

Summary of Section D of Part I Listening Comprehension in the 2017 NECCS, Level B-Preliminary states (Office of National College English Competition Organizing Committee, 2017):

Summary

Listen to the passage. For questions 26-30, complete the notes using no more than three words for each blank.

Intellectual property, the product of a person or company's (26) _____, is protected through patents, namely, copyrights and trademarks. Copyrights protect original works of (27) _____, including books, (28) _____, paintings, movies and architecture. Copyright has a time limit and after a period of time, the works can be copied or used (29) _____. Trademarks, different from copyrights, protect (30) _____ forever (P. 4).

The definition of patent is apparently mistaken by the word "namely", hence the concept of intellectual property, which is such a significant notion that its indication goes well beyond its academic boundaries.

According to *Webster's Ninth New Collegiate Dictionary*, which is conveniently handy by the author, the word "namely" is an adverb, meaning "that is to say" (A Merriam-Webster. 1990, p. 786). Cross-checking with *Oxford Dictionary*, the word "namely" is "used to introduce more exact and detailed information about something that you have just mentioned" (Netease Youdao Dictionary on-line. n.d.).

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Such being the case, the aforementioned **Summary** quote "...protected through patents, namely, copyrights and trademarks" means patents are composed of copyrights and trademarks, ie., a patent equals a trademark or a copyright. Before any further analysis is done, the paragraph in **Summary** with all the blanks filled with answers (Future Education Teaching and Research Center, 2020, p.82) for questions 26-30 would be helpful:

Intellectual property, the product of a person or company's originality and creativity, is protected through patents, namely, copyrights and trademarks. Copyrights protect original works of authorship, including books, musical composition, paintings, movies and architecture. Copyright has a time limit and after a period of time, the works can be copied or used without permission. Trademarks, different from copyrights, protect designs and slogans forever.

The structure of the **Summary** paragraph is unambiguous: Intellectual property...is protected through patents, namely, copyrights and trademarks. Copyrights protect...Trademarks...protect...

Defining patents are made up of copyrights and trademarks is an obvious error. A lesser collateral error here is the narrowing of the scope of intellectual property into patents only. Simply put, the **Summary** misconceptualizes intellectual property and confuses neighboring definitions. So what is intellectual property and what are the relevant definitions surrounding it must be worthy of immediate exploration.

3. Intellectual Property and Its Definitions

Property can be tangible property, i.e. goods capable of physical control like a car, or the intangible fruits of the labours arising from the use of mental as opposed to physical energy. The ownership of the intangible fruits is called *intellectual property*, which enjoys both statutory and common law [nonstatutory] protection (Adams, 2014, p.363). The protection by the law gives rights to intellectual property.

The nonstatutory intellectual property rights include know-how. The statutory intellectual property rights include copyrights, patents, and trademarks (August, 2010, p.345). It is clear here that patents, copyrights and trademarks are parallel to each other. Further clarification can be seen in August's text (2010):

Intellectual property is, in essence, useful information or knowledge. It is divided, for the purpose of study (and for establishing legal rights), into two principal branches: *artistical property* and *industrial property*. *Artistical property* encompasses artistic, literary, and musical works [that] ...are protected...by copyrights...*Industrial property* is itself divided into two categories: inventions and trademarks. Inventions include both useful products and useful manufacturing processes...[and] are protected...in the form of patents... Trademarks...are protected by trademark laws (p.344-345)

In plain words, the artistic type of intellectual property is protected by copyrights, invention type of intellectual property is protected by patents, and the trademark type of intellectual property is protected by trademark laws. The structure of **Summary** is contrasted here.

Most recognizable textbooks especially in English on international business law in China follow suit to August's work. Han (2011):

Intellectual property refers to creation of the human mind, and in essence, useful information or

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technology. For the purpose of academic study, intellectual property is generally classified into two main types: **copyright** and industrial property. Industrial property is itself divided into two categories: **patents** and **trademarks** (p.169).

The World Trade Organization (WTO) defines intellectual property categories in AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS) as follows (WTO-TRIPS ANNEX 1C as amended on 23 January 2017):

1. Copyright and Related Rights
2. Trademarks
3. Geographical Indications
4. Industrial Designs
5. Patents
6. Layout-Designs (Topographies) of of Integrated Circuits
7. Protection of Undisclosed Information
8. Control of Anti-Competitive Practices in Contractual Licences

The point of view here is that Copyright Rights, Trademarks and Patents are parallel to each other, unlike the **Summary** definition of patents being equal to copyrights and trademarks.

Similar to the intellectual property structure of WTO-TRIPS, Article 123 of the *Civil Code of The People's Republic of China* depicts intellectual property and stipulates intellectual property rights as follows (Adopted at the Third Session of the Thirteenth National People's Congress on 28 May 2020):

Civil entities enjoy intellectual property rights in accordance with the law.

