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Bruce Lee's Case: Intellectual Property vs. Free Access to Culture and Protection of Public Interest

1. Introduction

Bruce Lee is recognized nowadays as part of modern culture, as an icon with many connotations, one that it is relatively difficult to describe in one paper. Anyway, it is not the aim of this article to consider Bruce Lee's legacy as part of the cultural heritage of the 20th century. The aim of this paper is to focus on Bruce Lee not as a movie hero, but a superstar in a legal case.

This article analyses Bruce Lee's trademark infringement case. The aim of our study is to broaden current knowledge about the trademark law protection in the territory of the People's Republic of China as well as to shed new light on the significance of portrait right. Within the framework of these criteria, the following study focuses primarily on the background of Bruce Lee's case study and the new Chinese trademark law. Moreover, the article touches upon the conflict between the public interest and trademarks and hence tries to answer the question how to balance private owners' rights with public interest. It brings us to the final considerations on Bruce Lee as part of a modern culture belonging to the whole mankind. The key legal issues related to Bruce Lee's case concern intellectual property rights protection in China and some philosophical insights into the significance of Bruce Lee as a symbol. Finally, our research aims to find a solution to the challenging problem of reconciling the intellectual property rights protection mechanisms with common cultural heritage.

2. Bruce Lee's trademark case

As reported in press release and media statement, Bruce Lee's daughter Shannon Lee (李香凝), acting as a plaintiff for Bruce Lee Enterprises, LLC (李小龙有限责任公司), filed a lawsuit against Real Kungfu restaurant chain (真功夫) to the Shanghai Second Intermediate People's Court on 25 December 2019³. It should be pointed out that Real Kungfu restaurant

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³ 真功夫被诉回应称商标未被判过侵权 [Eng. *Zhen Kungfu was sued, saying that the trademark has not been convicted of infringement*], Xinhua, 27 December 2019, http://www.xinhuanet.com/fortune/2019-12/27/c_1125393186.htm, accessed on: 24 February 2020.

belongs to a Chinese fast food chain founded in 1990 and has been using the logo which resembles Bruce Lee's fighting pose since 2004⁴. Shannon Lee challenges the legitimacy of use of Bruce Lee's image as a trademark by Real Kungfu restaurant. As she is convinced that her father's image is being used in Real Kungfu's trademark without permission, she sued the above-mentioned company. She demands that Real Kungfu restaurant chain cease using Bruce Lee's image (including both marketing materials and signage), issue statements in media over 90 consecutive days clarifying that Real Kungfu has no connections with Bruce Lee, and pays plaintiff the compensation of CNY 210 million (USD 30 million) in economic losses and CNY 88,000 (USD 12,590) in reasonable legal expenses⁵. Contrary to Shannon Lee's statement, Real Kungfu explains that the relevant Chinese authorities in charge of trademark registration approved the use of its logo and that it has been used for over fifteen years without any objection. Real Kungfu stresses in its statement that:

The Real Kungfu chain's logo is one that the company had applied for and obtained after a rigorous screening by the national trademark agency, we have already been using this for 15 years. We are baffled that after so many years we are now being sued, and we are currently energetically studying the case and preparing our response⁶.

It is worth mentioning that Real Kungfu filed the trademark application in 2004, and after the preliminary validation in 2006 by the China Trademark Office (中国知识产权商标局) has successfully registered the trademark in 2008⁷. According to the China Trademark Office, Real Kungfu's trademark presents a martial artist dressed in a yellow top, which undoubtedly brings to mind the image of Bruce Lee in a yellow-and-black one-piece tracksuit known from the *Game of Death* movie. Even the posture, hands and fingers are almost the same as we see it in Bruce Lee's movies. Besides, there are other similar to Real Kungfu's trademarks registered and used across China⁸.

Taking into consideration the above-mentioned aspects, an analysis of the legal framework of trademark protection in China is carried out in order to provide some hypothetical scenarios of the Bruce Lee case.

3. Legal framework of trademark protection in China

Despite the fact that China is becoming an increasingly significant player in the global trade and commerce, there are still some challenges concerning protection of intellectual property which need to be faced. Different concerns related to the Chinese national intellectual property rights protection system are voiced by the individual rights holders and sovereign nations. Whereas an analysis of China's fulfilment of the World

⁴ Liao Shumin, *Bruce Lee's Daughter Sues China's Kungfu Catering Over Use of Father's Image*, Yicai Global, 26 December 2019, <https://yicai.global.com/news/bruce-lee-daughter-sues-china-kungfu-catering-over-use-of-father-image>, accessed on: 24 February 2020.

⁵ Zhang Rui, *Bruce Lee's daughter sues Chinese Kungfu restaurant*, China.org.cn, 26 December 2019, http://www.china.org.cn/arts/2019-2/26/content_75552555.htm, accessed on: 25 February 2020; A. Wining, *Bruce Lee Enterprises, LLC Sues Chinese Fast Food Chain for IP Infringement*, China IP Law Update, 27 December 2019, <https://www.chinaiplawupdate.com/2019/12/bruce-lee-enterprises-llc-sues-chinese-fast-food-chain-for-ip-infringement/>, accessed on: 25 February 2020.

⁶ *Bruce Lee's estate aims fist of fury at Chinese fast-food chain*, The Trademark Lawyer, 2 January 2020, <https://trademarklawyermagazine.com/bruce-lees-estate-aims-fist-of-fury-at-chinese-fast-food-chain/>, accessed on: 24 February 2020.

⁷ China Trademark Office webpage: <https://www.chinatradermarkoffice.com/searchtm>, accessed on: 24 February 2020.

