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RESEARCH ARTICLE

The Protection of Unregistered Trademarks under the Anti-Unfair Competition Law: With a Discussion on the Systemic Coordination Between the Anti-Unfair Competition Law and the Trademark Law*

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Abstract

Protecting unregistered trademarks is not only necessary but feasible. Although Articles 2 and 6 of the Anti-Unfair Competition Law of the People's Republic of China currently fail to provide effective protection for unregistered trademarks due to systemic deficiencies, its legal subsumption can be enhanced by reforming the application principles of general provisions, scientifically reconstructing the notion of "unfair competition," and adopting an open legislative approach featuring "defining unfair competition + key illustrative examples." Meanwhile, by proactively incorporating the concept that unregistered trademarks constitute the property rights of their owners into the trademark law and strengthening regulations against trademark squatting, the application of the anti-unfair competition law can be enhanced to provide more effective damage remedies for unregistered trademark holders. This approach would increase the legal costs of squatting, thereby achieving a dual governance effect of both cracking down on and preventing such practice. By rationally delineating the logical boundaries of anti-unfair competition protection in conjunction with the registration-based acquisition system under the trademark law, this approach scientifically resolves conflicts between the protection of unregistered trademarks and registration validity rules while providing proportionate remedies and respect for the former. Consequently, it achieves an organic unity of necessity and rationality, comprehensiveness and restraint, as well as foresight and pertinence in the protection of unregistered trademarks.

Keywords anti-unfair competition law; trademark law; unregistered trademark; systemic coordination; system reshaping

Since unregistered trademarks lack the public disclosure mechanisms inherent in registered trademarks, their protection often exhibits incompatibility with the trademark law. In jurisdictions with codified trademark registration systems, while efforts are made to provide reasonable protection for unregistered trademarks, such safeguards are largely confined

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to procedural measures, specifically, granting unregistered trademark owners opposition rights against trademark squatting through improper means.[1] From a normative framework perspective, the trademark law's protection of unregistered trademarks remains fundamentally inadequate. It neither confers exclusive rights to unregistered trademark owners nor grants them damage claims against others' trademark squatting, let alone providing punitive damage claims or criminal sanctions (such as the crime of counterfeiting the registered trademark) available to registered trademark owners. Precisely because the Trademark Law of the People's Republic of China (hereinafter referred to as the Trademark Law) provides insufficient protection for unregistered trademarks, SUN Shan attributes China's rampant "trademark squatting," speculative "trademark grabbing" through bulk registrations, and trademark hoarding phenomena to "the legislative system offering minimal safeguards for unregistered trademarks, prompting rights holders to pursue comprehensive registrations as defensive measures against appropriation of their commercial achievements."[2] Although the Trademark Law fails to deliver adequate remedies for unregistered trademarks, this in no way diminishes the legitimacy of protecting such trademarks. The goodwill embodied in a trademark is neither created by its designer nor acquired through registration systems; rather, it is cultivated by relevant enterprises through consistently providing quality goods or services.[3] Trademark registration "is inherently serviceable to trademark use, with its fundamental purpose being to ensure market distinguishability and thereby effectively fulfill the function of identifying goods' origin."[4] Since the purpose of the registration principle is to facilitate the formation of specific goodwill, adequate protection should consequently be extended to unregistered trademarks that have accumulated substantial goodwill.[5] Modern trademark law "elevates registration, originally a procedural requirement, into the unshakable sole prerequisite for generating trademark rights and interests,"[6] thereby rendering comprehensive protection for unregistered trademarks inherently difficult. To effectively overcome the drawbacks of the formalistic registration-based entitlement system, the solution lies in guiding theoretical frameworks back to the protection of goodwill value and incentivizing honest business practice. In this regard, the Anti-Unfair Competition Law of the People's

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[1] See HUANG Hui, 反不正当竞争法对未注册商标的保护 (Protection of Unregistered Trademarks under the Anti-Unfair Competition Law), 4 中华商标 (*China Trademark*), 19–23 (2007).

[2] SUN Shan, 未注册商标法律保护的逻辑基础与规范设计 (Logical Basis and Normative Design of Legal Protection for Unregistered Trademarks), 2 甘肃政法学院学报 (*Journal of Gansu University of Political Science and Law*), 61 (2015).

[3] See LI Mingde, 美国知识产权法 (*Intellectual Property Law in the United States*), 法律出版社 (Law Press · China), at 258–259 (2003).

[4] PENG Xuelong, 寻求注册与使用在商标确权中的合理平衡 (Seeking a Reasonable Balance Between Registration and Use in Trademark Confirmation), 3 法学研究 (*Chinese Journal of Law*), 155 (2010).

[5] See Tamura Yoshiyuki, 日本知识产权法 (*Intellectual Property Law in Japan*), translated by ZHOU Chao, LI Yufeng & LI Xitong, 知识产权出版社 (Intellectual Property Publishing House), at 105 (2011).

[6] LIU Chuntian, 民法原则与商标立法 (Civil Law Principles and Trademark Legislation), 1 知识产权 (*Intellectual Property*), 3–10 (2010).

Republic of China (hereinafter referred to as the Anti-Unfair Competition Law), with its distinct regulatory functions, plays a crucial complementary and coordinative role alongside the Trademark Law. Given this, the crux of the issue lies in how to scientifically structure the Anti-Unfair Competition Law to establish a robust protective barrier for unregistered trademarks.

I Reasonable Reconstruction of the General Provisions in the Anti-Unfair Competition Law from the Perspective of Unregistered Trademark Protection

Articles 2 and 6 of the Anti-Unfair Competition Law can provide protection for unregistered trademarks. LIU Wei refers to Article 2 as a general prohibition provision against "free-riding" and Article 6 as a "prohibition provision against confusion."[7] Although the fundamental value orientation of the Anti-Unfair Competition Law requires that the application of general provisions maintain necessary restraint to preserve essential free competition,[8] this by no means implies that general provisions should remain "silent" on the protection of unregistered trademarks, especially when Article 6 of the Anti-Unfair Competition Law proves inadequate in addressing malicious squatting of uninfluential unregistered trademarks. Regrettably, however, due to the lack of scientific design for general provisions in the Anti-Unfair Competition Law, judicial practice rarely sees cases where protection is sought based on this provision.

A Interpretation on the Necessity of Protecting Unregistered Trademarks Through General Provisions

Well-structured general provisions are a crucial hallmark of the refinement of the anti-unfair competition law. The general provisions serve two primary functions: (1) ensuring the comprehensiveness of the concept of unfair competition; and (2) providing judges with supplementary tools for assessing the legitimacy of competitive conduct. The former constitutes a formal function, while the latter represents a substantive function.[9] The establishment of general provisions represents a compromise between the statutory doctrine of the anti-unfair competition law and judicial discretion. Unlike specific rules, general provisions do not give fixed responses to predetermined events. Their application requires

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[7] See LIU Wei, 论混淆使用注册商标的反不正当竞争规制 (Anti-Unfair Competition Regulation on Confusing Use of Registered Trademarks), 7 知识产权 (*Intellectual Property*), 42–49 (2020).

[8] See WANG Yanfang, 论反不正当竞争法的基本价值取向（下）——以反不正当竞争法一般条款为视角 (Fundamental Value Orientation of the Anti-Unfair Competition Law [Part 2]: From the Perspective of the General Provisions of the Anti-Unfair Competition Law), 3 中国专利与商标 (*China Patents & Trademarks*), 54 (2020).

[9] See JIANG Ge, 反不正当竞争法一般条款的形式功能与实质功能 (Formal and Substantive Functions of General Provisions of the Anti-Unfair Competition Law), 6 法商研究 (*Studies in Law and Business*), 140–148 (2014).

contextual evaluation and supplementary interpretation by judges.[10] By virtue of their abstract and open-ended evaluative criteria, general provisions maintain bargaining flexibility and room for maneuver in the complex and diverse landscape of market competition, thereby adapting to its demands.[11] Consequently, in terms of legal status, general provisions typically possess overarching, comprehensive, and foundational functions. Generally speaking, to uphold legal certainty, the excessive judicialization of general provisions should be prevented. In terms of application logic, the principle of lex specialis derogat generali should be followed. For unfair competition acts that can be regulated by specific provisions, specific provisions should take precedence in adjustment. Only when the specific factual elements stipulated by law prove inadequate should general provisions be invoked, after prudent deliberation, to provide protection.