Intellectual property rights are the exclusive rights enjoyed by the rights holder in accordance with the law with respect to the following objects:

- (1) Works;
- (2) Inventions, utility models, and appearance designs;
- (3) Trademarks;
- (4) Geographical indications;
- (5) Commercial secrets;
- (6) Integrated circuit layout design;
- (7) New plant varieties;
- (8) Other objects stipulated by law.

Here Works, Inventions, and Trademarks correspond to Copyrights, Patents and Trademarks, respectively, still parallel to each other.

Unambiguously, China has updated legal documentation in theory to define intellectual property and separate patents, copyrights and trademarks. In reality, China's protection of intellectual property both in legislature and in governing organs actually began since Reform and Opening-Up with a clear structure that the whole world of intellectual property is roughly divided into three dominant parts: patents, copyrights, and trademarks (Zhang, 2011):

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On August 23, 1982, the 24th session of the Standing Committee of the Fifth National People's Congress adopted the *Trademark Law of the People's Republic of China*, which came into effect on March 1, 1983. The state organ for implementing trademark law is the **Trademark Bureau of the State Administration for Industry and Commerce**.

On March 12, 1984, the fourth session of the Standing Committee of the Sixth National People's Congress adopted the *Patent Law of the People's Republic of China*, which came into effect on April 1, 1985. The state organ for implementing patent law is the **State Intellectual Property Office**,

On September 7, 1990, the 15th session of the Standing Committee of the Seventh National People's Congress adopted the *Copyright Law of the People's Republic of China*, which came into effect on June 1, 1991. The state organ for implementing copyright law is **National Copyright Administration** (p.255-256).

On the one hand, it seems that the problem with the **Summary** of 2017 NECCS is an isolated case since China had been fully aware of the matter of intellectual property and the distribution of patents, copyrights and trademarks. On the other hand, inadequacy on the realization, normalization and practice is observed both on the **Summary** case and on the history of P. R. China's protection of intellectual property, which shows nothing prior to the 1980s, the start of the Deng Xiaoping era. The big picture of P.R. China's intellectual property practice now seems to be a collateral concern here in this review, but primarily and up to the point: Why did the Summary case come up and has hidden itself up to now without being caught for deviation from the main path?

4. The Plausible Cause of the NECCS Error and Its Ramification on Donald Trump

Simply put, it might be a case that the people who formulated the **Summary** of 2017 NECCS were not familiar enough with the concept and practice of intellectual property, hence unwittingly committing a cognitive gaffe related to the concept and classification of intellectual property. From neither lexical nor syntactic could an error be picked up in the Summary, in particular with the wording "namely". Hence it is not a linguistic mistake.

Now the question is: why intellectual property? What brought up the case that a sophisticated concept is adopted in a language contest? To answer this, a reference on another point of interest of the same contest coincidentally provides a feasible explanation (Office of National College English Competition Organizing Committee. 2017):

(Part VIII) Writing II

Write on the following topic.

One member from 2017 NPC (The National People's Congress) & CPPCC (The Chinese People's Political Consultative Conference) suggested that English should be cancelled at the college entrance examination, because too much time is spent in learning English for middle school students.

Read the above sentences. How do you understand this phenomenon? Write an essay of **no less than 160 words** on the **answer sheet** to express your personal views on the issue (p.16).

The 2017 CPPCC was held from March 3 to March 13. The 2017 NPC was held from March 5 to March 15 (Wu, G. Q., 2017, p.36). The 2017 NECCS Level B-Preliminary was held on April 9 (Liu, 2017). It means the

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contest-paper making personnel utilized a topic that was raised about one month earlier. With the same token, the **Summary** section of 2017 NECCS Level B-Preliminary was most probably induced by the rhetoric of then President-elect Donald Trump of the United States (Friedman, 2016):

‘They haven’t played by the rules’, Trump accuses China of ‘massive theft of intellectual property’ and unfairly taxing US companies.

The video associated with the above title shows that Trump gave a speech on 8 December 2016, a date four months ahead of the contest time of 2017 NECCS Level B-Preliminary.

By 20 January 2017, a date over a month ahead of the opening of 2017 NPC and CPPCC in China, Donald Trump became the 45th seating President of the United States (The White House. 2021, April 14).

But before turning our attention to Donald Trump, one more issue must be discussed here: The wording related to NPC and CPPCC in the aforementioned **Writing II**.

5. One More Error from the Same Contest Paper of 2017 NECCS Level B-Preliminary

This time it is about the “member” issue in the **Writing II**. Since the NPC is the highest legislative organ of the People’s Republic of China, a member of the NPC is a lawmaker. But CPPCC is the NPC’s advisory body, a consultative conference attended by representatives from the United Front, a member of the CPPCC is only a national political advisor (Santos, 2021). In reality, the “member” was Li Guangyu, a lawmaker of the NPC, who proposed at the ongoing session of the 2017 NPC that China should remove English from the national college entrance examinations, or *gaokao*, as primary and middle school students have to spend too much time on it (Global Times. 2017, March 6).