⁸ A. Wining, *Bruce Lee...*

Trade Organization (WTO) commitments on intellectual property rights protection falls outside the scope of this paper, further considerations therefore involve trademark law protection in respect of private rights holders⁹.

3.1. Overview of trademark law in China

The new Trademark Law of the People's Republic of China (中华人民共和国商标法)¹⁰ was promulgated on 23 April 2019 and came into effect on 1 November 2019. The fundamental challenge of the trademark provisions in China concerns the number of trademarks registered every year (for example 7,371,000 applications for trademark registration in 2018). It is worth mentioning that the majority of these applications were filed without an objective purpose of classifying goods and services. On the contrary, they have been treated as a commodity, easy and relatively cheap to obtain in the People's Republic of China and thus bringing potential profit if sold in the future. Such an unreasonable trademark registration can lead to serious consequences for genuine and sincere trademark applicants trying to find an adequate space on the Chinese market¹¹. Consequently, it is inevitable that amendments to the Chinese trademark law will have a significant influence on both domestic and international businesses¹².

The latest amendment has further enhanced the trademark law provisions to tackle bad-faith trademark applications as well as toughened punishment for trademark infringements. As China pushes ahead with its market-based reforms in a very serious way, it is not surprising that it simultaneously tightens the intellectual property rights protection mechanisms within its territory¹³. The aim of these reforms is thus to bring improvements in the national intellectual property protection system and further strengthen the confidence of foreign companies doing business in China.

The most crucial amendment to the Chinese Trademark Law concerns rejection of bad-faith trademarks as soon as at the application stage. The new Article 4(1) is intended to curtail bad-faith trademark registrations, and it provides that:

Where any natural person, legal entity or other organization, in the course of his or its production or business operations, intends to acquire the exclusive right to use a trademark for his or its goods or services, an application should be filed with the Trademark Office for registration of the goods trademark. Applications for trademark registrations [made] in bad faith which are not intended for use shall be refused¹⁴.

⁹ B. Luo, S. Ghosh, *Protection and Enforcement of Well-Known Mark Rights in China: History, Theory, and Future*, "University of Wisconsin Legal Studies Research Paper" 2009/1072, <https://ssrn.com/abstract=1326398>, accessed on: 24 February 2020.

¹⁰ Trademark Law of the People's Republic of China of 23 August 1982. Available in Chinese at: <http://www.npc.gov.cn/npc/c30834/201905/dacf65eec798444e821a1e06a347f3ee.shtml>, accessed on: 30 October 2020.

¹¹ P. Ranjard, Huang Hui, *Fourth Revision of China's Trademark Law*, "World Trademark Review", 20 May 2019, <https://www.worldtrademarkreview.com/fourth-revision-chinas-trademark-law>, accessed on: 15 February 2020.

¹² J.A. Lee, T. Mehaffy, *Prior Rights in the Chinese Trademark Law*, "European Intellectual Property Review" 2015/37, p. 674; <https://ssrn.com/abstract=2659404>, accessed on: 15 February 2020.

¹³ P. Ranjard, Huang Hui, *Fourth revision...*

¹⁴ *Amendments to China's Trademark Law will be implemented on November 1, 2019*, CCPIT Patent and Trademark Law Office, 29 April 2019, <https://www.ccpit-patent.com.cn/node/6201>, accessed on: 27 October 2020. See also: 全国人民代表大会常务委员会关于修改《中华人民共和国建筑法》等八部法律的决 [Eng. *Decision of the Standing Committee of the National People's Congress on Amending Eight Laws including the Construction Law of the People's Republic of China*], Ministry of Justice of the People's Republic of China, 24 April 2020, http://www.chinalaw.gov.cn/Department/content/2019-04/24/592_233748.html, accessed on: 15 February 2020; Trademark Law of the People's Republic of China of 23 August 1982, as amended on 23 April 2019.

It is noteworthy that “first-to-file” system functions within the territory of the People’s Republic of China. In other words, such a system could lead to serious consequences with regard to malicious registrations of well-known trademarks by squatters. In order to eliminate this kind of practices, the new revised law provides that China Trademark Office has the right to refuse bad-faith trademark registration, even at the initial stage of application. Furthermore, Article 33 of the new Trademark Law stipulates that:

The prior right owner or any interested party may, within three months from the date of publication, file an opposition against an accepted and published application for registration of a trademark, if he finds that the application stands in violation of the provisions of Article 13, paragraph two or three, Article 15, Article 16, paragraph one, Article 30, Article 31, Article 32 of this law, or any person finds that the application stands in violation with the provisions of Article 4 (bad-faith application), Article 10 (signs which cannot be used as trademarks), Article 11 (signs which cannot be registered as trademarks), Article 12 (three dimensional trademarks registration), Article 19 paragraph four of this law. If no opposition is filed within the specified period, the trademark shall be registered, a certificate of registration shall be issued, and the registration shall be published¹⁵.

Therefore, this regulation can be regarded as a guarantee that the China Trademark Office will reject application filed with malicious intent after verification.

Finally, the Trademark Law contains a new provision providing for a possibility to invalidate a bad-faith trademark registration in special proceedings. Pursuant to Article 44 of the Trademark Law:

Where a registered trademark stands in violation of the provisions of Article 4, Article 10, Article 11, Article 12, Article 19 paragraph four of this Law, or the registration of a trademark has been acquired by fraud or any other unfair means, the Trademark Office shall declare the registered trademark invalid; any other organization or individual may request the Trademark Review and Adjudication Board to declare such a registered trademark invalid¹⁶.

