
**2018 BFSU-WANHUIDA INTELLECTUAL PROPERTY
MOOT COURT COMPETITION
BEFORE BEIJING INTELLECTUAL PROPERTY COURT**

P NETWORK COMPANY

(PETITIONER)

v.

S NETWORK COMPANY

(RESPONDENT)

RESPONDENT

S NETWORK COMPANY

MEMORANDUM FOR THE RESPONDENT

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RESPONDENT CLAIMS

The Respondent hereby respectfully requests this Court to sustain the judgment of First Trial, particularly judge and declare:

- 1. The Petitioner's unauthorized rebroadcasting constituted a copyright infringement under *the Copyright Law of the PRC*.**
 - (1) The Sports Tournament Screens qualified as a work satisfying the originality test;
 - (2) The Petitioner infringed the Respondent's right of broadcasting, the right to network dissemination of information and alternatively other copyrights upon the Sports Tournament Screens under Article 10 of *the Copyright Law of the PRC*.

- 2. Alternatively, the Petitioner's unauthorized rebroadcasting constituted an infringement of neighboring rights under *the Copyright Law of the PRC*.**
 - (1) The Petitioner infringed the neighboring right enjoyed by video recordings producers under Article 42 of *the Copyright Law of the PRC*; or
 - (2) The Petitioner infringed the neighboring right enjoyed by broadcasting organizations under Article 45 of *the Copyright Law of the PRC*.

- 3. Alternatively, the Petitioner's unauthorized rebroadcasting constituted an unfair competition under *the Anti-Unfair Competition Law of the PRC*.**
 - (1) The Petitioner committed unfair competition practices which were prohibited under Article 2 of *the Anti-Unfair Competition Law of the PRC*;
 - (2) The Petitioner committed false and misleading propaganda which was prohibited under Article 8 of *the Anti-Unfair Competition Law of the PRC*.

STATEMENT OF FACTS

*Based on the facts (the “**Problem**” or “**Case**”) agreed by the P Network Company (the “**Petitioner**”) and the S Network Company (the “**Respondent**”) (collectively referred to the “**Parties**”) in 2018 BFSU – WANHUIDA IP Moot Court Case, the Respondent understands the Problem as follows.*

Copyright Ownership of the Sports Tournament Screens

Chinese Football Association (the “**CFA**”) was the original copyright owner of China Football Association Super League (the “**the Super League**”), the football tournaments where the dispute between the Parties arose from in the proceedings. The copyright ownership enjoyed by CFA was declared by the FIFA Constitution and Charter of Chinese Football Association (the “**CFA Charter**”).

Exclusive License Agreement between CFA and the Respondent

Acting as the agent of CFA, China Super League Limited Company (the “**Super League Company**” or the “**Licensor**”) and the Respondent entered into a copyright license agreement in March 2012 and a Power of Attorney issued in December 2012 (collectively referred to the “**Exclusive License Agreement**”), whereby the Respondent was duly authorized as the Licensee to exclusively rebroadcast the Super League from 1 March 2012 to 1 March 2014.

According to the terms of Exclusive License Agreement, during the contract period, the Respondent was entitled to [i] exclusive rights to broadcast the Super League’s videos on the portal website of S Company (*inter alia* live broadcasting, recording, on demand, and extension); and [ii] exclusive rights to rebroadcast, communicate and play all the Super League videos on the portal website.

For the sake of impeding potential unfair competition against the exclusive rights enjoyed by the Respondent, Exclusive License Agreement clearly identified the Petitioner and other portal websites as the major competitors against the Respondent and specifically prohibited these competitors from conducting live or video broadcast and making misleading and false propaganda of the Super League.

Unauthorized Use of the Sports Tournament Screens by the Petitioner

Dong’ao Sports Management Company (the “**Dong’ao Company**”) was limitedly authorized by Super League Company to broadcast the Sports Tournament Screens through television distribution and non-portal network. Dong’ao Company authorized L Network Company (the “**L Company**”) the 2013-2014 Season’s Communication rights of the Super League in L Company’s portal website L Network, and PC clients.

Without obtaining any form of authorization from CFA or Super League Company, the Petitioner labeled and provided videos of the Super League in the prominent position of its own portal website P Network in August 2013. Moreover, the Petitioner labeled the website with the words “*video broadcasting cooperation – P Network*

interactive broadcasting room”.

Decision Rendered by the Court of First Instance in Favor of the Respondent

The Respondent (the original Claimant) sued the Petitioner (the original Respondent) on the basis of copyright infringement for the unauthorized rebroadcasting of the Super League. Following due trial and deliberation, the Court of First Instance (the “**the First Trial**”) rendered the decision in favor of the Respondent (the “**Judgment of First Trial**”). Below are the key observations made by the First Trial.