1. The Inadequacy of Anti-Confusion Provisions in Protecting Unregistered Trademarks

For the protection of unregistered trademarks, priority should generally be given to applying Article 6 of the Anti-Unfair Competition Law. However, the application of this article is predicated on the likelihood of consumer confusion or mistaken identification. In practice, where a trademark squatter has not actually used the trademark in commerce, consumers are unlikely to be confused, even if the trademark has borne a certain degree of reputation. Conversely, where an unauthorized registrant squats on an unregistered trademark that has never been actually used in commerce, such a trademark acquires no recognition among consumers. Consequently, confusion is precluded as a matter of law. Therefore, theoretically speaking, regardless of the type of trademark squatting, there remains no room for the application of Article 6 of the Anti-Unfair Competition Law. Nevertheless, WANG Lianfeng and KANG Rui contend that trademark squatting prevents the true owner's trademark from establishing a connection with consumers, thereby hindering their ability to identify the genuine source of the goods—an outcome that in effect constitutes consumer confusion.[12] This opinion is debatable.

From a legislative perspective, Article 6 of the Anti-Unfair Competition Law currently primarily protects prior-used trademarks with a certain degree of reputation, as the prior user has already demonstrated its trademark in the market before squatting occurs. When the trademark squatter has not actually used the unauthorized trademark but merely attempts to sell or license it at an inflated price after bad-faith registration, or deliberately files malicious opposition or invalidation to destabilize the prior trademark to which the unauthorized trademark bears similarity, or simply uses such tactics to coerce the prior unregistered

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[10] See DONG Xiaomin, 导言 (Introduction), in《反不正当竞争法》一般条款的适用 (*Application of General Provisions of the Anti-Unfair Competition Law*), 知识产权出版社 (Intellectual Property Publishing House), at 16–17 (2019).

[11] See XIE Xiaoyao, 一般条款的裁判思维与方法——以广告过滤行为的正当性判断为例 (Judicial Thinking and Methodology of General Provisions: A Case Study on the Legitimacy Assessment of Ad-Blocking Behavior), 4 知识产权 (*Intellectual Property*), 39–57 (2018).

[12] See WANG Lianfeng & KANG Rui, 法律责任视角下商标恶意抢注的司法规制 (Judicial Regulation on Malicious Trademark Squatting from the Perspective of Legal Liability), 7 中华商标 (*China Trademark*), 68–72 (2018).

trademark owner into an unpredictable predicament, regardless of the scenario, Article 6 remains inapplicable. In reality, squatters often do not use the unauthorized trademark but instead intentionally abuse the registration system to intimidate or extort legitimate trademark owners. As long as the squatter has not used the unauthorized trademark in commerce, consumers are unlikely to experience actual confusion when the prior trademark has already gained a certain degree of reputation and market saturation through its owner's use. At this stage, the squatter merely possesses the potential to exclude the prior trademark owner from the competitive market. Since the trademark squatting has not yet succeeded and the squatter has not formally obtained registrant status, actual consumer confusion between the prior user and the squatter cannot possibly occur. Consequently, Article 6 (including its fourth paragraph as a residual clause), whose fundamental purpose is to prevent confusion, fails to satisfy the substantive conditions for regulating such scenarios. Although no actual trademark confusion occurs at this stage, the prior unregistered trademark owner already faces the imminent risk of being unlawfully driven out of the market or suffers severe disruption to normal business operations due to the trademark squatter's unethical conduct. In either scenario, the squatter's act constitutes a gross violation of business ethics and an abuse of rights, seriously infringing the legitimate use of trademarks by others and undermining the legal order shaped thereby. This urgently necessitates judicial intervention through the anti-unfair competition law to curb such acts.

2. Supplementary Role of General Provisions in Enhancing the Effectiveness of Anti-Confusion Provisions

From a jurisprudential perspective, the anti-unfair competition law often relies on general provisions to provide interim protection for certain legally protected interests that warrant safeguarding but have not been incorporated into the scope of intellectual property (IP).[13] In such cases, general provisions function as a transformative bridge, transmuting legally protected interests into statutory rights. Before a specific legally protected interest is formally typified as IP, its ex antes normative construction and legal recognition through general provisions constitute the institutional genealogical premise for the evolution from anti-unfair competition protection to IP rights protection. As LU Chunxin has noted, judicial practice in curbing unfair competition often serves as the precursor to statutory IP law protection.[14] Through shaping the concept of "unfair competition," general provisions conduct the initial value assessment on the legally protected interests they intend to protect. However, unlike conventional right paradigms, the anti-unfair competition law does not protect interests based on their inherent legitimacy but rather through negative evaluations on third-party conduct; that is, by condemning unfair competitive conduct, it reflexively safeguards certain legally

[13] See CAO Jingmin & ZHOU Duo, 论反不正当竞争法在注册商标保护中的适用逻辑——从新百伦诉纽巴伦反不正当竞争纠纷案说起 (Application Logic of the Anti-Unfair Competition Law in the Protection of Registered Trademarks: A Case Study on the New Balance v. New Barlun Anti-Unfair Competition Dispute), 7 中华商标 (*China Trademark*), 48–52 (2020).

[14] See LU Chunxin, 反不正当竞争法一般条款在知识产权保护中的适用定位 (Application Positioning of General Provisions of the Anti-Unfair Competition Law in Intellectual Property Protection), 1 知识产权 (*Intellectual Property*), 54–62 (2017).

protected interests.[15] Therefore, it is not so much that the anti-unfair competition law creates legally protected interests, but rather that the normative construction of fair competition order and the social correction and remedy of unfair competition facilitate the formation of the anti-unfair competition law, which in turn contributes to the emergence of modern legally protected interests, including unregistered trademarks.

The restraint in applying general provisions does not equate to exclusion of application but rather emphasizes that when specific IP laws already provide applicable regulations, the general provisions should not be invoked to protect a particular object. Otherwise, IP laws would be substantially circumvented, undermining the public domain principle that IP rights protection is the exception while non-protection is the norm. Specifically, the public domain is the core of IP law, while protection is merely an exception. Only by adhering to this principle can the stability of the public domain be ensured. In other words, from the general principles of IP rights protection, the application of general provisions must adhere to the principle of restraint. However, this by no means implies their "silence" in domains where they ought to function, particularly when Article 6 of the Anti-Unfair Competition Law proves inadequate in protecting prior unregistered trademarks. Within the jurisprudential framework of competition law, the supplementary function of the general provisions of the Anti-Unfair Competition Law is predominantly manifested in the domain concerning "identifier imitation" as stipulated in Article 6. Furthermore, from the perspective of competition law application, general provisions serve both as residual clauses and concurrence norms. As residual clauses, general provisions function to fill legislative gaps; as concurrence norms, their application does not entirely exclude that of special provisions, nor do they strictly adhere to the principle of lex specialis derogat generali. The concept of "unfair competition" used in general provisions to assess the legitimacy of competitive conduct exerts a dominant influence on the application and interpretation of special provisions.[16] In other words, within the existing regulatory framework, since Article 6 of the Anti-Unfair Competition Law lacks a scientifically grounded basis for addressing the unauthorized registration of unregistered trademarks, particularly those without a certain degree of reputation, the general provisions should be applied to provide remedies in such cases. Otherwise, it would be unfair to the owners of unregistered trademarks and could easily form an unjustifiable judicial blind spot. To be more specific, the general provisions govern the application of the entire Anti-Unfair Competition Law. When the specific factual elements of special provisions prove inadequate, interpreting the general provisions to provide remedies remains the proper approach to resolving such issues. From a comparative law perspective, although Articles 4 to 7 of the German Act Against Unfair Competition (revised in 2021) enumerate various types of unfair

[15] See HUANG Hui, 反不正当竞争法对未注册商标的有效保护及其制度重塑 (Effective Protection of Unregistered Trademarks under the Anti-Unfair Competition Law and Its System Reshaping), 5 中国法学 (*China Legal Science*), 83–102 (2022).

[16] See SHAO Jiandong, 德国反不正当竞争法研究 (*Research on the German Act Against Unfair Competition*), 中国人民大学出版社 (China Renmin University Press), at 37 (2001).

competition conduct, this list is not exhaustive. Where a party's conduct does not meet the constitutive elements of other specific provisions, Article 3, the general provision, can still be applied as a fallback solution.[17] In other words, in curbing unfair competition, the general provisions serve as the ultimate and foundational safeguard.

B Systemic Deficiencies in the General Provisions' Protection of Unregistered Trademarks

Although Article 2 of the Anti-Unfair Competition Law (2017 Revision) underwent substantive revisions and is considered to embody the characteristics of a modern general provision, there remains room for improvement in legislative technique: (1) It still juxtaposes principles of unequal weight, such as voluntariness, equality, and fairness, with the supreme principle of the anti-unfair competition law, namely, the principle of good faith. This makes it difficult to highlight the institutional essence of unfair competition acts as violations of the principle of good faith and business ethics. (2) Paragraph 2 of Article 2 still confines "unfair competition" to the circumstances "prescribed by this Law" (Articles 6–12), significantly diminishing the functional scope of Article 2. Even if interpretively, "violating the provisions of this Law" includes violations of Article 2 of the Anti-Unfair Competition Law, the absence of explicit and specific penalties in this article renders it practically inoperable in application. Civil liability is a secondary obligation arising from a civil subject's violation of primary obligations, reflecting a sufficient and necessary conditional relationship between unlawful acts and their normative consequences.[18] When an unfair act escapes the imposition of civil liability penalties, whether it is able to pass the test of secondary obligations under legal theory and thereby achieve the prevention and correction effect against unlawful conduct becomes particularly questionable. Regarding the protection of unregistered trademarks, if it strictly adheres to the "provisions of this Law," only Article 6 could barely be applicable. However, as analyzed earlier, doubts remain as to whether this article can effectively curb the unauthorized registration of unregistered trademarks with a certain degree of reputation or even prior unregistered trademarks without any reputation. This urgently calls for the intervention of general provisions, yet the existing general provisions prove unable to bear this burden due to defects including closed applicability and illusory liability enforcement.