Moreover, the China Trademark Office should notify parties in writing that a registered trademark has been declared invalid. However, a decision taken by the Trademark Office is not final. If a party is not satisfied with this decision, it is possible to apply to the Trademark Review and Adjudication Board for its review within 15 days of being notified of the decision. The Trademark Review and Adjudication Board issues a decision within nine months of the receipt of an application for review and notify the parties of the decision in writing. In special circumstances, it is possible to extend the time limit for issuing a decision (up to three months, subject to approval by the State Council Administration for Industry and Commerce). However, if a party still remains dissatisfied with the reviewed decision of the Trademark Review and Adjudication Board, said party may file a lawsuit to the Chinese people’s court within 30 days of the receipt of notice. This provision makes it possible to invalidate already registered malicious trademarks. Furthermore, this kind of action can be undertaken not only by organizations, but also individuals who have the right to file an invalidation request in respect of a trademark registered in bad faith.

Furthermore, Article 45 of the Trademark Law stipulates that if:

the registered trademark violates the provisions of Article 13, paragraphs 2 and 3, Article 15, Article 16, paragraph 1, Article 30, Article 31 and Article 32, the prior right holder or

¹⁵ *Amendments to China’s...*

¹⁶ *Amendments to China’s...*

interested party may request the Trademark Review and Adjudication Board to declare the registered trademark invalid within five years from the date of trademark registration. For malicious registration, the owner of a well-known trademark is not subject to a five-year time limit¹⁷.

In addition to the revised provisions, it is worth mentioning that the Supreme People's Court released a judicial interpretation related to the bad-faith trademark registrations, namely Provisions of the Supreme People's Court on Several Issues Concerning the Hearing of Administrative Cases Involving the Granting and Affirmation of Trademark Rights (最高人民法院关于审理商标授权确权行政案件若干问题的规定), adopted on 12 December 2016 and effective as of 1 March 2017. This interpretation sheds new light on determining whether the application was filed in bad faith. Article 25 of these Provisions stipulates that the court ruling whether the litigious trademark applicant registers another entity's well-known trademark in bad faith must determine not only the reputation of the cited trademark, the applicant's reasons for filing litigious trademark registration, but also the status of use of the litigious trademark. Moreover, "where the cited trademark has a high reputation and the applicant has no proper cause to justify his application of the litigious trademark, the court may presume that such registration constitutes bad-faith registration as provided in Article 45(1) of the Trademark Law"¹⁸. Therefore, according to judicial interpretation the court is entitled to examine the intention of the applicant as well as the status of trademark use, which obviously related to the situation existing after the filing date¹⁹.

Registration of trademarks requires many formalities that are legal procedures followed by the applicant to receive protection under trademark law. In the majority of legal systems, the registration of a trademark is confirmed in a document, the so-called registration certificate issued by the competent trademark authority. This kind of document comprises the name of the person or legal entity recognized as the owner of the registered trademark. In case of China, the China Trademark Office is competent to register all trademarks²⁰.

3.2. Intellectual property courts in China

In order to provide better protection of intellectual property rights, China decided to introduce new specialized courts. It should be pointed out that there were already some IP tribunals functioning within the people's courts, but the establishment of special IP courts was regarded as a guarantee of the rule of law in the governance of intellectual property rights in the People's Republic of China²¹. On 31 August 2014, the Standing Committee of the National People's Congress issued the Decision on the Establishment of Intellectual Property Rights Courts in Beijing, Shanghai and Guangzhou (全国人

¹⁷ *Amendments to China's...*

¹⁸ Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Administrative Cases Concerning Trademark Authorization and Confirmation, available in Chinese at: <http://www.court.gov.cn/zixun-xiangqing-34732.html>, accessed on: 15 February 2020.

¹⁹ J.A. Lee, Hui Huang, *Post-Application Evidence...*, p. 402.

²⁰ D.C.K. Chow, *Trademark Squatting and the Limits of the Famous Marks Doctrine in China*, "George Washington International Law Review" 2015/1, p. 9.

²¹ N. Lee, Zhang Liguo, *Specialised IP Courts in China – Judicial Governance of Intellectual Property Rights*, "IIC – International Review of Intellectual Property and Competition Law" 2017/58, p. 900.

民代表大会常务委员会关于在北京、上海、广州设立知识产权法院的决定)²², namely the Beijing Specialized IP Court (BIPC), the Shanghai Specialized IP Court (SIPC), and the Guangzhou Specialized IP Court (GIPC). There were actually three reasons to establish these courts: (1) almost 70% of IP cases had been examined by courts functioning in Beijing, Shanghai and Guangdong province, Jiangsu province and Zhejiang province; (2) these regions belong to the most developed parts of the country where the majority of high-tech companies do business; (3) these regions are particularly important from the perspective of foreign interactions. Thus, the establishment of IP courts in China reveals the so-called pro-innovation policy whereby attention is paid to the importance of IPR protection in the territory of the People's Republic of China²³.

Finally, in terms of the scope of jurisdiction, in comparison with the Shanghai and Guangzhou courts, Beijing IP Court has exclusive jurisdiction to examine administrative actions (including authorization and affirmation of intellectual property rights as well as compulsory licenses concerning patents, new plant varieties and layout designs of integrated circuits) taken by the department under the State Council²⁴.