- *The First Trial recognized the Sports Tournament Screens as a work.*

The First Trial observed that the disputed viewing screens of sports tournament (the “**Sports Tournament Screens**”) qualified as a work because different location settings, screen selections, arrangements and cuttings could lead to different final screens. The originality test for works was satisfied through the selections of the recording lens and orchestration, and thus fell within the scope of creative work.

- *The First Trial recognized CFA as the copyright owner of the work.*

The First Trial recognized CFA as the copyright owner of the Sports Tournament Screens by reference to the FIFA Constitution and CFA Charter. The Respondent notes that although the First Trial did not explicitly declare CFA as the copyright owner, it virtually confirmed that the terms of the FIFA Constitution and CFA Charter were legally valid and enforceable, which acknowledged the copyright ownership enjoyed by CFA.

- *The First Trial held that the joint copyright infringement by the Petitioner and L Company had been well established.*

The First Trial held that the Petitioner provided Sports Tournament Screens to network users through unauthorized collaboration with L Company by using jump links. The Petitioner’s rebroadcasting infringed the exclusive broadcasting right of the Respondent.

- *The First Trial ruled that the Petitioner shall cease the infringement, make a statement to eliminate the adverse effects and compensate the economic losses to S Company.*

The First Trial ruled and adjudicated that the Petitioner shall cease to broadcast the Super League from 1 March 2012 to 1 March 2014, make a public statement on the Respondent’ homepage for seven consecutive days to eliminate the adverse effects and compensate for the economic losses incurred.

Appeal lodged by the Petitioner in Beijing Intellectual Property Court

The Respondent refused to accept the Judgment of First Trial and appealed to Beijing Intellectual Property Court (the “**this Court**”), petitioning this Court to revoke the judgment of the First Trial and amend the judgment to non-infringement.

PLEADINGS AND ARGUMENTS

Notes: Unless otherwise defined in the Pleadings and Arguments, all defined terms have the meaning given to them in Statement of Facts.

I. THE SPORTS TOURNAMENT SCREENS QUALIFIED AS A WORK ENJOYING THE COPYRIGHT PROTECTION AND THUS THE PETITIONER'S UNAUTHORIZED REBROADCASTING OF THE SPORTS TOURNAMENT SCREENS CONSTITUTED A COPYRIGHT INFRINGEMENT.

The Petitioner infringed the Respondent's right of exclusive use upon the Sports Tournament Screens under *the Copyright Law of the PRC* (the "**Copyright Law**") because [A] the Respondent enjoyed copyright protection for the Sports Tournament Screens qualified as a cinematographic work; and [B] the Petitioner's unauthorized rebroadcasting infringed Respondent's copyrights under Article 10 of *Copyright Law*.

A. The Respondent's right of exclusive use upon the Sports Tournament Screens acquired from Exclusive License Agreement was protected under *the Copyright Law of the PRC*.

The Respondent's right of exclusive use upon the Sports Tournament Screens were protected because [1] Exclusive License Agreement between CFA and the Respondent was valid; and [2] the Sports Tournament Screens qualified as a cinematographic work.

1. Exclusive License Agreement between CFA and the Respondent was valid because CFA was the copyright owner of the Sports Tournament Screens.

Firstly, the copyright ownership self-declare by the Charter of the organizers of sports tournaments was recognized by a series of domestic judicial decisions, such as *Douyu v. Yaoyu Case*,¹ *Olympic Sports v. Quan Toodou Case*² and *Tianying Jiuzhou v. Sina Case*.³ **Secondly**, it is the widely-accepted commercial practice that the organizers of sports tournaments commissioned the photographic groups to shoot the Sports Tournament Screens accompanied with the TV signals,⁴ and then acquired the

¹ *Guangzhou Douyu Network Technology Co., Ltd. v. Shanghai Yaoyu Culture Media Co., Ltd. Case*, Shanghai Pudong People's Court, 2015. (the "**Douyu v. Yaoyu Case**")

² *China Sports Media Co., Ltd. v. Shanghai Quan Toodou Cultural Communication Co., Ltd. Case*, Shanghai First Intermediate People's Court, 2013. (the "**Sports Media v. Quan Toodou Case**")

³ *Beijing TianYing Jiuzhou Network Technology Co., Ltd. v. Beijing Sina Internet Information Service Co., Ltd. Case*, Beijing Intellectual Property Court, 2018. (the "**Tianying Jiuzhou v. Sina Case**")