Relevant international conventions and the anti-unfair competition laws of other jurisdictions tend to adopt a conduct-centered regulatory approach, providing unified protection for all commercial identifiers, including ordinary unregistered trademarks. Article 2 of the Model Provisions on Protection Against Unfair Competition published

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[17] See FAN Changjun, 德国反不正当竞争法研究 (*Research on the German Act Against Unfair Competition*), 法律出版社 (Law Press · China), at 39 (2010).

[18] See YU Jun & ZHU Xinli, 法律责任概念的形式构造 (Formal Construction of the Concept of Legal Liability), 4 法学研究 (*Chinese Journal of Law*), 159–171 (2010).

by World Intellectual Property Organization in 1996 (hereinafter referred to as the Model Provisions) explicitly stipulates: "Any act or practice, in the course of industrial or commercial activities, that causes, or is likely to cause, confusion with respect to another's enterprise or its activities, in particular, the products or services offered by such enterprise, shall constitute an act of unfair competition." The accompanying notes concerning to Article 2 further clarifies, "It is not relevant whether the trademark is registered or not, protection under unfair competition law should be available in the same way for registered and unregistered trademarks." Besides, Article 10bis(2) of the Paris Convention for the Protection of Industrial Property (hereinafter referred to as the Paris Convention) stipulates, "Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition." This applies regardless of whether the act infringes a registered trademark or not, and irrespective of the actual reputation of the trademark infringed. Article 2 of the Hungarian Competition Act stipulates, "It shall be prohibited to conduct economic activities in an unfair manner, particularly in a manner that infringes or jeopardizes the legitimate interests of competitors business partners or consumers, or that are contrary to the requirements of economic competition." The aforementioned provisions demonstrate sufficient openness, inclusiveness, and social adaptability in defining "unfair competition," encompassing all acts that violate the principle of good faith and business ethics within the scope of unfair competition. They neither tie themselves to specific clauses nor confine unfair competition to the scenarios enumerated under "the Law." Consequently, it enables the inclusion of all malicious trademark squatting activities within its regulatory scope. In other words, as long as the trademark squatting activities violate the principle of good faith and normal commercial practice, there exists the possibility of applying the general provisions of the anti-unfair competition law for regulation, regardless of whether it causes consumer confusion or mistaken identification, and irrespective of whether the maliciously squatted trademark is a prior trademark with a certain degree of reputation or an ordinary one.

C Scientific Reconstruction of the General Provisions of the Anti-Unfair Competition Law

Given that "the general provisions of the Anti-Unfair Competition Law serve as the fundamental summarization of the constitutive elements of the regulated unfair competition acts, they should not only highly abstract the common characteristics of all typified unfair competition acts but serve as a principled legal guideline for determining untypified unfair competition acts."[19] The rational construction of general provisions has always been highly valued by various countries. Article 2 of the Anti-Unfair Competition Law adopts a closed

[19] YU Shi,《反不正当竞争法》一般条款适用的泛化困局与绕行破解——以重构"二维指征下的三元目标叠加"标准为进路 (The Generalized Application Dilemma of the General Provisions of the Anti-Unfair Competition Law and Its Circumvention Solution: Reconstructing the "Tripartite Objectives Convergence under Dual Indicia" as a Pathway), 1 中国应用法学 (*China Journal of Applied Jurisprudence*), 113 (2020).

"statutory typification" stance toward "unfair competition," making it impossible to cover all unfair competition acts. This results in incomplete legal application and inadequate protection of unregistered trademarks, while increasing the difficulty of coordination between the Trademark Law and the Anti-Unfair Competition Law.

The Anti-Unfair Competition Law can fully draw on the provisions of Article 2 of the Model Provisions and Article 10bis(2) of the Paris Convention to comprehensively and substantively revise Article 2. Specifically, it could stipulate that "operators shall adhere to the principles of good faith and recognized business ethics in their business activities. Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition." In terms of legislative approach, the author suggests drawing particular inspiration from Article 10bis of the Paris Convention, which adopts a hybrid model combining "broad general prohibition clause with narrow specific prohibition clause." Article 10bis(2) serves as the broad general prohibition clause, defining unfair competition as "any act contrary to honest practices in industrial or commercial matters," while Article 10bis(3) enumerates three specific types of acts that "shall be prohibited."[20] "It should be noted that Article 10bis(2) of the Paris Convention establishes an exceptionally broad residual clause, enabling its application to any competitive act violating honest practices, regardless of whether it falls under the explicitly enumerated types of unfair competition acts in Article 10bis(3)."[21] The rationale for this reconstruction is as follows:

First, the concept of "unfairness" embedded in the general provisions constitutes the very core of the Anti-Unfair Competition Law. While the law cannot positively define what constitutes good competition, it must be capable of identifying what constitutes unfair competition. This explains why the general provisions of the German Act Against Unfair Competition after 2004 abandoned the terminology of "good morals" while retaining the core concept of "unfairness."[22] In Article 2 of the Anti-Unfair Competition Law, "act of unfair competition" means that "in its production or distribution activities, a business disrupts the order of market competition and causes damage to the lawful rights and interests of the other businesses or consumers or the public interest in violation of this Law." The author contends that this provision primarily describes the factual consequences of "act of unfair competition" rather than a value judgment on their essence. The Anti-Unfair Competition Law should not only positively advocate for honest business ethics and practices but also negatively specify the legal consequences of violating them. Positive advocacy merely serves as

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[20] The three types of unfair competition acts enumerated in Article 10bis(3) of the Paris Convention include creating a likelihood of confusion, disparaging competitors through false statements (defamation of goodwill), and making misleading representations about another's products (false allegations).

[21] See Frauke Henning-Bodewig (ed.), 全球反不正当竞争法指引 (*International Handbook on Unfair Competition*), translated by HUANG Wushuang, LIU Wei & CHEN Yaqiu, 法律出版社 (Law Press · China), at 30–31 (2015).

[22] See CHAI Yaotian, 反不正当竞争法一般条款的体系化功能——德国 2015 年《反不正当竞争法》改革对中国修法的启示 (Systematic Function of General Clause of the Anti-Unfair Competition Law: Implications of the 2015 German Reform for China's Legislative Revision), 10 电子知识产权 (*Electronics Intellectual Property*), 16–26 (2016).

behavioral guidance, whereas negative stipulation constitutes value judgment and embodies the normative structure of "obligation imposition." Since unfair competition acts broadly encompass all acts violating honest practices and business ethics, the anti-unfair competition law should reasonably regulate the "squatting" of others' prior unregistered trademarks with a certain degree of reputation or ordinary trademarks without any reputation, as well as acts where registered trademark owners engage in counterfeiting, passing off, reverse passing off, or even weakening others' unregistered trademarks to disrupt fair market order. As the Anti-Unfair Competition Law is a conduct-regulating law, IP rights, including registered trademark rights, created by a legal system recognizing exclusive rights over goods, are inevitably exercised within the framework of fair competition, reasonable market structure, consumer protection, and prevailing social values.[23] Therefore, if the fundamental purpose of the Anti-Unfair Competition Law is to rectify and socially remedy all acts that violate the principle of good faith and business ethics, then the scientific definition of "unfair competition" constitutes its foundational premise.

Second, the reason for emphasizing the importance of good faith, business ethics, and commercial practices in the general provisions lies primarily in the overarching status and function of good faith across the entire legal domain, which is the supreme principle that every market participant must observe. "The theoretical foundation for prohibiting trademark squatting lies in the principle of good faith under the framework of civil law. Where the applicant knows of another party's prior use of an unregistered trademark, such registration is not entitled to protection, regardless of whether the prior trademark has acquired a certain degree of reputation."[24] Even whether the trademark squatting occurs on identical or similar goods is irrelevant. Therefore, not only prior unregistered trademarks with a certain degree of reputation but those that have never been used may entitle their owners to oppose registration by other parties, provided the trademark squatting violates recognized business ethics and good faith practices.