3.3. Trademarks and the public interest

Another interesting approach concerns trademarks and the public interest. From this perspective, “the public has an interest in not being deceived... [and] being assured that the mark it associates with a product is not attached to goods of unknown origin and quality”²⁵. Therefore, the registered trademark should not in any way confuse the public. In other words, the Chinese Trademark Law aims to protect the public interest and hence not only guarantee benefits for consumers, but also increase effective competition²⁶. Actually, the Chinese Trademark Law stipulates in Article 10(7) that “a sign which is deceptive and easily misleads the public regarding the quality or origin of goods” cannot be used as a trademark. The above-mentioned provision directs our attention to the origin of trademarks. This entails that the registered trademark should not mislead the public opinion about its origin in any case.

According to the Chinese court's WeChat judgment, upon registration the trademark office should take into account the public interest and the market stability and order. Furthermore, the first instance court in WeChat's case ruled that consumers' perception should be understood as a public interest in trademark law²⁷. Therefore, even if the trademark right belongs to a private holder, it is not unlimited. From the

²² See: Decision of the Standing Committee of the National People's Congress on Establishing Intellectual Property Right Courts in Beijing, Shanghai and Guangzhou, available in Chinese at: <http://www.npc.gov.cn/npc/c12489/201409/9d38b14721f44b35817082f371afb76a.shtml>, accessed on: 30 October 2020.

²³ Jiang Jieru, *China Specialized IP Courts: Substance or Theatre? Part I*, “Les Nouvelles – Journal of the Licensing Executives Society” 2019/1, p. 9.

²⁴ D. Matthews, *Intellectual Property Courts in China*, in: S. Maniatis, I. Kokkoris, Wang Xiaoye (eds.), *Competition Law and Intellectual Property in China and the ASEAN*, Oxford 2019, pp. 76–100.

²⁵ See: R. Tushnet, *Intellectual Property as a Public Interest Mechanism*, in: R.C. Dreyfuss, J. Pila (eds.), *The Oxford Handbook of Intellectual Property Law*, Oxford 2018.

²⁶ H. Yan, *The China-Australia Free Trade Agreement and the Choice of Intellectual Property Interest Balance in the Two Countries*, in: L. Corbin, M. Perry (eds.), *Free Trade Agreements: Hegemony or Harmony*, Singapore 2019, p. 137.

²⁷ Deng Hongguang, 商标授权确权程序中的公共利益与不良影响 [Eng. *Public Interests and Adverse Effects in the Process of Trademark Authorization and Confirmation*], China.com.cn, 27 May 2015, http://www.china.com.cn/legal/2015-05/27/content_35673260.htm, accessed on: 10 April 2020.

Chinese perspective, it is much more important to protect the public interest rather than the rights of private holders²⁸.

One must note that Real Kungfu restaurant has already registered its trademark. We are of the opinion that this trademark resembles Bruce Lee's image and consequently the general public could easily identify Real Kungfu restaurant with Bruce Lee. However, apart from the trademark, Real Kungfu does not have anything in common with Bruce Lee.

3.4. Application of trademark law to Bruce Lee's case

The above-mentioned considerations provide a particularly useful lens through which to analyse Bruce Lee's case. Shannon Lee claims that the disputed trademark has been registered unlawfully and is used without consent of Bruce Lee's heirs. Nevertheless, it would be difficult to invalidate the disputed trademark after almost 15 years of its constant use. In fact, the new Trademark Law in China stipulates in Article 45 that "the prior right holder or interested party may request the Trademark Review and Adjudication Board to declare the registered trademark invalid". However, there are two reasons why it seems impossible to apply this article in Bruce Lee's case. Firstly, there is a list of circumstances (infringements) included in Article 45 of the Trademark Law that justifies its applicability. Bruce Lee's case does not involve any of these circumstances. Secondly, there is a time limit specified for requesting invalidation of the trademark: within five years of its registration. Neither condition is fulfilled in Bruce Lee's case, hence it seems impossible to invalidate the registered trademark under Article 45 of the Chinese Trademark Law. Although it would be difficult or almost impossible to invalidate the disputed trademark, Bruce Lee's heirs could invoke an infringement of portrait rights.

4. Portrait rights in China

4.1. Overview of portrait rights in China

While discussing the law related to the cause of action, Bruce Lee's case concerns an infringement of portrait rights rather than a trademark infringement, thus the General Principles of the Civil Law of the People's Republic of China should apply²⁹. Portrait is generally understood as a reproduction of somebody's true image by means of photography, sculpture or any other means. In other words, portrait represents an exclusive

²⁸ Jiang Shuo (ed.), 公共领域视野下的商标通用名称化问题 [Eng. *The problem of Generic Trademark from the Perspective of Public Domain*], 8 June 2020, http://www.iprchn.com/cipnews/news_content.aspx?newsId=123215, accessed on: 10 April 2020.

²⁹ It is noteworthy that the General Principles of the Civil Law of the People's Republic of China, promulgated in 1986 (中华人民共和国民法通则) still remain in force even after the promulgation of the General Provisions of the Civil Law of the People's Republic of China, effective on 1 October 2017 (中华人民共和国民法典) and will be binding until the adoption of all the subsequent sections of the new Chinese Civil Code. The principle of *lex posterior derogat priori* should apply in case of any discrepancies between two above-mentioned legal acts. The Chinese Civil Code will enter into force on 1 January 2021. See 民法通则与《民法通则》如何在衔接中共融 [Eng. *How to integrate the General Provisions of Civil Law and the General Principles of Civil Law*], China Court, 20 October 2017, <https://www.chinacourt.org/article/detail/2017/10/id/3024992.shtml>, accessed on: 15 March 2020; Zhai Tiantian, Yen-Chiang Chang, *The Contribution of China's Civil Law to Sustainable Development: Progress and Prospects*, "Sustainability" 2019/1, p. 294.

and graphical representation of the individual. Nowadays, modern technology provides many more opportunities to reproduce portraits of a person with high fidelity. Thus, a portrait often is recognized as somebody's identity³⁰.