⁴ *Football Association Premier League Co., Ltd. v. British Telecommunications PIC and Others Case*, The High Court of England and Wales, 2017; Wang Hao, *Online Live Broadcasting Right of Sports Games: The Case of Sina Litigating Ifeng*, 30 Journal of TUS, p.514 (2015); Zhang Yuchao,

transferred copyright from the photographers, through the explicit or implicit contractual arrangements.⁵

In the present Case, CFA is the organizer of the Super League and acquired the copyright ownership from the commissioned C TV Station,⁶ based on self-declared CFA Charter and established commercial practice.⁷ Therefore, CFA was the legitimate copyright owner of the Sports Tournaments Screens and thus the signed Exclusive License Agreement was valid.

2. Exclusive License Agreement conferred the Respondent copyright protection because the Sports Tournament Screens qualified as a cinematographic work satisfying the originality test.

Pursuant to *Guidance for Hearing Copyright Infringement Cases* newly issued by Beijing Higher People's Court in April 2018, the Sports Tournament Screens meeting the imperative requirements for cinematographic works shall enjoy the copyright protection.⁸ "Cinematographic works" refers to a series of created images with originality that can be recorded on the materials.⁹ The fixation test was duly satisfied in Sports Tournament Screens¹⁰ because the viewing screens are fixed accompanied with the transmitted signals.¹¹ Therefore, the originality will be determinative.¹²

In the present Case, the Sports Tournament Screens satisfied the originality test as [a] required under the national legislations and [b] evolved by international practices.

- a. *The Sports Tournament Screens satisfied the originality test as required by Article 2 of the Regulation for Implementation of the Copyright Law of the PRC.*

Legal Nature and Attribution of Sports Broadcasting Right, 47 Journal of Wuhan Institute of Physical Education, p.42 (2013).

⁵ Matthew Tsai, *Copyright and Live Streaming of Sports Broadcasting*, 31 International Review of Law, Computers and Technology, p.268 (2017).

⁶ *Problem*, ¶7.

⁷ *Id.*, ¶2.

⁸ Beijing Higher People's Court, *Guidance for Hearing Copyright Infringement Cases (2018)*, Article 2.13. (the "**Copyright Infringement Guidance**")

⁹ State Council of the PRC, *Regulations for the Implementation of the Copyright Law of the People's Republic of China (2013)*, Article 2, 4(11). (the "**Regulations for Copyright Law**")

¹⁰ *CCTV International Network Co., Ltd. v. Shanghai Joysports Information Technology Co., Ltd. Case*, Shanghai Minhang People's Court, 2016; *CCTV International Network Co., Ltd. v. 21CN Information Network Co., Ltd. Case*, Guangzhou Intermediate People's Court, 2010. (the "**CCTV v. 21CN Case**")

¹¹ *CCTV International Network Co., Ltd. v. Beijing Baofeng Group Co., Ltd. Case*, Beijing Intellectual Property Court, 2018. (the "**CCTV v. Baofeng Case**")

¹² Supreme People's Court of the PRC, *The Interpretation of the Supreme People's Court of the PRC concerning the Application of Laws in the Trial of Civil Disputes over Copyright (2002)*, Article 15.

Firstly, previous judicial practices did not set a high threshold for originality of work¹³. The originality of the work does not require the high literary, artistic or scientific value, but only requires it is the individual creation without the plagiarism.¹⁴ Beijing Higher People's Court has introduced creativity as a benchmark for the originality test and explained the creativity as whether a work reflects the author's selections and arrangements.¹⁵

Secondly, previous judicial practices never denied the possibility that the Sports Tournament Screens could qualify as work.¹⁶ Although there existed a few cases denying the originality of sports tournament screen solely based on the surrounding circumstances of a given case,¹⁷ this Court still left the space for the Sports Tournament Screens to qualify as work if it satisfied the originality test.¹⁸

In the present Case, the Sports Tournament Screens satisfies the basic requirements of originality. While reiterating the insightful observations regarding originality made by the First Trial, the Respondent submits that the Sports Tournament Screens stemmed from a series of value-added activities of the photographers, editors and directors. Recording positions chosen by photographers, editing techniques used by editors and scenes selected by directors¹⁹ determine the way in which a tournament is presented to the audience.²⁰

b. *The Sports Tournament Screens satisfied the originality test as evolved by international practices.*

The recognition of originality in the Sports Tournament Screens is consistent with international practices. The United States protected the creativity in the Sports Tournament Screens²¹ to protect the special techniques of sports broadcasting-instant replays and split screen shots.²² Moreover, a similar approach has been adopted by

¹³ *LEGO Corporation v. Guangdong Xiao Bai Long Animation Toys Industrial Co., Ltd. and Beijing Huayuan Xidan Shopping Center Co., Ltd. Case*, Beijing Higher People's Court, 2011.