Finally, regarding the legislative model, a more open attitude should be adopted toward general provisions. It is advisable to revise the "catch-all" legislative model of Article 2 of the Anti-Unfair Competition Law—"as stipulated by this Law"—into an exemplary legislative model that specifies "particularly including the following circumstances." Compared to a "catch-all" general provision or rigid enumerative legislation, a hybrid legislative model combining enumeration with general provisions achieves both legal certainty and leaves sufficient room for judicial development to adapt to evolving circumstances. Currently, the Anti-Unfair Competition Law adopts a legislative model, in which general provisions and enumerative provisions are strictly correlated, rigidly confining unfair competition acts to

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[23] See Tomita Mitsuo, 序言 (Preface), in 市场竞争中的知识产权 (*Intellectual Property in Market Competition*), translated by LIAO Zhengheng, ZHANG Mingguo, XU Shushen, et al., 商务印书馆 (The Commercial Press), at 1 (2017).

[24] WEN Xue, 商标使用与商标保护研究 (*Research on Trademark Use and Protection*), 法律出版社 (Law Press · China), at 219 (2008).

the literal interpretation of "as stipulated by this Law." This forces inherently open-ended general provisions into an inflexible and closed framework, which clearly contradicts the original intent of general provisions. From the perspective of legislative technique, in legal relations where social values evolve rapidly or in highly innovative socio-legal practices, the demand for open-ended legislative norms is greater. This implies a higher need for general provisions and indeterminate legal concepts, whereas exhaustive enumeration is often destined to fail.[25] The modernization of China's IP rule of law exhibits characteristics of "leapfrog transformation," "unbalanced development," and "super-sized rise."[26] For laws like the anti-unfair competition law, which possess strong social attributes and aim to encourage innovation while maintaining fair competition, an absolutely closed-loop legislative model is unsuitable. Instead, an open and inclusive legislative model should be adopted to meet the demands of practical development and provide equal protection opportunities for all unregistered trademark owners.

II Improvement of the Damage Remedies System for Unregistered Trademarks under the Anti-Unfair Competition Law

In terms of legal efficacy, the previous Anti-Unfair Competition Law primarily functioned as a public regulatory instrument, addressing bad-faith trademark applications as a societal problem.[27] This approach relied more on public authority intervention to impose administrative liability on trademark squatters. Consequently, the property interests of prior unregistered trademark owners were often entangled in administrative procedures of trademark registration, failing to achieve effective civil remedies. In judicial practice, a more pertinent issue is whether the prior trademark owner has the right to file an unfair competition lawsuit and claim civil damages if the infringer only engaged in bad-faith registration without other infringing acts. How does this issue relate to the administrative authorization and confirmation procedures for bad-faith trademark registration? Should the parties wait until the final administrative determination of trademark authorization and confirmation before asserting civil liability? The answers to these questions not only concern the scientific understanding of the legal status of unregistered trademarks but also determine how the Anti-Unfair Competition Law can be utilized to provide the most comprehensive remedies for the parties' interests.

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[25] See Ernst A. Kramer, 法律方法论 (*Legal Methodology*), translated by ZHOU Wanli, 法律出版社 (Law Press · China), at 42 (2019).

[26] See WU Handong, 中国知识产权制度现代化的实践与发展 (Practice and Development of the Modernization of China's Intellectual Property System), 5 中国法学 (*China Legal Science*), 24–43 (2022).

[27] See XU Mingyue, 侵权救济、救济成本与法律制度的性质——兼论民法与经济法在控制侵权现象方面的功能分工 (Tort Remedies, Costs of Legal Relief, and the Nature of Legal Systems: Concurrently Discussing the Functional Division Between the Civil Law and the Economic Law in Controlling Tortious Conduct), 6 法学评论 (*Law Review*), 54–60 (2005).

A Institutional Dilemma of Civil Damage Remedies for Unregistered Trademarks

In response to rampant trademark squatting and hoarding, owners of unregistered trademarks often resort to the Trademark Law to safeguard their rights and interests by filing oppositions or invalidation requests and other legal measures. However, even if the squatting is deemed bad-faith and subsequently rejected or invalidated, the bad-faith squatter only loses the relevant application fees (which may include agency costs), while the trademark owner incurs far greater expenses to prevent such squatting. Although Paragraph 4 of Article 68 of the Trademark Law (revised in 2019) and Article 12 of the Several Provisions on Regulating Trademark Registration Applications (2019) impose administrative penalties such as warnings and fines for malicious squatting and stipulate judicial penalties for malicious trademark litigation, as well as Paragraph 2 of Article 6 and Article 9 of the Provisions of the China National Intellectual Property Administration on Intellectual Property Credit Management (2022) classify malicious trademark squatting as acts of dishonesty and subject violators to regulatory measures, none of these provisions offer civil damage remedies to the victims of squatting. This results in excessively low costs for trademark squatters, leading to frequent occurrences of "bad money driving out good," which undermines effective deterrence against bad-faith squatting and hampers the establishment of a first-class legal business environment as well as the implementation of new development concepts for high-quality growth.

If the punishment for bad-faith squatting is not limited to administrative procedures but can be challenged through civil unfair competition litigation, courts could recognize such acts as unfair competition, prohibit the trademark squatter from continued trademark use, and even hold the defendant or the trademark registration agency jointly liable for damages. This would provide prior trademark owners with a new approach to combat squatting and help curb bad-faith registration at its source. Germany provides a notable legislative model in this regard. There, if a prior unregistered trademark is maliciously squatted by a later party, the affected party may not only file a cancellation request with the Deutsches Patent-und Markenamt under Paragraph 2 of Article 54 of the German Act on the Protection of Trade Marks and other Signs (hereinafter referred to as German Trade Mark Act) but also initiate legal action for cancellation and damages based on Article 1 of the German Act Against Unfair Competition or Articles 226 and 826 of the German Civil Code.[28] In other words, regarding the protection of unregistered trademark rights and interests and the prevention of squatting to uphold fair competition, the German Act Against Unfair Competition, the German Trade Mark Act, and even the German Civil Code maintain close coordination and coherence. Specifically, Article 1 of the German Act Against Unfair Competition (2021) stipulates legislative purposes, while Article 226 of the German Civil Code stipulates the "prohibition of abuse of rights." Article 826 of the German Civil Code pertains to "good morals," stating that

[28] See Marianne Grabbruck, 德国法中的恶意商标注册申请 (*Bad-Faith Trademark Registration Applications under German Law*), translated by ZHANG Haichen, in LIU Xiaohai (ed.), 德国知识产权理论与经典判例研究 (*German Intellectual Property Theory and Model Case Study*), 知识产权出版社 (Intellectual Property Publishing House), at 33–39 (2013).

"A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage." In other words, the German Act Against Unfair Competition and the German Trade Mark Act are not isolated from each other. Article 1 of the German Act Against Unfair Competition, along with Articles 226 and 826 of the German Civil Code, can be applied in competition law proceedings to resolve disputes involving trademark infringement.[29] The author believes that Germany's approach offers two key advantages in protecting unregistered trademarks: (1) Anti-unfair competition safeguards against trademark squatting. Parties may assert cancellation, in which case the distinctiveness or reputation of the unregistered trademark is not considered, thereby facilitating equal protection for all unregistered trademarks, including ordinary ones. (2) Owners of unregistered trademarks may exercise claims for damages against trademark squatters. From a jurisprudential perspective, the mere registration of a trademark does not inherently legitimize its use. The judicial authorities may directly determine the infringement of bad-faith squatted trademarks without awaiting their invalidation or cancellation through administrative procedures.[30]

WANG Lianfeng holds that Paragraph 2 of Article 47 of the Trademark Law, which stipulates that "losses caused to others due to the bad faith of the trademark registrant shall be compensated," essentially constitutes a civil penalty provision against bad-faith registrants.[31]Given its systematic position within the statutory framework, this clause does not function as a general provision under the German Trade Mark Act that would obligate bad-faith registrants to compensate the rightful trademark owners. Even if this clause is deemed to possess the nature of a civil penalty, its effectiveness would be significantly diminished given that Article 4 of the Trademark Law only targets "stockpiling-type" bad-faith registrations rather than "use-type" bad-faith squatting. Furthermore, although the Trademark Law stipulates administrative liability for bad-faith squatters, the maximum administrative penalty of RMB 30,000 remains insufficient to deter or intimidate the parties involved. The systemic shortcomings of the Trademark Law in this regard have led people's courts in multiple cases involving bad-faith squatting, such as the "WUDANGHONG Trademark Squatting Case,"[32] the "ELLASSAY Case,"[33] the "UNIQLO Case,"[34] and the "SKS Hydraulic Technology

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[29] Id. at 33.

[30] See LI Chen, 中国商标法制四十年观念史述略 (A Brief History of Conceptual Evolution in China's Trademark Legal System over Four Decades), 9 知识产权 (*Intellectual Property*), 57–65 (2018).

[31] See WANG Lianfeng, 规制商标恶意注册的法律适用问题研究 (Research on Legal Application Issues in Regulating Trademark Bad-Faith Filings), 1 中州学刊 (*Academic Journal of Zhongzhou*), 52–59 (2020).