Writing II’s depiction of “one member from 2017 NPC & CPPCC” is an apparent mistake. Committing such an error downgrades the proficiency of NECCS. Especially, the fact that both the problematic **Summary** and the ambiguous **Writing II** appear in the same contest paper of 2017 NECCS Level B-Preliminary casts an inappropriate image on the organizing parties whose titles are highest in the country: College Foreign Languages Teaching Guidance Committee and College Foreign Languages Teaching Research Association of China Ministry of Education (The 2017 national English competition for college students set sail. 2017).

The actual undertaking of the contest was by English Tutoring Gazette of Tianren Press Group and the Periodical Office of Testing and Evaluation, which proclaims on the back cover of the contest paper (Office of National College English Competition Organizing Committee. 2017) that “this content-setting of the contest is made by the Organizing Committee of the National College English Competition, and its intellectual property belongs to Tianren Times (Beijing) Technology Development Co., Ltd. No unit or individual may extract, publish, reprint (record) the content and listening materials of this competition or use them in any other activities without permission. Anyone who violates [our intellectual property rights] will be prosecuted!”

It is quite righteous for the Tianren Times to claim its intellectual property rights on its work of NECCS in general, and its work of 2017 NECCS Level B-Preliminary in particular. It is also rather reasonable to probe a little more on what conceivably inspired the intellectual property content of the **Summary** of 2017 NECCS Level B-Preliminary: Donald Trump’s accusation of intellectual property theft by China.

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6. The Ten-year Trump Intellectual Property Case in China

The case is popularly named something like “Ten-year legal battle in China over Trump trademark” (Ten-year legal battle in China over Trump trademark still unresolved. 2016, November 22) and sprang up in media in China and the U.S. alike. The story runs from December 2006 when Trump made the trademark application in China to November 2016 when Trump became the President-elect of the United States, exactly ten years. To be authoritative, only the final court verdict is translated and presented here as the official outline of the case.

6.1 The Final Verdict on Donald Trump’s Trademark Case

The script of the final verdict, which was uploaded to *China Judgements Online* on 26 August 2015, is downloaded by dffyw.com (Trump lost the lawsuit in China. 2016, November 19). The complete version is as follows.

**People’s Republic of China
Beijing Higher People’s Court
Administrative Judgment**

(2015) Higher-Administrative (Intellectual Property) Final Verdict No. 345

Appellant (plaintiff in the original trial) Donald Trump, male, born on June 14, 1946, at 725 Fifth Avenue, New York City.

Entrusted agent ZHOU Dandan, lawyer of Beijing Jijia Law Firm.

Entrusted agent ZHAO Lei, lawyer of Beijing Jijia Law Firm.

Appellee (defendant in the original trial) the Trademark Review Committee of the State Administration for Industry and Commerce of the People’s Republic of China, domiciled at No. 1, Chama South Street, Xicheng District, Beijing, People’s Republic of China.

Legal representative He Xunban, director.

Entrusted agent YANG Fengjing.

The appellant, Donald Trump, refused to accept the Administrative Judgement of the (2014) First Intermediate Administrative (Intellectual Property) First Instance No. 6095 by Beijing First Intermediate People’s Court of the People’s Republic of China (Beijing First Intermediate People’s Court for short) on the administrative dispute over the refusal of trademark application and review, appealed to this court. After accepting the case on 7 January 2015, this court formed a collegial panel according to the law to conduct the trial. The case has now been concluded.

The Beijing First Intermediate People’s Court ascertained that the trademark No. 5771154 “TRUMP” (namely the trademark in application, reference the attached picture of the Judgment) was applied by Donald Trump for registration with the Trademark Bureau of State Administration for Industry and Commerce of the People’s Republic of China (the Trademark Bureau for short) on 7 December 2006, designated for use in interior decoration, repair, and other services of Class 37 commercial, residential and hotel real estate.

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The trademark No. 5743720 “TRUMP” (namely the cited trademark, reference the attached picture of the Judgment) was applied for registration with the Trademark Bureau by DONG Wei, who is neither an appellant nor an appellee of this case, on 24 November 2006, and was approved to be used for Class 37 building construction supervision and other services. The term of exclusive right for this registered trademark is until 20 January 2020.