¹⁴ Beijing Higher People's Court, *Answers to Several Issues concerning the Application of Law for Hearing the Copyright Civil Disputes (1996)*, Answer 1.

¹⁵ *Copyright Infringement Guidance*, Article 2.2.

¹⁶ *Id.*, Article 2.13.

¹⁷ *CCTV v. Baofeng Case; CCTV International Network Co., Ltd. v. China City United Net TV Co., Ltd. Case*, Shenzhen Futian People's Court, 2015. (the "**CCTV v. China City TV Case**")

¹⁸ *Tianying Jiuzhou v. Sina Case*.

¹⁹ *Beijing Sina Internet Information Service Co., Ltd. v. Beijing TianYing Jiuzhou Network Technology Co., Ltd. Case*, Beijing Chaoyang People's Court, 2014.

²⁰ *Guangzhou Huaduo Network Technology Co., Ltd. v. Guangzhou NetEase Computer Systems Co., Ltd. Case*, Guangzhou Intellectual Property Court, 2015.

²¹ *National Association of Broadcasters v. Copyright Royalty Tribunal Case*, 675 F.2d 367 (D.C. Cir. 1982); *Feist Publications Inc. v. Rural Telephone Service Co., Ltd. Case*, 499 U.S.340 (1991); *Live Nation Motorsports Inc. v. Davis Case*, 2006 W.L. 3616983 (N. D. Tex. 2006).

²² *National Football League Properties v. Wichita Falls Sportswear Inc. Case*, 542 F. Supp. 651

the European Union²³ for the purpose of safeguarding the investment in sports events and rewarding authors' contributions to the sports culture.²⁴

B. The Respondent's related copyrights upon the Sports Tournament Screens were infringed by the Petitioner's unauthorized rebroadcasting of the Super League in August 2013.

The Petitioner's [1] unauthorized rebroadcasting [2] infringed the Respondent's related copyrights under Article 10 of *the Copyright Law of the PRC*, and [3] the Petitioner's infringement cannot be exempted by technology neutrality principle.

1. The Petitioner's rebroadcasting was unauthorized.

The Petitioner did not obtain any valid authorization from relevant parties in the present Case. Since there was no copyright agreement,²⁵ C TV Station did not authorize the Petitioner. As a listed excluded competitor,²⁶ the Petitioner was not authorized by Super League Company and the Respondent. Furthermore, the authorization the Petitioner gained from L Company is the *ultra vires* authorization, because L Company's right was limited to its own website²⁷ and cannot authorize the third parties.²⁸ Collectively, the Petitioner conducted the unauthorized rebroadcasting.

2. The Petitioner's unauthorized rebroadcasting infringed the Respondent's related copyrights under Article 10 of *the Copyright Law of the PRC*.

The unauthorized rebroadcasting infringed the Respondent's [a] the right of broadcasting under Article 10(11) and [b] the right to network dissemination of information under Article 10(12). [c] Even if the above-mentioned articles are inapplicable, Article 10(17) protecting Respondent's other copyrights should be finally applied.

a. *The Petitioner's unauthorized rebroadcasting infringed the Respondent's right of broadcasting under Article 10(11) of the Copyright Law of the PRC.*

(W.D. Wash. 1982); *National Basketball Association and NBA Properties Inc. v. Motorola Inc. Case*, 105 F.3d 841 (2nd Cir. 1997).

²³ *Football Association Premier League Co., Ltd. and Others v. QC Leisure and Others Case*, European Court of Justice, C-403/08, 2011.

²⁴ Chris Davies, *Copyright and Sport Broadcasting in Australia and England*, 23 *Sports Law Journal*, p.4 (2015); Asser International Sports Law Center-University of Amsterdam, *Study on Sports Organizers' Rights in the EU*, 2014.

²⁵ *Problem*, ¶7.

²⁶ *Id.*, ¶4.

²⁷ *Id.*, ¶5.

²⁸ *Id.*, ¶15.