[32] See 湖北省高级人民法院（2013）鄂民三终字第 132 号民事判决书 (*Civil Judgment [2013] E. M. S. Z. Z. No. 132 of Hubei Provincial High People's Court*).

[33] See 最高人民法院（2014）民提字第 24 号民事判决书 (*Civil Judgment [2014] M. T. Z. No. 24 of the Supreme People's Court*).

[34] See 最高人民法院（2018）民再 396 号民事判决书 (*Civil Judgment [2018] M. Z. No. 396 of the Supreme People's Court*).

Case,"[35] to invoke Article 7 of the Trademark Law. From the perspective of good faith and prohibition of rights abuse, the courts have dismissed bad-faith squatters' abusive claims and unreasonable demands against genuine prior trademark owners, thereby safeguarding the fair existence of prior unregistered trademarks. Regrettably, China's legislation has not granted parties the right to mount more effective countermeasures against such "competition-hindering" unfair practices as bad-faith trademark squatting, which undermines the prevention and deterrence of such acts. Precisely in light of this issue, the ongoing fifth amendment to the Trademark Law has placed significant emphasis on it. Article 85 of the Draft Amendment to the Trademark Law of the People's Republic of China (Submitted for Review) specifically regulates civil liability for damages by bad-faith applicants.

B Comparative Study on Remedies for the Value of Unregistered Trademark Property Rights

The people's court determined the trademark registration application as an administrative licensing act initiated by the party with the administrative authority. Consequently, disputes arising therefrom fall outside the scope of civil litigation. Therefore, damage suffered by the prior unregistered trademark owner due to bad-faith squatting cannot be resolved through relevant administrative procedures. Disputes arising therefrom must be addressed through separate litigation, namely, remedy via civil damages proceedings. This approach theoretically denies the property rights and interests of trademark owners in their unregistered trademarks. Its underlying logic still adheres to the principle that "a trademark constitutes property after registration"[36] as the theoretical basis for acquiring trademark rights, thereby neglecting the genuine value of protecting unregistered trademarks. However, from a comparative law perspective, the principle that "an unregistered trademark owner enjoys property rights and interests in their trademark" has been affirmed and supported by the legislation of numerous countries. In civil law jurisdictions, Article 55 of the Italian Code of Industrial Property explicitly stipulates that legal actions in trademark matters shall constitute personal property actions. Under this article, the litigation between the bad-faith applicant and the unregistered trademark owner regarding the prior trademark right is regarded as that over personal property. The heading of Chapter II of Title II of this law reads "Proprietor of Trademark," and its Article 22 states that a trademark registration may not be obtained by anyone who has made the application in bad faith. Read in conjunction with the chapter heading, this implies that a bad-faith applicant cannot acquire ownership of the registered trademark, which remains vested in the prior user. Consequently, the prior unregistered trademark owner

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[35] See 最高人民法院（2014）民提字第 168 号民事判决书 (*Civil Judgment [2014] M. T. Z. No. 168 of the Supreme People's Court*).

[36] FU Jicun, 商标法的价值构造研究——以商标权的价值与形式为中心 (*Research on the Value Structure of Trademark Law: Focusing on the Value and Form of Trademark Rights*), 中国政法大学出版社 (China University of Political Science and Law Press), at 221 (2012).

may fully initiate an action in rem against trademark squatting, with the right to demand that the bad-faith trademark squatter promptly return the property interests. In judicial practice, when the property rights and interests of a prior trademark owner are maliciously infringed through registration procedures by others, the prior trademark owner may fully assert claims for restitution and damages through personal property action. The same applies in common law jurisdictions. In the United Kingdom, the protection afforded to unregistered trademarks under equity law is likewise grounded in the property interests and value they embody. The basis for private right remedies for trademarks lies not in protecting the public from deception but rather in redressing the infringement against the plaintiff. Public deception serves as the factual evidence that the original owner's rights have been infringed. If the original owner has suffered no infringement whatsoever, courts of equity will not consider the matter of public deception. Therefore, the intent to deceive the public is not an essential element of trademark infringement; what the law truly seeks to prevent is the plaintiff's loss of property interests.[37] Public deception does not constitute the foundation of trademark right protection; rather, it serves as the jurisdictional basis for courts.[38] That is, the genuine foundation for protecting unregistered trademarks lies in their property interests. Certainly, given the common law tradition in Anglo-American legal systems, the protection of trademark rights and interests often follows the principle of "remedy precedes legally protected interests," that is, the relevant property interests arise only through remedies. Compared to the interpretation that "a trademark is property and therefore should be protected," the explanation that "a trademark should be protected and therefore constitutes property" better clarifies the issue.[39] In any case, recognizing unregistered trademarks as the property rights and interests of their owners serves as the common theoretical foundation for their protection across both civil law and common law jurisdictions.

Moreover, from a procedural perspective, for those who squat unregistered trademarks used by others, Article L.712-6 of the French Intellectual Property Code even stipulates: "Where registration has been applied for, either fraudulently with respect to the rights of another person or in violation of a statutory or contractual obligation, any person who believes he has a right in the mark may claim ownership by legal proceedings." Unlike the Trademark Law, Articles 6 to 10 of the Patent Law of the People's Republic of China grant parties' exclusive rights to file patent applications for their scientific and technological inventions, which in effect recognizes the proprietary value of scientific and technological achievements. In terms of subject, unless it constitutes a service invention-creation, such rights are generally vested in the inventor or designer. The patent application right, fundamentally differing from the patent right, constitutes an initial allocation and interest confirmation system for the rights

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[37] See Frank I. Schechter, 商标法的历史基础 (*The Historical Foundations of the Law Relating to Trade-Marks*), translated by ZHU Dong, 知识产权出版社 (Intellectual Property Publishing House), at 175 (2019).

[38] Id. at 174.

[39] Id. at 172.

and interests of parties' scientific and technological achievements. This system is premised on and grounded in the legal recognition of the proprietary nature and value of scientific and technological inventions. Where infringement on the patent application right occurs, the right holder may obviously pursue legal recourse to reclaim such right. Consequently, aggrieved parties are naturally entitled to claim compensatory remedies for damage suffered.

Prior unregistered trademarks, particularly those with a certain degree of reputation, undeniably constitute significant property for the right holders. Regrettably, the Trademark Law fails to explicitly recognize the proprietary value of such property through legislative provisions or confer the legal status of proprietor on its owner. From a regulatory design perspective, China has not established a recovery procedure akin to Article L.712-6 of the French Intellectual Property Code. Although Articles 13 and 32 of the Trademark Law procedurally grant parties the right to oppose or invalidate trademark squatting, these provisions essentially serve as legal grounds for administrative acts in the administrative procedures for trademark authorization and confirmation by registration authority. They do not constitute private law norms enabling parties to exercise civil rights or assert specific proprietary interests. This has led people's courts in relevant cases to frequently require the plaintiff to file a separate lawsuit or deny its civil compensation claims altogether.[40] Such an approach is clearly unscientific. Insufficient recognition and theoretical exploration of the proprietary value of prior unregistered trademarks have resulted in China's protection system offering only administrative remedy procedures, lacking preemptive civil remedy procedures like those in France and Italy. Consequently, the property interests of prior trademark owners are confined within administrative procedures for trademark authorization and confirmation, relegating the owners from their original status as proactive civil claimants to passive respondents or third parties in administrative proceedings. Moreover, after a prior unregistered trademark is squatted, its owner may endure protracted litigation procedures, spanning administrative reexamination, first-instance judicial review, second-instance appeal, and even judicial retrial, before its prior rights can be fully restored. Evidently, owners of prior unregistered trademarks bear disproportionately high institutional costs. From a comparative law perspective, partial jurisdictions have established a four-right framework to protect the property rights and interests of prior unregistered trademarks against squatting: (1) the "right to request cancellation" of the squatter's registration when the owner chooses not to register; (2) the "right to demand transfer and re-registration" to substitute the trademark squatter's registration with the owner's when the owner opts to register; (3) the "right to seek injunction" prohibiting any domestic use after squatting occurs; and (4) the "right to claim damages" for losses caused to the owner by the trademark squatter's intentional or negligent acts. This four-right framework essentially treats prior unregistered trademarks as the property of the owners and grants them claims in rem. Specifically, the prior unregistered

[40] See 北京市高级人民法院(2021)京民终497号民事裁定书 (*Civil Judgment [2021] J. M. Z. No. 497 of the Beijing High People's Court*).

trademark owner enjoys rights in personam, including claims for restitution, removal of impediments, and restoration to the original state. Additionally, they possess the tracing effect of real rights, enabling them to assert ownership over the trademark wherever it may be used. Therefore, given China's actual situation, it is imperative to grant rights such as the "right to apply for trademark registration" for owners of prior unregistered trademarks and endow them with complete claim capacity. This would emancipate unregistered trademark owners from their relatively passive and subsidiary role in the administrative trademark registration procedures, transforming them into actual right holders, and simultaneously addressing the issue of protection of their civil rights in the administrative trademark registration procedures, which undoubtedly facilitates swifter and more efficient safeguarding of their interests.