Firstly, it is worthwhile to explain the notion of portrait under Chinese law. Portrait should be understood as a kind of identity of citizens. Therefore, portraits are closely connected with the external image and personality of specific citizens. There is no doubt that portrait right is essentially a personality right and thus belongs to the category of personal rights. According to Chinese law, the right of portrait is included in the General Principles of Civil Law and more specifically in the chapter on personal rights where civil rights are classified. Moreover, portrait rights are generally recognized as a spiritual (non-property) right³¹. On the one hand, personality rights in China refer to a bundle of rights that protect the innate personhood. This perspective concerns the jurisprudential level. On the other hand, with regard to the Supreme People's Court's provisions on the cause of action in civil cases, the personality rights should be understood as the right to a name, portrait rights, the right to protection of honour and reputation, privacy, marriage, personal liberty, and the right of personal dignity³².

Overall, the Supreme Court in China has previously issued judicial interpretations confirming that compensation for the personal rights should be spiritual in nature. However, in some cases this kind of infringement could also lead to property damage, for instance in celebrities' portrait cases. When their portrait is used in advertisements or for any other commercial purposes, the portrait rights can certainly produce significant economic interest. On the other hand, if the celebrities' portraits are used without their consent, they are deprived of economic interests. Inasmuch as economic interests can be measured, the infringement of personal rights can cause property damage³³.

Article 100 of the General Principles of the Civil Law provides that “[c]itizens shall enjoy the right of portrait. The use of a citizen's portrait for profits without his consent shall be prohibited”³⁴. Moreover, the law stipulates in Article 120 that:

If a citizen's right of personal name, portrait, reputation or honour is infringed upon, he shall have the right to demand that the infringement be stopped, his reputation be rehabilitated, the ill effects be eliminated and an apology be made; he may also demand compensation for losses. The above paragraph shall also apply to infringements upon a legal person's right of name, reputation or honour³⁵.

In other words, Chinese citizens enjoy portrait rights and any usage of their portrait for commercial purposes without their consent is strictly prohibited by law.

³⁰ Liu Xianian, *Sixty Years of the Protection and Development of Human Rights in China*, Portland 2015, p. 268.

³¹ Zhu Miaochun, 死亡人肖像权初探 – 鲁迅肖像权案评析 [Eng. *A Preliminary Study on the Portrait Right of the Deceased: An Analysis of Lu Xun's Portrait Right Case*], 《法学》 [Eng. “Law”] 1998/8, p. 42.

³² Chen Lei, *Codifying Personality Rights in China: Legislative Innovation or Scaremongering?*, in: K. Oliphant, Zhang Pinghu (eds.), *The Legal Protection of Personality Rights: Chinese and European Perspectives*, Leiden–Boston 2018, p. 104; Chen Lei, *Debating Personality Rights Protection in China: A Comparative Outlook*, “European Review of Private Law” 2018/1, p. 34. See: Notice of the Supreme People's Court on Issuing the Revised “Provisions on the Causes of Civil Cases (最高人民法院关于印发修改后的《民事案件案由规定》的通知) 20 November 2013, available in Chinese at: <http://dcqfy.chinacourt.gov.cn/article/detail/2013/11/id/1147886.shtml>, accessed on: 30 October 2020.

³³ Li Xiang, Jin Jigang, *Concise Chinese Tort Law*, Berlin–Heidelberg 2014, p. 133.

³⁴ General Principles of the Civil Law of the People's Republic of China of 12 April 1986. Available in English at: http://www.china.org.cn/china/LegislationsForm2001–2010/2011–02/11/content_21898337.htm, accessed on: 27 October 2020.

³⁵ General Principles of the Civil Law of the People's Republic of China of 12 April 1986.

Furthermore, the notion of “face” (面子) in Chinese culture is worth mentioning. Harold Chee said that:

Face is about one's self-respect and prestige, and crucially, about one's standing in the group. It is an essentially public phenomenon, though it has powerful (albeit secondary) emotional consequences. The emotions are about dignity and dignity's enemy, shame. This polarity runs deep in the lives of Chinese people³⁶.

Indeed, this statement is not particularly surprising given the fact that “concept of face” plays an important role in Chinese culture. Thus, the possibility of “losing face”, that is a public shame, can be seen as a very effective strategy for preventing the intellectual rights infringement in the People's Republic of China. Consequently, a public apology has been acknowledged to be one of the remedies for intellectual property rights infringement³⁷.

4.2. Portrait rights of the deceased

It is noteworthy that neither the General Principles of the Civil Law nor the General Provisions of the Civil Law stipulate whether portrait rights should also apply to the deceased. The Supreme People's Court of the People's Republic of China made it clear in the reply concerning violation of Lu Xun's (鲁迅) portrait right. It is widely considered to be the first lawsuit defending the portrait rights of deceased (死者肖像权) in China. According to the Supreme People's Court stance from 2000:

After the death of citizens, their portrait rights should be protected according to law. If any defacement, vilification or unauthorized use of the deceased's portrait constitutes infringement, the close relatives of the deceased have the right to bring a lawsuit to the people's court³⁸.

Consequently, the lawsuit filed by Zhou Haiying (周海婴), the son of Lu Xun, against Shaoxing Yuewang Jewellery and Gold Company (绍兴越王珠宝金行有限公司) in violation of his father's portrait rights met the conditions stipulated in Article 108 of the Chinese Civil Procedure Law, and hence the Shaoxing Intermediate People's Court should accept the case³⁹.