The rebroadcast constituting copyright infringement under Article 10(11) should satisfy two elements that [i] the initial broadcast by wireless means and [ii] the later rebroadcast by wired or wireless means.²⁹ Moreover, in *CCTV v. Baidu and Sohu Case* and *Tianying Jiuzhou v. Sina Case*³⁰, the Court recognized that the online live rebroadcasting could be regarded as the later rebroadcast by wired means under Article 10(11),³¹ which was also supported by latest amendment to *Copyright Law*.³²

In the present Case, with the evidence of C TV logo appeared on the broadcast pages,³³ it can be proved that the Sports Tournament Screens were initially broadcast by C TV Station by wireless means and then were rebroadcast by the Petitioner by wired means,³⁴ thus satisfying the requirements to apply Article 10(11).

- b. *Alternatively, the Petitioner's unauthorized rebroadcasting infringed the Respondent's right to network dissemination of information under Article 10(12) of the Copyright Law of the PRC.*

The right to network dissemination of information under Article 10(12) of *Copyright Law* refers to the right to provide the public with access to works at the time and place selected by them.³⁵ The interactive character of the right requires works to be accessible to the public no merely at a given time.³⁶

In the present Case, the Petitioner infringed such right under Article 10(12) of *Copyright Law* because it provided the Sports Tournament Screens in its website labeled “[...] *Interactive Broadcasting Room*”³⁷ and there was no evidence that they were accessible only at a given time.³⁸

- c. *Even if Article 10(11) or Article 10(12) was inapplicable, the Petitioner's unauthorized rebroadcasting infringed the Respondent's other copyrights under Article 10(17) of the*

²⁹ *The Copyright Law of the People's Republic of China (2010)*, Article 10(11). (the “**Copyright Law**”)

³⁰ *Tianying Jiuzhou v. Sina Case*.

³¹ *CCTV International Network Co., Ltd. v. Beijing Baidu Netcom Technology Co., Ltd. and Beijing Sohu Internet Information Service Co., Ltd. Case*, Beijing First Intermediate Court, 2013. (the “**CCTV v. Baidu and Sohu Case**”)

³² State Council of the PRC, *The Third Revised Draft for Copyright Law of the PRC (2014)*, Article 13(6). [Previous Article 10(11) was revised to be Article 13(6): “Right of broadcasting, that is, the right to broadcast or rebroadcast a work in a wireless or wired manner, or to communication the work to the public through the technical equipment.”]

³³ *Problem*, ¶11.

³⁴ *Id.*, ¶6, 7.

³⁵ *Copyright Law*, Article 10(12).

³⁶ *Tianying Jiuzhou v. Sina Case*.

³⁷ *Problem*, ¶14.

³⁸ *Id.*, ¶6.

Copyright Law of the PRC.

Beijing Higher People's Court supported that Article 10(17) of *Copyright Law* can regulate the unauthorized online live rebroadcasting,³⁹ and further provided two elements to be considered:⁴⁰ [i] whether the continued infringement would prejudice the normal exercise of copyrights by copyright owners;⁴¹ and [ii] whether the continued infringement would lead to a significant imbalance of interests between the copyright owners, the disseminator and the public.⁴²

In the present Case, **firstly**, the Petitioner's unauthorized rebroadcasting made the communication of the work out of the control and expectation of the copyright owners, which was once determined as prejudicial to the exercise of copyrights by Beijing Intellectual Property Court.⁴³ **Secondly**, the Respondent paid huge investments but suffered the unbalanced loss of the presupposed commercial returns incurred out of copyright infringement.⁴⁴ Moreover, the continued infringement without any remedies under *Copyright Law* will frustrate the development in the whole sports industry.⁴⁵ Therefore, it is respectfully submitted that Article 10(17) of *Copyright Law* should be applied for the purpose of neutralizing imbalanced interests between Parties and protecting the business of online live rebroadcasting.

3. The Petitioner's infringement cannot be exempted by technology neutrality principle.

The technology neutrality principle is accepted as an exemption from the copyright infringement for network service providers in legislation⁴⁶ and related judicial interpretations.⁴⁷ Technology neutrality principle requires [i] such technology is to provide the network service instead of substantial content, and [ii] such use does not

³⁹ Beijing Higher People's Court, *Guidance for Hearing the Internet-Related Intellectual Property Cases (2016)*, Article 15.

⁴⁰ *Copyright Infringement Guidance*, Article 5.18.

⁴¹ *CCTV v. Baidu and Sohu Case; CCTV International Network Co., Ltd. v. Huashu Media and Network Co., Ltd. Case*, Beijing Haidian People's Court, 2015.

⁴² *Hunantv.com Interactive Entertainment Media Co., Ltd. v. Shenzhen Taiza Software Technology Co., Ltd. Case*, Hunan Changsha Intermediate People's Court, 2015.