C Systematic Construction of Civil Damage Remedies for Unregistered Trademarks

China can fully draw on the practices of regulatory coordination and synergistic protection mechanisms for unregistered trademarks adopted by France and Italy as well as the normative linkage among the German Act Against Unfair Competition, the German Civil Code, and the German Trade Mark Act to curb trademark squatting. This includes the following critical dimensions of institutional design.

The first is to clarify the proprietary value of unregistered trademarks. Drawing on Article L.712-6 of the French Intellectual Property Code and Article 55 of the Italian Code of Industrial Property, it should be explicitly stipulated in the General Provisions of the Trademark Law: "Actions concerning trademarks constitute personal property actions." Defining the proprietary value of unregistered trademarks in a comprehensive manner under the Trademark Law facilitates the curbing of trademark squatting by prior trademark owners through either the trademark law or the anti-unfair competition law, thereby establishing a preemptive normative framework and value foundation for claiming damages. (1) As a key guardian of modern private law order, the Trademark Law evidently bears the obligation to affirm the proprietary value of unregistered trademarks through subjective rights. (2) The modern anti-unfair competition law, being a conduct-regulating law, primarily focuses on regulating unfair competition acts, while the remedy of parties' civil interests remains its secondary objective. Where the party merely engages in trademark squatting without constituting confusion infringement under Article 6 of the Anti-Unfair Competition Law, there is no legal basis for holding the bad-faith squatter liable for damages. However, by proactively affirming the proprietary legal status of unregistered trademarks in terms of value, the trademark law is undoubtedly able to provide a preemptive normative framework and jurisprudential foundation for prior trademark owners to invoke the anti-unfair competition law in safeguarding their interests against trademark squatting. This embodies the inherent normative essence and institutional connotations of the division and coordination between the trademark law as modern property law and the anti-unfair competition law as conduct-regulating law, ultimately manifested through their functional complementarity.

The second is to enhance protective synergy between the Anti-Unfair Competition Law and the Trademark Law. It is necessary to introduce an additional residual clause for the invalidation procedure under Article 45 of the Trademark Law, stipulating that: "Where a registered trademark was obtained for the purpose of unfair competition or malicious harm to others through means violating good morals, the prior right holder or interested party may, within five years from the date of registration, request the Trademark Review and Adjudication Board to invalidate such registration based on Article 1 of the Anti-Unfair Competition Law or Article 8 of the Civil Code (violation of public order and good morals). Compensation shall be awarded for losses caused by bad-faith registration." The advantages of such a clause structure lie in: (1) It facilitates the expansion of circumstances where trademark invalidation is applicable, encompassing even cases where prior unregistered trademarks without reputation or popularity are squatted, thereby effectively curbing all trademark registrations obtained for purposes of unfair competition or malicious harm to others. This approach differs from the invalidation procedure under Article 44 of the Trademark Law targeting bad-faith registrations under Article 4, as the latter specifically addresses bad-faith stockpiling without intent to use, clearly incapable of covering bad-faith squatting aimed at actual use to exclude competitors from the market. Moreover, it differs from Article 45 of the Trademark Law concerning invalidation of trademarks squatted in bad faith under Article 15, which applies when the registrant was aware of another's trademark due to agency or other proximate or cooperative relationships. Although Article 15 of the Trademark Law regulates trademark squatting without requiring the prior unregistered trademark's reputation, this article specifically targets trademark squatting involving special relationships, forming a particular-versus-general relationship with the residual clause discussed here. Where a squatter has an agency or other special relationship with the trademark owner, Article 15 applies to initiating invalidation proceedings regardless of the squatted trademark's reputation. Otherwise, the residual clause herein shall apply. This approach would encompass cases of squatting of ordinary unregistered trademarks involving no special relationship, thereby creating a comprehensive regulatory framework to deter trademark squatting. (2) The liability provisions for damages arising from bad-faith registration clearly facilitate the application of both the Trademark Law and the Anti-Unfair Competition Law, particularly when claimants initiate an unfair competition lawsuit against bad-faith trademark squatting under Article 2 of the Anti-Unfair Competition Law rather than seeking invalidation under the Trademark Law. Although parties may choose between these two approaches, invoking Article 2 of the Anti-Unfair Competition Law to assert liability for unfair competition by bad-faith squatters offers a fundamental advantage: It enables judicial protection for prior unregistered trademark owners without challenging the validity of trademark registrations. The distinct advantage of this protection lies in circumventing the cumbersome administrative invalidation procedures, thereby reducing institutional costs. Its drawback, however, is legal uncertainty. In such cases, if the Trademark Law preemptively stipulates that bad-faith squatting causing harm to others entails liability for damages, this

provision, when applied as a referential provision, can effectively integrate this principle into the enforcement of the anti-unfair competition law. This approach would foster a networked regulatory order against bad-faith squatting, thereby enhancing cross-departmental law institutional coordination and normative synergy between the Anti-Unfair Competition Law and the Trademark Law. Together, they would form a system and semantic framework with maximally consistent value judgment,[41] providing a legal basis for claimants to assert damages in unfair competition lawsuits.

Moreover, the inclusion of cases of violations of public order and good morals is justified because the principle of public order and good morals, as an important principle of the Civil Code, serves to regulate social order and compensate for the deficiencies of mandatory legal provisions. This achieves the objectives of filling legal gaps, balancing conflicts of interest, safeguarding public welfare, and upholding social justice.[42] In summary, explicit legislative stipulation that trademark squatters must bear liability for damages would fundamentally rectify China's inadequate punitive measures against bad-faith trademark squatting. In addition, it would strengthen institutional coordination, normative synergy, and value alignment between the Anti-Unfair Competition Law and the Trademark Law.

Finally, under the fundamental premise of recognizing the proprietary status of unregistered trademarks, when the anti-unfair competition law is employed to curb squatting, how does the owner's claim for damages differ from a party's claim for damages under the invalidation procedure of the trademark law? The distinction is merely procedural, and it should not vary based on the trademark law being a property law and the anti-unfair competition law being a conduct-regulating law. Specifically, in determining the scope of damages, compensation awarded to the prior unregistered trademark owner should at least include: (1) loss of goodwill attributable to the unregistered trademark (if any); (2) market opportunity costs incurred by the owner due to squatting; and (3) expenses incurred to stop squatting (including attorney fees, litigation costs, notarization fees, and preservation fees, investigation and evidence collection expenses, as well as other necessary costs to restore the relevant rights to their full integrity). Furthermore, if the prior unregistered trademark owner can demonstrate that the squatter acted with subjective bad-faith and engaged in other egregious conduct, such as repeatedly abusing litigation rights after squatting, aggressively pursuing legal actions against the rights holder, placing the owner in unpredictable jeopardy, or even forcing them out of the market or into business closure, the claimant may, in addition to filing a trademark or unfair competition lawsuit, fully assert a claim for punitive damages. Regrettably, Article 17 of the current Anti-Unfair Competition Law only allows punitive damage claims in cases of trade secret infringement, an approach that is clearly unscientific. This gap was promptly addressed by Article 1 of the Interpretation of the Supreme People's Court on the Application

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[41] See Kramer, fn. 25 at 55–56.

[42] See YANG Lixin, 中华人民共和国民法典条文要义 (*Essentials of the Articles of the Civil Code of the People's Republic of China*), 中国法制出版社 (China Legal Publishing House), at 7–8 (2020).

of Punitive Damages in the Trial of Intellectual Property Infringement Civil Cases (FS [2021] No. 4). Moreover, when the losses of the prior unregistered trademark owner are difficult to calculate or the squatter's profits cannot be determined, statutory damages may be applied to provide remedy to the plaintiff, whether under the Trademark Law or the Anti-Unfair Competition Law. Since unregistered trademarks are recognized as proprietary interests of the rights holder, they should be granted equal protection. Such legal arrangements clearly facilitate the elimination of bad-faith trademark squatting conducted for unfair competition purposes, ensuring a high degree of systemic coordination and normative synergy between the Anti-Unfair Competition Law and the Trademark Law. This approach enables comprehensive protection for the interests of prior unregistered trademark owners and fundamentally rectifies the distorted market competition order caused by trademark squatting.

In summary, even if a trademark squatter obtains nominal legal status for a prior unregistered trademark, it must not abuse this status to conduct litigation threats or engage in coercive extortion against others, especially when such right was acquired in violation of social propriety and the principle of good faith. Otherwise, the anti-unfair competition law should be promptly invoked to regulate such conduct, rectifying the imbalanced competitive order and providing timely remedy and compensation for the property losses suffered by the prior unregistered trademark owner. This approach truly reflects the fundamental requirement of equal protection under the anti-unfair competition law.