Until now, Chinese law has not provided for precise provisions on portrait rights of the deceased. It can thus be hypothesized that portrait rights belong to the legal language in China, nonetheless the legal concept still remains unclear. The portrait right should be understood as interests enjoyed by natural persons to their own portraits as well as the right to prevent infringement by others. In other words, portrait owners can freely dispose of their own portrait rights, but they have also the right to prevent others from using their portraits without their consent. According to the Chinese law, namely the General Principles of the Civil Law (Articles 100 and 120), in case of the infringement of citizens' portrait rights two elements are required: the first one involves

³⁶ H. Chee, C. West, *Myths about Doing Business in China*, New York 2004, p. 481.

³⁷ P.K. Yu, *No personality rights for pop stars in Hong Kong*, in: A.T. Kenyon, Ng-Loy Wee Loon, M. Richardson (eds.), *The Law of Reputation and Brands in the Asia Pacific*, New York 2012, p. 75.

³⁸ See: The Reply of the Supreme People's Court on whether the case of Zhou Haiying v. Shaoxing Yuewang Jewellery and Gold Company infringing upon Lu Xun's portrait right should be accepted (最高人民法院关于周海婴诉绍兴越王珠宝金行侵犯鲁迅肖像权一案应否受理的答复意见), available in Chinese at: http://www.qinquanfa.com/t_content.asp?Id=338, accessed on: 30 October 2020.

³⁹ The Reply of the Supreme People's Court...

using someone's portrait without their consent, and the second concerns the purpose of obtaining profits. Taking into consideration judgements of Chinese courts, these two conditions must be fulfilled at the same time, otherwise there is no infringement of the portrait right. Moreover, close relatives of the deceased have the right to bring a lawsuit against the infringer to a Chinese court, as they have some spiritual, emotional and economic interest related to their relatives. Certainly, unauthorized use of the portrait of a deceased without the consent of near relatives violates the law and should be prohibited⁴⁰.

Another case concerning Lu Xun's portrait rights is related to his biography 鲁迅像传 (*Biography of Lu Xun*), which was published in July 2013. Zhou Lingfei together with four other grandchildren brought a lawsuit against the author of Lu Xun's biography – Huang Qiaosheng, the publishing house and the seller. The plaintiffs claimed that this book, including 114 Lu Xun's photos, violated his portrait rights, and thereby their civil rights as his close relatives. They demanded that the defendants cease selling the book and compensate their losses by paying CNY 50.000 (the publishing house) and CNY 10.000 (the seller) to each plaintiff. During the public hearing, the Huangpu District Court in Shanghai had to decide whether the plaintiffs has the *locus standi* to bring a lawsuit, whether the defendants infringed Lu Xun's portrait rights, and whether the plaintiffs' civil rights were violated. This case is particularly interesting, because the defendant (Huang Qiaosheng) was convinced that the deceased did not have any portrait rights and that portrait rights could not be inherited as a personality right. In other words, the defendant stated that portrait rights were strictly related to the person and that they were not protected by law after death. On the contrary, plaintiffs believed that Lu Xun's portrait rights should be protected by law. Moreover, they were convinced that in case of any unauthorized use of the portrait with the purpose of obtaining profits, close relatives had the right to file a lawsuit in court. Pursuant to the Shanghai's District Court judgment, the portrait rights belong to a specific category of personality rights of the citizens. Besides, their interests embodied in portraits concern not only the right of reputation, but also the name of the citizen. Furthermore, the court pointed out, with regard to the General Principles of Civil Law in China, that civil rights of citizens begin at birth and continue until death, thus a deceased person is no longer the subject of civil rights. In other words, the deceased cannot be recognized as the holder of portrait rights. Although the deceased obviously does not enjoy the portrait rights, a portrait of the deceased objectively still exists and cannot die out. A reasonable explanation for the protection of the portrait of a deceased person may be that it has some specific spiritual and economic benefits for close relatives. Consequently, improper use of the deceased's portrait may reduce the social status of the close relatives and cause psychological pain. Inasmuch as the portrait of a deceased person has a certain commercial value, it cannot be used by others for profits. Thus, despite the fact that the deceased cannot be recognized as the holder of portrait rights, the portrait of a deceased person should still be protected by law. As a consequence, close relatives have the right to claim damages for use of a portrait without their consent⁴¹.

⁴⁰ See: Zhang Wenxin, 浅析我国审判实践中对死者肖像权的保护 [Eng. *On the Protection of the Portrait Right of Deceased in China's Judicial Practice*], China Court, 5 March 2012, <http://ggzy.chinacourt.gov.cn/public/detail.php?id=782>, accessed on: 28 February 2020.

⁴¹ Tang Zhengming, 《鲁迅像传》引发肖像权之争 [Eng.: "*Biography of Lu Xun*" triggers a dispute over portrait rights], 人民法院报 [Eng. "People's Court Newspaper"], 7 November 2014, http://rmfyb.chinacourt.org/paper/images/2014-11/07/03/2014110703_pdf.pdf, accessed on: 17 May 2020.

To sum up, both presented cases confirmed that the portrait of a deceased person is protected by law and that close relatives have the right to bring a lawsuit against the infringer to the Chinese people's court in order to claim damages for its unauthorized use.