⁴³ *Beijing Yilian Weida Technology Co., Ltd. v. Shenzhen Tencent Computer Systems Co. Ltd. Case*, Beijing Intellectual Property Court, 2016. (the "**Yilian Weida v. Tencent Case**")

⁴⁴ *Sports Media v. Quan Toodou Case*.

⁴⁵ Lu Haijun, *Discussion on Legal Status of Sports Events Programs*, 2 Social Science, p.103 (2015).

⁴⁶ State Council of the PRC, *Regulations on Protection of the Right to Network Dissemination of Information (2013)*, Article 21, 23. (the "**Regulations for Network Dissemination**")

⁴⁷ Supreme People's Court of the PRC, *Provisions of the Supreme People's Court of the PRC on Several Issues concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right to Network Dissemination of Information (2012)*, Article 6. (the "**Interpretations for Network Dissemination**")

have any malicious intention to cause possible damages upon other parties.⁴⁸

Firstly, consistent with the First Trial,⁴⁹ P Company did not use jump link to facilitate the network service but used it to provide relevant videos without authorization.⁵⁰

Secondly, the Petitioner, as the major competitor excluded in Exclusive License Agreement,⁵¹ should be able to foresee possible damages to the Respondent as an exclusive right owner.⁵² Therefore, such principle cannot be invoked for exemption.

II. EVEN IF THE SPORTS TOURNAMENT SCREENS DID NOT QUALIFY AS A WORK, THE PETITIONER STILL INFRINGED THE RESPONDENT'S NEIGHBORING RIGHT UNDER ARTICLE 42 OR ARTICLE 45(1) OF THE COPYRIGHT LAW OF THE PRC.

Even if the Sports Tournament Screens did not qualify as a work, the Petitioner still infringed the neighboring right enjoyed by the Respondent [A] as a video recording producer or [B] as a broadcasting organization.

A. The Petitioner infringed the neighboring right enjoyed by the Respondent as a video recordings producer under Article 42 of the Copyright Law of the PRC.

The Sports Tournament Screens, as a series of connected images,⁵³ alternatively qualifies as video recordings enjoying the protections of neighboring rights.⁵⁴ And the Respondent gained the exclusive rebroadcasting right and litigation right for video recordings producer through Exclusive License Agreement.⁵⁵

The right to network dissemination of information upon video recordings regulates both interactive and non-interactive communication,⁵⁶ because such right for video recordings under Article 42 does not specify the limitation of interactive character,⁵⁷ which was reiterated by related regulations⁵⁸ and judicial interpretations.⁵⁹ Moreover,

⁴⁸ *Beijing IQIYI Science and Technology Co., Ltd. v. Shenzhen Ju Wang Shi Science and Technology Co., Ltd. Case*, Shanghai Intellectual Property Court, 2016. (the “*IQIYI v. Ju Wang Shi Case*”)

⁴⁹ *Problem*, ¶15.

⁵⁰ *CCTV v. China City TV Case*.

⁵¹ *Problem*, ¶4.

⁵² *Beijing 58 Information Technology Co., Ltd. v. Qingdao Hanhua Kuaixun Network Media Co., Ltd. Case*, Beijing Intellectual Property Court, 2017.

⁵³ *Regulations for Copyright Law*, Article 5(3).

⁵⁴ *CCTV v. Baofeng Case*.

⁵⁵ *Problem*, ¶4.

⁵⁶ *WIPO Performances and Phonograms Treaty (1996)*, Article 15(1).

⁵⁷ *Copyright Law*, Article 42.

⁵⁸ *Regulations for Network Dissemination*, Article 26.

⁵⁹ *Interpretations for Network Dissemination*, Article 3.

in *Shiyue v. Chenggong Case*,⁶⁰ the court supported that the unauthorized online live rebroadcasting could be categorized as an infringement upon such right.⁶¹ Therefore, the Petitioner's unauthorized rebroadcasting infringed the Respondent's neighboring right upon video recording no matter such communication was interactive or not.

B. Alternatively, the Petitioner infringed the neighboring right enjoyed by the Respondent as a broadcasting organization under Article 45(1) of the Copyright Law of the PRC.

The broadcasting organizations possess the neighboring right to prohibit the unauthorized rebroadcasting of its broadcast programs under Article 45(1) of *Copyright Law*.⁶² **Firstly**, as supported by judicial practices⁶³ and international practices,⁶⁴ online broadcasting entities authorized by radio or TV stations also enjoyed the neighboring right for broadcasting organizations.⁶⁵ The Respondent gained the authorization from CFA, which is equivalent as gaining implied authorization from C TV Station due to the above-mentioned commercial practice.⁶⁶ **Secondly**, *CCTV v. NetEase Case* held that online rebroadcasting was regulated under Article 45(1),⁶⁷ because the different way of rebroadcasting indeed caused the same substantial damages to the communicators' protected rights.⁶⁸ Therefore, the Petitioner's unauthorized rebroadcasting constituted the infringement.