On 30 November 2009, the Trademark Bureau issued a notice of partial refusal of trademarks, regarding the application for trademarks in the Class 37, registration application on services of “installation and repair of air-conditioning equipment for commercial, residential and hotel real estate; interior decoration repair for commercial, residential and hotel real estate; installation and repair of heating equipment for commercial, residential and hotel real estate; installation and repair of commercial, residential and hotel real estate elevators” is granted for preliminary approval and announcement, while that on services of “providing construction information on commercial, residential and hotel real estate; construction information on commercial, residential and hotel real estate” is rejected. Donald Trump dissatisfied with the rejection decision and filed a review request with the Trademark Review Committee of the State Administration for Industry and Commerce of the People’s Republic of China (the Trademark Review Committee for short). The Trademark Review Committee made the Trademark Review Verdict (2014) No. 2758 Rejection of Review Decision on the No. 5771154 “TRUMP” trademark (the No. 2758 Decision for short) on 10 February 2014. In the No. 2758 Decision, the Trademark Review Committee confirms: No. 5771154 “TRUMP” trademark is composed of “TRUMP”. The applied trademark shows no difference from the No. 5743720 “TRUMP” trademark in terms of letter composition and pronunciation, hence constituting a similar trademark; the services of “building of commercial, residential and hotel real estate; providing construction information on commercial, residential and hotel real estate” designated for use by the applied trademark are analogous to the services of “building, factory construction” and others that have been approved for use by the cited trademark. The two trademarks, which will cause the consumers to confuse and misidentify the source of the services if they coexist in the market, have constituted similar trademarks used for analogous services. The evidence submitted by Donald Trump is not sufficient to prove that the applied trademark can be distinguished from the cited trademark in usage, nor can it be a rightful basis for the grant of registration of the applied trademark. Donald Trump states that “without permission, the owner of the cited trademark applied for registration of the name Donald Trump as a trademark, which infringed the name rights of others” is not within the scope of the trial of this case, and the Trademark Review Committee will not hear it.

In accordance with the provisions of Article 28 of the *Trademark Law of the People’s Republic of China* (Trademark Law for short), the Trademark Review Committee decides to reject the applied trademark on review goods.

The Beijing First Intermediate People’s Court held that Donald Trump recognizes that the applied trademark and the cited trademark are similar trademarks registered and used on analogous goods, and the court confirms it. The cited trademark is still in effect at present and can be used as a prior cited trademark. Therefore, the application for registration of the applied trademark violates Article 28 of the *Trademark Law*.

To sum up, the No. 2758 Decision made by the Trademark Review Committee is with clear ascertainment of the facts and correct application of laws. In accordance with the provisions of Article 54 Item 1 of the *Administrative Procedure Law of the People’s Republic of China*, the Judgement of the

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Trademark Review Verdict (2014) No. 2758 “Rejection of Review Decision on the No. 5771154 ‘TRUMP’ trademark” made by the Trademark Review Committee of the State Administration for Industry and Commerce of the People's Republic of China is upheld.

Donald Trump dissatisfied with the verdict of the first instance and appealed to this court, requesting to revoke the verdict of the first instance and the N. 2758 Decision of the Trademark Review Committee, and decree the Trademark Review Committee to make a new review decision. The reasons for the appeal are: first, the applied trademark has extremely-strong distinctiveness and extremely-high popularity, and its application for registration does not violate the provisions of Article 28 of the *Trademark Law*; second, the cited trademark is a malicious preemptive registration of a trademark previously used by the appellant, which has certain influence, and the cited trademark is currently in the process of trademark objection review, and its legal status is not stable. The Trademark Review Committee obeys the Judgment of the first instance.

This court finds out that the verdict of the first instance is with clear ascertainment of the facts, and there are evidences of the files for trademark in application, the files for cited trademark, the notice for trademark partial rejection, the trademark review application, the No. 2758 decision, the statements of parties concerned, and others that are available to support the case. The collection and acceptance of evidences are appropriate. Therefore, this court confirms the facts ascertained by the court of first instance.

This court considers that up to the trial period of this case, the No. 5743720 “TRUMP” trademark, namely the cited trademark, is still a prior registered trademark in effect, and can be used as the basis for judging whether the applied trademark can be granted registration. Therefore, the focus of the dispute in this case is whether the applied trademark constitutes a similar trademark to the cited trademark referred to in Article 28 of the *Trademark Law*. The applied trademark shows no difference from the cited trademark in terms of letter composition and pronunciation; and the services designated for use by the applied trademark and the services approved for the use by the cited trademark are analogous services. The two trademarks, which will cause the consumers to confuse and misidentify the source of the services if they coexist in the market, have constituted similar trademarks used for analogous services. The registration of the applied trademark does not comply with the provisions of Article 28 of the *Trademark Law*. In summary, Donald Trump’s grounds for appeal cannot be established, and his appeal is not supported by this court. The Judgment of the first instance is with clear ascertainment of the facts, correct application of laws, and lawful trial proceedings, which should be upheld according to the law. In accordance with the provisions of Article 89, Paragraph 1, Item (1) of the *Administrative Procedure Law of the People’s Republic of China* as amended in 2014, the judgment is as follows:

The appeal is rejected and the verdict of first instance is upheld.

The case acceptance fee of the first and second instance is 100 yuan each, which shall be borne by Donald Trump (both have been paid).

This verdict is final.