4.3. Portrait rights: Michael Jordan's case

A previous infringement of portrait rights in trademarks concerns Michael Jordan's case⁴², that is, Qiaodan Sports company, which registered the trademark logo with jumping basketball player silhouette. Michael Jordan claims that this logo (similar to "Jumpman logo" used by Nike) infringes upon his portrait rights. He brought a lawsuit against Qiaodan Sports company requesting it to withdraw the trademark registered by the competent Chinese authority. The cause of action concerned the disputed trademark which infringed upon Michael Jordan's prior portrait right, that is, causes "damage to other persons with priority rights" under Article 31 of the Chinese Trademark Law. After eight years of court battle, the Supreme People's Court ruled that the disputed logo contained only a human-shaped silhouette and did not represent exactly the same body shape as Michael Jordan had. Moreover, the motion used in the trademark logo is a common motion in basketball. Therefore, the logo does not reveal any personal features and is not related to Michael Jordan. The Supreme People's Court in China also stated that portrait should obviously reflect the character of the person's appearance, i.e. the public could recognize the owner of the portrait. However, the disputed trademark neither contains personal features nor could be identifiable by the public, thus it cannot be protected by the portrait rights⁴³. In other words, despite the fact that the disputed trademark logo, that is, the basketball player silhouette, is very similar to the image of Michael Jordan in his leaping pose in photographs, it does not constitute sufficient evidence that this trademark would be recognized as Michael Jordan's image⁴⁴.

In conclusion, the Supreme People's Court in Michael Jordan's case enumerated the essential elements of the portrait rights. The central issue remains whether the disputed trademark was identified by the public as Michael Jordan. It must be acknowledged that a body-shaped silhouette alone does not reflect any personal features (appearance). Generally speaking, this entails that protection of portrait rights requires two elements: first, the portrait should reveal personal features of its holder, and second, the holder of the portrait should be identified and recognized by the public.

⁴² Michael Jordan has also filed a lawsuit in order to protect his prior right (right to name). See: Tao Kaiyuan, Wang Chuang, Xia Junli, Wang Yanfang, Du Weike, *Michael Jeffrey Jordan v. Trademark Review and Adjudication Board of the State Administration for Industry and Commerce of the People's Republic of China & Jordan Sports Co., Ltd. (Administrative Disputes over Trademark) – Right to One's Name May Constitute "Prior Right" Protected by Trademark Law*, in: Wang Chuang et al. (eds.), *Selected Cases from the Supreme People's Court of the People's Republic of China*, Vol. 1, Singapore 2020, pp. 17–32.

⁴³ Michael Jeffrey Jordan, *Retrial Administrative Judgment of China National Intellectual Property Administration (迈克尔·杰弗里·乔丹、国家知识产权局商标行政管理(商标)再审行政判决书)*, available in the China Judgments Online database, <https://wenshu.court.gov.cn/website/>, accessed on: 13 March 2020; 最高院再审改判撤销“乔丹及图”商标 [Eng. *The Supreme People's Court revises the judgment to revoke the trademark "Jordan and pictures"*], People.cn, 10 April 2020, <http://ip.people.com.cn/n1/2020/0410/c136655-31668680.html>, accessed on: 16 May 2020. See: Jin Haijun, *Market survey recently recognised as a persuasive tool to solve trademark disputes in China*, in: Kung-Chung Liu (ed.), *Annotated Leading Trademark Cases in Major Asian Jurisdictions*, New York 2020.

⁴⁴ Michael Jeffrey Jordan...

4.4. Bruce Lee's case in the context of portrait rights

Judgments in both Lu Xun's and Michael Jordan's cases are a particularly useful lens through which to analyse Bruce Lee's case. First of all, it is noteworthy that portrait rights are generally recognized in China as spiritual (non-property) rights. However, in case of celebrities, when their image is used in advertisements or for any other commercial purpose, infringements of portrait rights could also lead to financial damage. Bruce Lee is part of modern culture and a commonly known icon, thus there is no doubt that the use of his image would bring some profits for the user. Bruce Lee's case is more precisely centred on two legal issues: the first one concerns the right of Bruce Lee's heirs to bring a lawsuit against the infringer to the Chinese people's court, and the second one is the answer to the question whether the disputed trademark logo sufficiently reveals the features of Bruce Lee.

The above-mentioned deliberations about Lu Xun's case can be regarded as an answer to the first legal problem: who can file a lawsuit when portrait rights of a deceased person are infringed? Lu Xun's cases proves that the relatives have the right to prevent unauthorized use of the deceased's portrait. According to the Chinese Supreme People's Court reply issued in 2000 and the Shanghai District Court's judgment issued in 2013, the portrait of a dead person is therefore protected by law. Certainly, Bruce Lee's daughter, Shannon Lee, has the right to bring a lawsuit against the infringer of her father's portrait rights, nevertheless she should act as the plaintiff in the lawsuit.

The judgment in Michael Jordan's case is, in turn, useful in order to solve the second legal problem. Therefore, the Chinese court will have to decide whether the disputed trademark logo sufficiently resembles Bruce Lee. In other words, the people's court will judge whether the image presented in Real Kungfu logo is similar to Bruce Lee (namely his facial features, hairstyle, sportswear, fighting pose, etc.).

Taking into considerations all aforementioned aspects, we do believe that Bruce Lee's heirs have the right to sue Real Kungfu restaurant and request them to stop using Bruce Lee's image without their consent. Moreover, we are of the opinion that the disputed trademark logo reveals personal features of Bruce Lee and thus Bruce Lee's image could be efficiently protected by the portrait rights under Chinese law.