III. ASSUMING ARGUENDO THAT THE COPYRIGHT LAW OF THE PRC WAS INAPPLICABLE, THE RESPONDENT CAN SEEK REMEDIES UNDER ARTICLE 2 AND ARTICLE 8 OF THE ANTI-UNFAIR COMPETITION LAW OF THE PRC.

Even if this Court holds that *Copyright Law* was inapplicable, the Respondent still can seek remedies under *the Anti-Unfair Competition Law of the PRC* (the "**Anti-Unfair Competition Law**"). [A] This Court has the power to entertain the dispute in respect of *Anti-unfair Competition Law*, and [B] the Petitioner has committed unfair

⁶⁰ *Beijing Shiyue Network Technology Co., Ltd. v. Ningbo Chenggong Multimedia Communication Co., Ltd. Case*, Beijing First Intermediate People's Court, 2008. (the "*Shiyue v. Chenggong Case*")

⁶¹ *CCTV v. Baofeng Case*.

⁶² *Copyright Law*, Article 42(1).

⁶³ *Jiaxing Huaxia Shilian Television Communication Co., Ltd. v. Jiaxing Branch of China Telecom Stocks Co., Ltd. Case*, Zhejiang Jiangxing Intermediate People's Court, 2012.

⁶⁴ *Consolidated Text for a Treaty on the Protection of Broadcasting Organizations (2004)*, Article 0.01.

⁶⁵ *Beijing iTalkTV Network Technology Co., Ltd. v. CCTV International Network Co., Ltd. Case*, Beijing First Intermediate People's Court, 2014. (the "*iTalkTV v. CCTV Case*")

⁶⁶ *Problem*, ¶4.

⁶⁷ *CCTV International Network Co., Ltd. v. Guangzhou NetEase Computer Systems Co., Ltd. Case*, Guangzhou Tianhe People's Court, 2012. (the "*CCTV v. NetEase*")

⁶⁸ *CCTV v. 21CN Case*.

competition prohibited under Article 2 and Article 8 thereof.

A. This Court has the power to entertain the dispute under *the Anti-Unfair Competition Law of the PRC*.

The unfair competition issue may be adjudicated by this Court as [1] this Court has competent jurisdiction and [2] the issue has been duly discussed in the First Trial.

1. This Court has competent jurisdiction to review the unfair competition issue.

Supreme People's Court of the PRC has confirmed that⁶⁹ intellectual property courts have the jurisdiction to review anti-unfair competition issues in connection to copyright infringement in appellate trials.⁷⁰ In the present Case, the dispute had been adjudicated under *Copyright Law* in the First Trial. Therefore, the court enjoys full appellate jurisdiction under the unfair competition issue.⁷¹

2. The unfair competition issue is admissible before this Court as the adjudication upon it does not violate any civil procedures.

Firstly, the absence of the rendered decision of unfair competition issue in the First Trial would not render such issue inadmissible in the Second Trial. It is the accepted approach used in domestic judicial practices to solve the concurrence of *Copyright Law* and *Anti-Unfair Competition Law*.⁷² **Secondly**, the First Trial did not violate Article 326 of *Interpretation of the Civil Procedure Law*, which prescribed that failure to adjudicate upon the claims of the parties in the First Trial would cause the inadmissibility in the Second Trial,⁷³ because the First Trial indeed adjudicated the unfair competition issue when explaining the unnecessary to adjudicate.⁷⁴

B. The Petitioner committed an unfair competition by unreasonably prejudicing competition advantages enjoyed by the Respondent under Article 2 of *the Anti-Unfair Competition Law of the PRC*.

Based on practices of domestic courts, *Anti-Unfair Competition Law* always provides

⁶⁹ Supreme People's Court of the PRC, *Provisions of the Supreme People's Court of the PRC on the Jurisdiction of the Intellectual Property Courts of Beijing, Shanghai and Guangzhou over Cases (2014)*, Article 6.

⁷⁰ *Miss Tourism International Industry Association and Zhongze Shiyi International Cultural and Art Center v. Beijing Sino Media Holding Co., Ltd. and Wu Xian Jie Film Television Culture Co., Ltd. Case*, Beijing Intellectual Property Court, 2016.

⁷¹ *Problem*, ¶18.