III Logical Boundaries in Unregistered Trademark Protection under the Anti-Unfair Competition Law

When invoking the Anti-Unfair Competition Law to curb trademark squatting, must the subjective fault of the infringing party be established as a prerequisite? Should actual harm to the rights holder be a condition for determining squatting as an act of unfair competition? If squatting constitutes unfair competition, how should the boundaries of remedy be defined? Specifically, what would be the scientifically sound scope for prohibiting the squatter's use of the trademark in terms of goods and geographical regions? Addressing these questions is crucial, as they not only determine the extent of remedy the anti-unfair competition law can provide to prior unregistered trademark owners but also influence the harmonized application of the anti-unfair competition law and the trademark law. These issues warrant equal attention.

A Prerequisites and Remedy Boundaries in Unregistered Trademark Protection

When applying the anti-unfair competition law, particularly its general provisions, to curb trademark squatting and protect unregistered trademarks, is it necessary to establish the subjective fault of the party involved? The answer should be negative. From a general legal perspective, the elements stipulated in the general provisions do not involve subjective

requirements such as knowledge or constructive knowledge. As long as the conduct of the party violates recognized business ethics or the principle of good faith, it can be directly deemed as constituting unfair competition.[43] In other words, the perpetrator's subjective fault (including intent or negligence) arising from the violation of relevant duty of care is not a constitutive element of unfair competition but rather a prerequisite for liability.[44] Squatting on others' unregistered trademarks, as a typical violation of widely recognized business ethics, exhibits obvious unfairness. Treating it as a quintessential act of unfair competition aligns with the general public's common perception. For such "free-riding" market exploitation behaviors, as long as they objectively result in the improper capture of others' competitive advantages, they should be promptly suppressed and curbed, even if the actor subjectively acted in good faith. Therefore, the suppression of trademark squatting does not require proof of the party's subjective fault as a prerequisite. This aligns with the principle in modern unfair competition law that the fault requirement for determining unfair competition is inversely proportional to the maturity of the protected legal interest.[45] That is, the more mature the protected legal interest of the protected subject matter, the less emphasis should be placed on the actor's subjective intent or negligence. As one of the most mature types of legally protected interests in modern private law, unregistered trademarks warrant the abandonment of the subjective fault requirement in anti-unfair competition regulation against squatting. This approach better conforms to the general concept of modern competition law and proves more effective in curbing such behaviors. Certainly, when providing specific remedies for unregistered trademarks, given that China's Anti-Unfair Competition Law lacks provisions equivalent to Paragraph 1 of Article 8 of the German Act Against Unfair Competition (which stipulates claims for cessation, removal, and prevention of infringement), remedy may be sought under Article 179 of the Civil Code. Since these claims possess the nature of property-based claims, their application likewise does not require proof of the party's subjective fault. However, attention must then be paid to determining the reasonable scope of the squatter's liability. Currently, judicial practices vary across people's courts regarding this issue. For instance, some people's courts have ruled for the complete cessation of using the registered trademark (as seen in the "LEFENG Trademark Case"[46]), while others have deemed standardized usage sufficient (as demonstrated in the "SAM'S CLUB Trade Name Unfair

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[43] See CAO Liping & ZHANG Xuan, 网络不正当竞争纠纷相关问题研究——《反不正当竞争法》类型化条款与一般条款适用难点探析 (Research on Issues Related to Online Unfair Competition Disputes: Analysis of Application Difficulties in Typified Provisions and General Provisions of the Anti-Unfair Competition Law), 1 法律适用 (*Journal of Law Application*), 16–22 (2017).

[44] See ZHANG Yumin, 侵害知识产权民事责任归责原则研究 (Research on the Principle of Civil Liability Attribution for Infringement on Intellectual Property Rights), 3 法学论坛 (*Legal Forum*), 20–28 (2003).

[45] See WANG Wenmin, 反不正当竞争法中过错的地位及适用 (Status and Application of Fault Element in the Anti-Unfair Competition Law), 2 法律科学(西北政法大学学报) (*Science of Law [Journal of Northwest University of Political Science and Law]*), 175–188 (2021).

[46] See 北京市朝阳区人民法院(2013)朝民初字第1516号民事判决书 (*Civil Judgment [2013] C. M. C. Z. No. 1516 of the Chaoyang Primary People's Court, Beijing*).

Competition Case"[47]). However, in most rulings under either circumstance, courts have neither restricted the geographical scope nor delineated the range of goods or services for which the squatter is prohibited from using identical or similar trademarks. Consequently, LI Yang has pointed out: To prevent the Anti-Unfair Competition Law from substantially undermining the Trademark Law and avoid the phenomenon of so-called "excessive injunctions," it is indeed necessary for judicial rulings to explicitly define the scope of goods and geographical areas subject to the defendant's cessation of infringement, removal of obstacles, and elimination of hazards.[48] This would effectively balance the relationship between the two laws, ensuring that the anti-unfair competition law does not excessively diminish or erode the efficacy of the trademark law.

The author concurs with this view, though regarding specific remedies, we should still distinguish between prior unregistered well-known trademarks and prior trademarks with a certain degree of reputation. Since unregistered well-known trademarks require a high degree of recognition across most regions domestically, representing the most influential category among unregistered trademarks, the scope of their protection should not be limited to identical or similar goods (services). In fact, regarding the categories of goods or services, since Article 6 of the Anti-Unfair Competition Law only requires that the use of another's commercial identifier is likely to create the effect of "a specific connection with others" without being restricted by the categories of goods or services, the "cross-class" use of another's unregistered trademark with a certain degree of reputation may similarly constitute unfair competition[49] and should therefore be prohibited. Although the anti-unfair competition law aims to maintain fair market competition order, and the similarity of goods or service categories essentially emphasizes the existence of competition between the parties, the element of "competitive relationship" should clearly not become an obstacle to the anti-unfair competition law's objective of safeguarding fair competition.[50] In other words, modern anti-unfair competition law no longer fundamentally requires the existence of a competitive relationship between parties to curb unfair competition practice. Even in the absence of such a relationship, as long as a third party's use involves the morally unjustifiable appropriation of the plaintiff's competitive advantages, anti-unfair competition law can be invoked to suppress and penalize such conduct. In this regard, Article 13 of the Trademark Law merits the most reflection. This provision simultaneously grants owners of prior unregistered well-known trademarks the right to prohibit others from registering and using such trademarks.

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[47] See 天津市高级人民法院（2018）津民终 242 号民事判决书 (*Civil Judgment of [2018] J. M. Z. No. 242 the High People's Court of Tianjin Municipality*).

[48] See LI Yang, 反不正当竞争法基本原理 (*Basic Principles of the Anti-Unfair Competition Law*), 知识产权出版社 (Intellectual Property Publishing House), at 108 (2022).

[49] See LIU Jifeng, 反不正当竞争法中 "一定影响" 的语义澄清与意义验证 (Semantic Clarification and Significance Verification of "Certain Degree of Reputation" in the Anti-Unfair Competition Law), 4 中国法学 (*China Legal Science*), 186–200 (2020).

[50] See LONG Jun, 论反不正当竞争法中功能主义解释方法的适用 (Application of Functionalist Interpretation Methods in the Anti-Unfair Competition Law), 5 甘肃政法学院学报 (*Journal of Gansu University of Political Science and Law*), 70–86 (2019).

This prohibitive stipulation demonstrates the legislature's attempt to incorporate the spirit of anti-unfair competition law into trademark law, thereby constructing a robust fortress for the protection of prior unregistered well-known trademarks. Paragraph 2 of Article 13 of the Trademark Law distinguishes between registered and unregistered well-known trademarks, granting the former the right to prohibit cross-class use while limiting the latter's prohibition to similar goods or services. This indicates that the Trademark Law has not fully incorporated the fundamental spirit of the anti-unfair competition law. Unlike a mere prohibition on registration, the provision to "prohibit use" essentially reflects the core objective of the anti-unfair competition law, that is, whenever another party's use of a trademark creates a specific association with the trademark owner and unfairly appropriates the latter's competitive advantages, there arises a necessity to invoke the anti-unfair competition law to prohibit such use, regardless of whether it occurs on identical or similar goods or services. As evidenced by Article 6 of the Anti-Unfair Competition Law, this principle similarly applies to the protection of prior unregistered trademarks with a certain degree of reputation. Therefore, Article 13 of the Trademark Law appears somewhat conservative in its adoption of anti-unfair competition principles for protecting unregistered well-known trademarks. From the perspective of inter-legal value coordination, this provision still requires further revision and refinement.