5. Last but not least: Argumentation from culture

Bruce Lee's case, described above, is also very interesting from one more point of view. If we accept Bruce Lee as an icon of modern culture, it means that "philosophically" we all own him. His legacy is part of our life and eventually he is part of the intangible cultural heritage of mankind. In other words, this philosophical insight refers to the heritage understood as a "common good" or the so-called "the common heritage of mankind". This perspective underlines the cosmopolitan character of Bruce Lee and thus enhances the desire to protect him as part of common heritage. Therefore, Bruce Lee becomes part of everyone's identity, regardless of time – past, present or future – and could not be regarded as the identity of a single group or person. In this sense, it is possible to identify Bruce Lee's icon with the "common heritage of mankind". This stance is based on the intergenerational equity as a reason for protection of cultural heritage. This approach insists that the cultural heritage should be safeguarded for future generations. The concept of cultural heritage understood as the "common

heritage of mankind” provides that future generations should have the right to participate in this heritage⁴⁵. The “common heritage of mankind” should then be understood as the heritage belonging to a collective entity. This entails that various nations of the world are entitled to exercise their rights to the common heritage⁴⁶. In other words, the argumentation from culture refers directly to the public interest. From this perspective, some restrictions upon private property rights related to trademarks are legitimate, because they are introduced for the sake of the public interest. Thus, the main aim of such restrictions is to guarantee proper preservation of intangible cultural heritage⁴⁷.

Argumentation from culture embraces the idea that Bruce Lee is an icon of modern culture belonging to the intangible heritage of mankind and on this basis the use of Bruce Lee's image is in the public interest. Moreover, Bruce Lee is thus treated as a public good and everyone can benefit from it.

This statement leads us to, as we can call it after Aristotle or Confucius, the golden mean. On the one hand, the daughter Shannon Lee is not the only one “owner” of her father's legacy. On the other hand, we think, Real Kungfu went two steps too far.

6. Hypothetical scenario in Bruce Lee's case

What are the hypothetical scenarios in Bruce Lee's case? We are of opinion that Real Kungfu restaurant went two steps too far. Firstly, they have registered the trademark of its logo and it has been approved by the relevant Chinese authorities – and this logo is based on the image of Bruce Lee, who perhaps would not desire to be a figure like Ronald Macdonald for McDonald's or Harland Sanders for KFC. Furthermore, Real Kungfu restaurant has already registered its trademark that has been approved by the Chinese authorities. We are of the opinion that this trademark resembles Bruce Lee's image and thus the public could certainly identify Real Kungfu restaurants with Bruce Lee. However, apart from this trademark, Real Kungfu does not have anything in common with Bruce Lee.

Secondly and finally, we do accept that nowadays Bruce Lee is part of common culture, and hence he can be admired and “owned” by all of us. Nonetheless, Real Kungfu restaurants use his image for a commercial purpose, to make profit. Therefore, for this kind of measures, Real Kungfu should probably cooperate with Bruce Lee's heirs – namely with Shannon Lee and, additionally, Bruce Lee Enterprises, LLC. In this case we find that both conditions are met: first, someone's portrait was used without consent, and second, profits are obtained. However, it is difficult to calculate how much Real Kungfu restaurants earn because they use Bruce Lee's image, and how much because they offer good food, if it is so.

To sum up, in this case, Shannon Lee, as the heiress, has the right to bring a lawsuit against the infringer to the Chinese court, because she has a spiritual, emotional, and economic interest related to her father. Furthermore, unauthorized use of the portrait of the deceased without consent of near relatives violates the law and should be prohibited. Hence, the court will have to decide if it was a bad-faith trademark registration, or a sign which cannot be used as a trademark, or a sign which should not be registered

⁴⁵ L. Lixinski, *Intangible Cultural Heritage in International Law*, Oxford 2013, p. 151.

⁴⁶ R.P. Arnold, *The Common Heritage of Mankind as a Legal Concept*, “The International Lawyer” 1975/1, p. 154.

⁴⁷ F. Lenzerini, *Property Protection and Protection of Cultural Heritage*, in: S.W. Schill (ed.), *International Investment Law and Comparative Public Law*, Oxford 2010, pp. 564–567.

as a trademark, or maybe it will find some other objections. On the other hand, this is a case, perhaps, where the right to a name, portrait, reputation or honour is infringed upon, thus the heirs have the right to demand that the infringement be stopped, his reputation be rehabilitated, the ill effects be eliminated and an apology be made. As it was mentioned above, citizens in China “shall enjoy the right of portrait. The use of a citizen’s portrait for profits without his consent shall be prohibited”. Nonetheless, as we all know, Bruce Lee neither is a citizen of the People’s Republic of China, nor is alive. Anyway, this case is very interesting in itself and, moreover, could set a precedent, a model for future decisions.

Bruce Lee’s Case: Intellectual Property vs. Free Access to Culture and Protection of Public Interest

Abstract: This article provides a comprehensive analysis of Bruce Lee’s case by presenting the intellectual property rights mechanisms in the People’s Republic of China. The aim of this paper is to bring attention to the trademark law as well as to shed new light on infringements of personality rights, in particular portrait rights, in trademarks. This begs the question as to what kind of legal action should be undertaken by Bruce Lee’s heiress to protect her rights. Moreover, the article touches upon the conflict between the public interest and trademarks and tries to answer the question how to balance private holders’ rights with the public interest. In order to provide some hypothetical scenarios, the study focuses primarily on Bruce Lee’s case background and the new amendments to trademark law in China, bringing the authors to final deliberations on Bruce Lee as part of modern culture belonging to mankind as a whole. Therefore, our research aims to find a solution to the challenging problem of reconciling intellectual property rights protection mechanisms with the common cultural heritage.

Keywords: Bruce Lee’s case, intellectual property infringement, trademark law, Chinese law, public interest, cultural heritage

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