Chief Judge LIU Jixiang
 Judge LIU Xiaojun
 Acting Judge ZhOU Bo
 The Eighteenth Day of May 2015
 Court Clerk ZHANG Jianqiu

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6.2 The Trademark Bureau and the “TRUMP” Trademarks Applied by DONG and TRUMP

The ten-year story starts in 2006 with the Trademark Bureau of State Administration for Industry and Commerce of the People's Republic of China (hereinafter referred to as the Trademark Bureau). The Trademark Bureau received application for registration of trademark “TRUMP” in class 37 from DONG Wei in November 24 and from Donald Trump in December 7. The outcome seems to be decided by the Article 28 of the *Trademark Law of the People's Republic of China* (hereinafter referred to as the Trademark Law), which is cited later by courts' ruling, that DONG Wei won out and Donald Trump lost, since the Trademark Bureau approved DONG's “TRUMP” trademark application but rejected TRUMP's “TRUMP” trademark application. DONG successfully blocked TRUMP for ten years from registering his own name TRUMP as trademark “TRUMP” in class 37 in China by beating TRUMP for fourteen days at initial application to the Trademark Bureau.

A seemingly plain decision on the first-to-file basis by the Trademark Bureau, in the author's view, might be a simple blunder of misinterpreting the Trademark Law, which was enacted by the National People's Congress (NPC), the highest organ of state power in China. The Article 28 of Trademark Law 2001 Version (www.npc.gov.cn 2001) does stipulate that

Where the trademark applied for registration does not comply with the relevant provisions of this Law or is identical or similar to another person's registered or preliminarily approved trademark on the same or similar goods, the application shall be rejected by the Trademark Bureau and no announcement shall be made.

But there are other related articles for consideration in determining the matter. Paragraph 1 of Article 13 of Trademark Law 2001 Version depicts exactly the situation of TRUMP and DONG:

Where the trademark applied for registration is a copy, imitation or translation of another person's well-known trademark that has not been registered in China, which is likely to cause confusion, it shall not be registered and its use shall be prohibited.

Apparently, the trademark “TRUMP” applied by DONG Wei is a copy of the family name of Donald Trump. Regarding the appraisal of being well-known of a trademark, the Trademark Law lists criteria for evaluation in Article 14, which can be studied in detail and applied to the trademark “TRUMP” that has been in use by Donald Trump. As early as in 1971, Donald Trump became the president of the company named The Trump Organization, which served as an umbrella brand; in 1980 he obtained the rights to develop the Trump Tower in mid-town Manhattan of New York City; in 1982 when the first issue of Forbes 400 was issued, he was listed as one of the 400 richest Americans (Geist, 1984); his first book *The Art of the Deal* (1987) was a *New York Times* best seller (Geist, 2021, April 14).

In addition, the Trademark Law has an entire article being devoted to the principle of prior rights and the principle of influence. Article 31 of Trademark Law 2001 Version:

An application for trademark registration shall not damage the existing prior rights of others, nor shall

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it preemptively register by improper means a trademark that has been used by others and has certain influence.

Donald Trump's prior right derives from his use of his family name TRUMP as trademark "TRUMP" long before 2006 in the United States. DONG Wei's 2006 preemptive registration of "TRUMP", which is neither his personal name nor his native language, constitutes trademark squatting.

If the Trademark Bureau did not know Donald Trump and his brand "TRUMP" when DONG Wei applied the trademark "TRUMP" in class 37 by 24 November 2006, two weeks later the person Donald Trump and the trademark "TRUMP" that existed in the United States should be known to the Trademark Bureau. According to the Trademark Law 2001 Version, at that time when Donald Trump filed the application for registration of trademark "TRUMP" on 6 December 2006 the trademark "TRUMP" applied by DONG Wei was in a prior status of being preliminarily approved (not a final approval) since Article 30 depicts that

Any person may raise an objection to a preliminarily approved trademark within three months from the date of announcement. If there are no objections at the expiration of the announcement period, the registration shall be approved, the trademark registration certificate shall be issued, and the announcement shall be made.

It means the trademark "TRUMP" applied by DONG Wei was in preliminary announcement period of three months, and Donald Trump's application acted as an objection to DONG Wei. Article 33 of Trademark Law 2001 Version states the procedure for handling objection:

Where an objection is raised to a trademark that has been preliminarily approved and announced, the Trademark Bureau shall hear the objector and the objected state the facts and reasons, and make a ruling after investigation and verification. If the party concerned is dissatisfied, he may apply to the Trademark Review Committee for review within 15 days from the date of receipt of the notice, and the Trademark Review Committee shall make a ruling and notify the objector and the objected in writing.

If the party concerned is dissatisfied with the ruling of the Trademark Review Committee, he may bring a suit in a people's court within 30 days from the date of receipt of the notice. The people's court shall notify the opposing party in the trademark review procedure to participate in the litigation as a third party.

What is most important and meaningful is that the Trademark Law 2001 Version further stipulates that before the final judgement is concluded, the trademark in preliminary announcement period has its legal status remain as being preliminarily approved but not registered. Article 34:

If the party concerned does not apply for review of the ruling made by the Trademark Bureau within the statutory time limit or does not file a suit with a People's Court for the ruling made by the Trademark Review Committee, the ruling shall take effect.