Consequently, the most critical distinction in limiting the scope of remedies actually lies in the geographical dimension. From a territorial perspective, it is indeed necessary to differentiate between Paragraph 3 of Article 59 of the Trademark Law and Article 6 of the Anti-Unfair Competition Law. The former constitutes the so-called "prior use" system. This provision merely acknowledges the prior trademark owner's positive right to continue using their own trademark, without further granting them exclusive rights. In essence, it functions as "an exception to trademark infringement, or more precisely, a limitation on the exclusive rights of registered trademarks."[51] In other words, Paragraph 3 of Article 59 of the Trademark Law merely respects the established factual status or social relations formed through the prior use of a trademark. It represents nothing more than a limited restriction on registered trademark rights based on "natural justice." Consequently, the prior trademark owner should not be permitted to expand or promote their trademark without geographical constraints. Otherwise, it would substantially undermine the effectiveness of registered trademark rights, exposing consumers nationwide to conflicts between registered trademarks and prior-used trademarks, ultimately disrupting the order of brand-based purchasing. As some scholars have noted, certain limitations may be imposed on IP, but these restrictions must not constitute excessive interference with their substantive value.[52] Otherwise, it would completely undermine the order value of the trademark registration system. In contrast, the mission of

[51] DU Ying, 商标先使用权解读《商标法》第 59 条第 3 款的理解与适用 (Interpretation on Prior Use Right of Trademarks: Understanding and Application of Article 59[3] of the Trademark Law), 5 中外法学 (*Peking University Law Journal*), 1359 (2014).

[52] See Jonathan D. C. Turner, 知识产权与欧盟竞争法 (*Intellectual Property and EU Competition Law*), translated by LI Shuo & LI Jingze, 中国法制出版社 (China Legal Publishing House), at 6–7 (2022).

Article 6 of the Anti-Unfair Competition Law is to establish a normative foundation for the exclusive effect of unregistered trademarks, thereby restricting various forms of "free-riding" behavior and ultimately providing incentives for businesses to improve product quality and accumulate goodwill value in their marks.[53] The latter may be appropriately expanded in geographical scope, particularly when the prior unregistered trademark constitutes a well-known trademark. Where a prior unregistered well-known trademark has acquired substantial recognition in most regions nationwide, granting nationwide anti-unfair competition protection would satisfy the principle of proportionality.

B Protection of Unregistered Trademarks and Determination of Competition Harm Elements

Should the protection of unregistered trademarks under the Anti-Unfair Competition Law be contingent upon actual harm suffered by the parties? This primarily concerns whether owners of unregistered trademarks with a certain degree of reputation used overseas can file unfair competition lawsuits to prevent bad-faith squatting within China. LIU Lijuan argues that unregistered trademarks used overseas, having no actual use in China, no established market presence, and no concrete market harm, should not fall under the anti-unfair competition law. Unfair competition remedy must be premised on the existence of harm. When foreign trademark owners cannot prove that their rights have been infringed domestically, they cannot claim injunctive relief solely based on the defendant's use of their overseas reputation.[54] In fact, the relationship between harm and the determination of unfair competition is not one of sufficient necessity. If an act harms the interests of businesses or consumers but does not disrupt the existing healthy competitive order, it can only be considered a general tort.[55] The essence of identifying unfair competition lies in the pursuit of transactional opportunities and the usurpation of competitive advantages, which serves as the demarcation between ordinary torts and unfair competition.[56] In other words, the anti-unfair competition law is not confined to actual harm but focuses on safeguarding a sound market competition mechanism, prioritizing the protection of undistorted competition. This

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[53] See ZHANG Peng, 我国未注册商标效力的体系化解读 (Systematic Interpretation on the Validity of Unregistered Trademarks in China), 5 法律科学(西北政法大学学报) (*Science of Law [Journal of Northwest University of Political Science and Law]*), 137–144 (2016).

[54] LIU Lijuan, 确立反假冒为商标保护的第二支柱——《反不正当竞争法》第 6 条之目的解析 (Establishing Anti-Passing-Off as the Second Pillar of Trademark Protection: A Purpose-Based Analysis of Article 6 of the Anti-Unfair Competition Law), 2 知识产权 (*Intellectual Property*), 56–66, 89 (2018).

[55] See SUN Wanzhong (ed.), 反不正当竞争法实用全书 (*Practical Compendium of the Anti-Unfair Competition Law*), 中国法律年鉴社 (The Press of China Law Yearbook), at 27 (1993).

[56] See KONG Xiangjun, 商标与不正当竞争法：原理和判例 (*Trademark and Unfair Competition Law: Principles and Cases*), 法律出版社 (Law Press · China), at 689 (2009).

aligns with the doctrine of behavioral propriety, which does not hinge on concrete harm.[57] The anti-unfair competition law essentially adheres to a dynamic competition paradigm. Under this framework, even if a party's conduct causes no actual harm to others, it should still be strictly regulated by competition law if it distorts or disrupts the market competition mechanism. The anti-unfair competition law protects not individual competitors but the competitive order itself.[58] Maliciously squatting trademarks that have gained a certain degree of reputation abroad undermines the legitimate process of trademark acquisition. Such acts, aimed at unlawfully excluding competitors from the market to secure unfair competitive advantages, clearly violate the fundamental objectives of fair competition. Moreover, it cannot be asserted that the foreign trademark owner suffers no harm whatsoever. If they intended to enter the domestic market; the preemptive registration effectively deprives them of the opportunity to compete fairly in that market; the loss of legitimate competitive prospects itself constitutes a form of harm.

In summary, as an integral part of economic law, the anti-unfair competition law fundamentally differs from private law, which prioritizes the protection of individual interests. It should place greater emphasis on the disruptive effects of conduct on socioeconomic order and the harm to public interests.[59] The anti-unfair competition law is a conduct-regulating law, with the legitimacy of behavior as its central concern. The judgment of whether competition is fair should not be weakened or replaced by an infringement-based analytical framework, such as assessing the protectability of the plaintiff's interests, the defendant's subjective state, or the damages suffered by the plaintiff.[60] Otherwise, it may erroneously lead to the misguided notion of IP rights in the anti-unfair competition law, deviating from its scientific understanding and hindering the effective regulation of specific unfair competition practices. The fact that parties may utilize the anti-unfair competition law to claim damages and the requirement that such protection must be premised on actual harm are two distinct issues and should not be conflated. Only by adhering to this principle can equal protection be provided to foreign owners of unregistered trademarks, enabling the IP systems, including the Anti-Unfair Competition Law, to serve as a model for systemic openness. This will comprehensively curb trademark squatting, ensure equal protection for domestic and foreign entities, and establish systemic conditions for China to cultivate a world-class, rule-of-law based international business environment.

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[57] See CHEN Genghua, 我国竞争法竞争观的理论反思与制度调适——以屏蔽视频广告案为例 (Theoretical Reflection and Institutional Adjustment of Competition View in China's Competition Law: A Case Study on Video Ad-Blocking), 6 现代法学 (*Modern Law Science*), 165–179 (2020).

[58] See KONG Xiangjun, 反不正当竞争法新论 (*A New Treatise on the Anti-Unfair Competition Law*), 人民法院出版社 (People's Court Press), at 63 (2001).

[59] See LI Jinfang, 反不正当竞争法对商标的保护及其完善 (Protection of Trademarks under the Anti-Unfair Competition Law and Its Improvement), 3 贵州工业大学学报(社会科学版) (*Journal of Guizhou University of Technology [Social Science Edition]*), 85–87 (2007).

[60] See KONG Xiangjun, 反不正当竞争法新原理(总论) (*New Principles of Anti-Unfair Competition Law [General Part]*), 法律出版社 (Law Press · China), at 46–47 (2019).

IV Conclusion

In summary, protection of unregistered trademarks under the Anti-Unfair Competition Law is both theoretically justified and institutionally necessary. However, achieving precise and scientifically grounded protection of unregistered trademarks requires systematic coordination between the Trademark Law and the Anti-Unfair Competition Law as well as the rational system reshaping and coherent interpretation of the latter. First, refining the general provisions of the Anti-Unfair Competition Law to enhance its openness, inclusiveness, and interpretive flexibility in protecting unregistered trademarks is pivotal to addressing this issue. Second, embedding the recognition of unregistered trademarks' property status into the Trademark Law and enhancing systemic coordination between the Anti-Unfair Competition Law and the Trademark Law is essential. Particular attention should be paid to linking the trademark invalidation mechanism with Article 1 of the Anti-Unfair Competition Law, thereby strengthening the liability for damages imposed on bad-faith trademark squatters. This approach will undoubtedly intensify the regulation of malicious trademark squatting and reinforce the legal protection framework against such acts. Finally, the boundaries of the Anti-Unfair Competition Law's application must be delineated to ensure impartiality in unregistered trademark protection. This requires balancing the maintenance of the trademark registration system and its established order with the effective remediation of legal loopholes through systematic interpretation. Only in this way can the law achieve value-aligned, nuanced protection for unregistered trademarks, harmonizing its necessity with rationality, comprehensiveness with restraint, and foresight with pertinence in an organic unity.