If it is ruled that the objection is untenable, the registration shall be approved, a trademark registration certificate shall be issued, and the registration shall be announced; if it is ruled that the objection is tenable, the registration shall not be approved.

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By violating Article 13 and Article 31 of the Trademark Law 2001 Version, the Trademark Bureau appears to make the wrong decision. By further ignoring Article 30, Article 33 and Article 34, the Trademark Bureau rejected the application for registration of trademark “TRUMP” by Donald Trump, based on its own wrong decision on the trademark “TRUMP” applied by DONG Wei, at the very late time of 30 November 2009, three years after Donald Trump filed the application for registration of “TRUMP” trademark.

Comparing the two weeks from November 24 to December 7 for DONG Wei to gain the preliminary approval on his application for registration of the trademark “TRUMP”, the three years for Donald Trump to get the rejection of his application for registration of trademark “TRUMP” seems really too long.

6.3 The Trademark Review Committee and the “TRUMP” Case

Instead of questioning the tenability of the application by DONG Wei on the registration of a trademark specified as “TRUMP” that had been used by Donald Trump since 35 years ago, the review verdict made on 10 February 2014 by the Trademark Review Committee appears to make the wrong decision by taking the Trademark Bureau as the basis, concluding that TRUMP’s “TRUMP” trademark is a similar trademark to DONG’s “TRUMP” trademark. It is a self-evident fact that the two applied trademarks have exactly the same five uppercase English letters of T, R, U, M, and P, which constitute the family name for Donald Trump in his native language English and has been used by him as a brand and trademark as early as 1971.

The focus of the review should be on whether the “TRUMP” trademark used by Donald Trump satisfies the requirement of Article 31 as “a trademark that has been used by others and has certain influence”. Then, the review should follow the directives of Trademark Law 2001 Version and focus on ascertaining whether DONG Wei’s applied trademark “TRUMP” “is a copy, imitation or translation of another person’s well-known trademark that has not been registered in China”, the registration of which “is likely to cause confusion” (Article 13). So in order to make sure “it shall not damage the existing prior rights of others, nor shall it preemptively register by improper means” (Article 31), “it shall not be registered and its use shall be prohibited” (Article 13).

All the articles quoted in the above paragraph are from the Trademark Law 2001 Version. By the time the Trademark Review Verdict (2014) No. 2758 Rejection of Review Decision was made, the Trademark Law 2013 Version (www.gov.cn 2013) already replaced Trademark Law 2001 Version, but with all the quoted articles remaining (some in different article numbers). From the rejection by Trademark Bureau in 2009 to the decision by Trademark Review Committee in 2014, five years passed, accumulating the time from the filing of the application in 2006 by Donald Trump to eight years in total.

Probably the NPC noticed this kind of delay and stipulated in its Trademark Law 2013 version that “The Trademark Bureau shall notify the applicant for trademark registration in writing of the rejection of the application and the refusal to announce the trademark. If the applicant for trademark registration is dissatisfied, he may apply to the Trademark Review Committee for review within 15 days from the date of receipt of the notification. The Trademark Review Committee shall make a decision within 9 months from the date of receipt of the application and notify the applicant in writing ... If the party concerned is dissatisfied with the decision of the Trademark Review Committee, he may bring a suit in a people’s court within 30 days from the date of receipt of the notification” (Article 34).

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6.4 The Beijing First Intermediate People's Court and the "TRUMP" Case

The Beijing First Intermediate People's Court concludes, in its Administrative Judgement of the (2014) First Intermediate Administrative (Intellectual Property) First Instance No. 6095, that "The cited trademark is still in effect at present and can be used as a prior cited trademark. Therefore, the application for registration of the applied trademark violates Article 28 of the *Trademark Law*."

Assuming that the "TRUMP" trademark applied by DONG Wei had been in a status of being effective before the final ruling is in direct contradiction to the stipulation by Article 34 of the Trademark Law 2001 Version that "... If it is ruled that the objection is untenable, the registration shall be approved, a trademark registration certificate shall be issued, and the registration shall be announced; if it is ruled that the objection is tenable, the registration shall not be approved", which is mingled in the Article 33, 34, 35, and 36 of the Trademark Law 2013 Version.

It may sound unbelievable but it is really a blundering case by the Beijing First Intermediate People's Court: it even quoted the wrong article from the then current law version. By the time the verdict was made, in the year of 2014, the Trademark Law was already updated to the 2013 Version, which states, in Article 28 that "For trademarks applied for registration, the Trademark Bureau shall complete the examination within 9 months from the date of receipt of the trademark registration application documents, and if they meet the relevant provisions of this Law, preliminary approval and announcement for them shall be made." This article is not the original Article 28 in the Trademark Law 2001 Version, which moved to Article 30 in the Trademark Law 2013 Version.

Simply put, the Trademark Law of the PRC requires that any trademark applied shall pass a three months preliminary announcement period after preliminary approval, during which objections are allowed. Only when there is no objection or all the objections are cleared by Trademark Review Committee and further by the People's Courts, the applied trademark is matured from its preliminary announcement period and is entitled to final approval and registration. Before the final approval, an applied trademark cannot be in effect. This should be the understanding from Donald Trump's team, who argued that "first, the applied trademark has extremely-strong distinctiveness and extremely-high popularity, and its application for registration does not violate the provisions of Article 28 of the *Trademark Law*; and second, the cited trademark is a malicious preemptive registration of a trademark previously used by the appellant, which has certain influence, and the cited trademark is currently in the process of trademark objection review, and its legal status is not stable," in the reasons for an appeal to Beijing Higher People's Court.

6.5 The Beijing Higher People's Court and the "TRUMP" Case

The Beijing Higher People's Court upheld the verdict by Beijing First Intermediate People's Court because "The Judgement of the first instance is with clear ascertainment of the facts" and "correct application of laws". But the facts that the "TRUMP" trademark had been with Donald Trump for decades; that "TRUMP" is a trademark that stems from Donald Trump's family name; that Donald Trump has been in the business of applied class 37 for decades—were not ascertained in the first instance. Likewise, the reasons why DONG Wei started applying "TRUMP" as a trademark for the first time in his life on 24 November 2006; why DONG Wei did not use his own family name in Chinese but used Donald Trump's family name in English to apply for the trademark; why DONG Wei never proved that he is actually in the business of class 37—were not ascertained in the first

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instance.

In reality, DONG Wei did not produce any voice for the entire ten-year period except his filing of the application for the registration of “TRUMP” as his trademark in class 37. By the time his opponent Donald Trump won the Presidency of the United States, there was a curious journalist stationed in Beijing who went to Liaoning Province to visit his registered residence. What the journalist found at DONG Wei’s registered address that the “apartment in the gritty industrial city of Shenyang ... had been unoccupied for several years, according to a neighbour who said he believed Mr Dong had died about three years ago” (Hornby 2017). If this was the case, DONG Wei died either by the end of 2013 or by the beginning of 2014. It means by the time the Trademark Review Committee made the No. 2758 Decision on 10 February 2014, DONG was probably not in this world any more. If it was true; it would have been a gigantic irony.

As for the saying that the first instance is with “correct application of laws”, observing the Trademark Law concludes otherwise. By the times of the first instance in 2014 and the final verdict in 2015, the Trademark Law 2013 Version was already in effect, which stipulates that

For trademarks that have been preliminarily approved and announced, within three months from the date of announcement, prior right holders and stakeholders who believe that the provisions of paragraphs 2 ... of Article 13 ... Article 30, Article 31, Article 32 of this law are violated ... may raise an objection to the Trademark Bureau. If there are no objections at the expiration of the announcement period, the registration shall be approved, a trademark registration certificate shall be issued, and the announcement shall be made (Article 33).

It is worthy of reiterating here that the above-mentioned Article 33 of Trademark Law 2013 Version stipulates that an applied trademark can get registered only after a no-objection preliminary announcement period. Apparently, the application for registration of trademark “TRUMP” fell in the preliminary announcement period of the preliminarily-approved trademark “TRUMP” applied for by DONG Wei. So, technically, DONG Wei’s trademark “TRUMP” was never formerly registered with Trademark Bureau before the Beijing Higher People’s Court delivered the final verdict in the “TRUMP” case. Obviously enough, even the People’s Courts themselves are not allowed by the Trademark Law to consider the trademark “TRUMP” in application by DONG Wei as a registered trademark in effect.

Article 30 and 31 talks about the first-to-file principle. Paragraph 2 of Article 13 and Article 32 correspond to Paragraph 1 of Article 13 and Article 31 respectively in the Trademark Law 2001 Version:

Where the trademark applied for registration is a copy, imitation or translation of another person’s well-known trademark that has not been registered in China, which is likely to cause confusion, it shall not be registered and its use shall be prohibited;

An application for trademark registration shall not damage the existing prior rights of others, nor shall it preemptively register by improper means a trademark that has been used by others and has certain influence.

Logically, Article 32 matches Article 30 and 31. Then Paragraph 2 of Article 13 overrides Article 30 and

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31 (all articles are numbered by Trademark Law 2013 Version) .

Although the application for registration in China of trademark “TRUMP” by Chinese DONG Wei is two weeks ahead of the application for registration in China of trademark “TRUMP” by American Donald Trump, which falls in principle in general of first-to-file by Article 30 and 31, by the spirit in particular of Article 32 the **“application for trademark registration”** by DONG Wei **“shall not damage the existing prior rights of”** Donald Trump long established in the United States, **“nor shall”** DONG Wei **“preemptively register by improper means a trademark”** TRUMP **“that has been used by”** Donald Trump **“and has certain influence”** in the United States even since more than three decades ago. Further to clarify, **“the trademark”** TRUMP **“applied for registration”** by DONG Wei **“is a copy of”** Donald Trump’s **“well-know trademark”** in the United States **“that has not been registered in China, which is likely to cause confusion,”** so the trademark “TRUMP” applied by DONG Wei **“shall not be registered and its use shall be prohibited.”**

In addition, the Beijing Higher People’s Court “considers that up to the trial period of this case, the No. 5743720 “TRUMP” trademark, namely the cited trademark [by DONG Wei], is still a prior registered trademark in effect [against the Trademark Law by NPC], and can be used as the basis for judging whether the applied trademark [by Donald Trump] can be granted registration. Therefore, the focus of the dispute in this case is whether the applied trademark constitutes a similar trademark to the cited trademark.” Since “TRUMP” by Donald Trump is similar to “TRUMP” by DONG Wei, “the registration of the applied trademark [by Donald Trump] does not comply with the provisions of Article 28 of the *Trademark Law*.”

Just would like to remind Beijing Higher People’s Court that by the time its final verdict is delivered on 18 May 2015, the Trademark Law 2001 Version had been expired for 2 years, and Article 28 had moved to Article 30 in Trademark Law 2013 Version. 2015 was the tenth year since 2006 when Donald Trump first filed his trademark TRUMP application for class 37 in China. Time-wise, one month after the final verdict, on 16 June 2015, Donald Trump announced his candidacy for President of the United States and by 8 November 2016 won the Presidency of the United States (The White House. 2021, April 14).

6.6 Donald Trump and the “TRUMP” Intellectual Property Case

Half a year after the final verdict by the Beijing Higher People’s Court, in a “Good Morning America” interview (2015, November 3, as cited in Stracqualursi, 2017, November 9), Donald Trump stated “But when you see China, these are fierce people in terms of negotiation. They want to take your throat out; they want to cut you apart. These are tough people. I’ve dealt with them all my life.”

Nobody dares to say that those exaggerating descriptive words are not negatively affected by his experience of legal battle in China with the Trademark Bureau, the Trademark Review Committee, and the Courts in Beijing. While overwhelmingly calling for international direct investment, China seemed never interested in the possible investment from non-President Donald Trump. Otherwise, even Donald Trump’s request to register trademark “TRUMP” in class 37 in China is really legally blocked, what could have been different if a satisfactory solution to him as a businessman were managed promptly by some people or some organizations in China? An amicable solution might have made friendlier businessman Donald Trump and a friendlier President Donald Trump.

From the analysis of this article, China’s legal track had been available but the human handling of the legal rules derailed the TRUMP train that was running to the investment-destination of China. As for the Donald

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Trump as US President, he declares (Phelps, 2017): “I don’t blame China,” during his November 2017 visit to China. “After all, who can blame a country for being able to take advantage of another country to the benefit of its citizens?”

Epilogue

This paper is at odds with some statements from Western media that “In China, the rules for trademarks are established by China’s State Administration for Industry and Commerce,” and “China awards trademarks on a first-to-file basis” (Legum J., Raymond L., 2017, Feb 18). This paper introduces the political structure that the National People’s Congress is the highest power in China and entitled to enact the trademark law, and the trademark law does not award trademarks on an absolute first-to-file principle but on the basis of conditioned first-to-file basis. The conditions for the first-to-file basis are

Where the trademark applied for registration is a copy, imitation or translation of another person’s well-known trademark that has not been registered in China, which is likely to cause confusion, it shall not be registered and its use shall be prohibited (Paragraph 1 of Article 13 in China Trademark Law 2001 Version; Paragraph 2 of Article 13 in China Trademark Law 2013 Version);

An application for trademark registration shall not damage the existing prior rights of others, nor shall it preemptively register by improper means a trademark that has been used by others and has certain influence (Article 31 in China Trademark Law 2001 Version; Article 32 in China Trademark Law 2013 Version).

Conclusion

The 2017 NECCS Level B-Preliminary contained two cognitive distortions: firstly, the “namely” definition in its Summary section; and the “member” inclusion in its Writing II section. The present paper analysed the former as an error with respect to the concept of intellectual property rights, while the latter was discussed as an error that struck at the very identity of both the NPC and CPPCC. The decade-long legal battle over the “TRUMP” trademark has had a deleterious impact upon investment in China. In contradistinction to the position espoused by Unitalen Attorneys at Law in Beijing, which were represented by ZHOU Dandan, who has worked for Donald Trump since 2006 (Kinetz, 2017), this paper concluded that the decision to deny the legal use of the TRUMP trademark was solely based upon a single generic article of Trademark Law, whilst other relevant law articles were wholly disregarded by the Bureau, the Committee and the Courts, not to mention recent legal texts.

This paper studied the case in its entirety up until 18 May 2015, when the final verdict was given by the Beijing Higher People’s Court. In this respect, all of the events that proceeded this verdict, including the period from 16 June 2015 onwards when Donald Trump announced his candidacy for President of the United States, were disregarded from this study.

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