⁷² *Jingdezhen Franz-Collect Industrial Co., Ltd. v. Chaozhou Jialande Ceramics Co., Ltd. Case*, Fujian Higher People's Court, 2011.

⁷³ Supreme People's Court of the PRC, *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the PRC*, Article 326. (the "***Interpretation of the Civil Procedure Law***")

⁷⁴ *Problem*, ¶18.

the last and supplementary protection if *Copyright Law* cannot be applied.⁷⁵ Furthermore, as observed in *iTalkTV v. CCTV Case*⁷⁶ and *Heyi v. Baofeng Case*,⁷⁷ the unauthorized rebroadcasting of the Sports Tournament Screens has been consistently and repeatedly deemed as unfair competition practice.

As held in *Yuqu v. Xuanmo and Maimiao Case*,⁷⁸ an act will constitute unfair competition under Article 2 of *Anti-Unfair Competition Law*⁷⁹ if [1] the parties have competitive relationship in the same market;⁸⁰ [2] the act has caused substantial damage to other market players;⁸¹ and [3] the act violates the generally-recognized business ethics.⁸² In the present Case, the Petitioner's unauthorized rebroadcasting constituted an unfair competition satisfying all these requirements.

1. The Parties had a competitive relationship in the same market.

Competitive relationship can be well established by the substitutability test.⁸³ Substitutability test means if market players have negatively related profitability, including providing same or substitutable products or services in the same market,⁸⁴ the market players will present competitive relationship.⁸⁵

In the present Case, **firstly**, the Parties were providing same services in the same product market, because they both conducted online live rebroadcasting services of the Super League on portal websites.⁸⁶ **Secondly**, the services provided by the Parties were substantially substitutable as the customers' demand could be satisfied by the

⁷⁵ *Beijing Tiny Ants Interactive Network Technology Co., Ltd. v. Feihu Information Technology Co., Ltd. Case*, Beijing Intellectual Property Court, 2017.

⁷⁶ *iTalkTV v. CCTV Case*.

⁷⁷ *Heyi Communication and Technology Co., Ltd. v. Baofeng Group Co., Ltd. Case*, Beijing Shijingshan People's Court, 2017. (the "**Heyi v. Baofeng Case**")

⁷⁸ *Wuhan Yuqu Network Technology Co., Ltd. v. Shanghai Xuanmo Network Technology Co., Ltd. and Shanghai Maimiao Information Technology Co., Ltd. Case*, Wuhan Intermediate People's Court, 2017. (the "**Yuqu v. Xuanmo and Maimiao Case**")

⁷⁹ *The Anti-Unfair Competition Law of the People's Republic of China (2017)*, Article 2. (the "**Anti-Unfair Competition Law**")

⁸⁰ *Lan Jianjun and Suremoov Automotive Technology Co., Ltd. v. Tianjin Xiao Mu Zhi Technology Co., Ltd. Case*, Tianjin Higher People's Court, 2013.

⁸¹ *Jia Duo Bao Food and Drink Co., Ltd. v. Chongqing Jia Duo Bao Drink Co., Ltd. Case*, Supreme People's Court of the PRC, 2016.

⁸² *Beijing Baidu Internet Technology Co., Ltd. v. Beijing Sogou Information Service Co., Ltd. and Beijing Sogou Technology Development Co., Ltd. Case*, Beijing Higher People's Court, 2017.

⁸³ *Fuzhou Zhongqi Media Co., Ltd. v. Fujian Dong Nan Wang Media Co., Ltd. Case*, Fuzhou Intermediate People's Court, 2017.

⁸⁴ *CC. Media Co., Ltd. v. Mu Deyuan et al. Case*, Beijing Intellectual Property Court, 2016.

⁸⁵ *IQIYI v. Ju Wang Shi Case*.

⁸⁶ *Problem*, ¶4, 6.

replaceable service of either party.⁸⁷ Therefore, the Parties had competitive relationship in the same market.

2. The Petitioner's unauthorized rebroadcasting caused substantial damages to the Respondent by prejudicing the legitimate economic interests.

As held by *Yuqu v. Xuanmo and Maimiao Case*, the substantial damages caused by unfair competition referred to the weakening of the competitive advantage,⁸⁸ which is *inter alia* reflected as the traffic loss in Internet competitive environment.⁸⁹ More importantly, it is clarified by *iTalkTV v. CCTV Case* that such substantial damages can be presumed if the unauthorized rebroadcasting had been proved.⁹⁰

In the present Case, the Petitioner's unauthorized rebroadcasting caused the loss of pageview and users,⁹¹ resulting in the huge decrease of the Respondent's advertisement fee and membership fee,⁹² which are the major economic income that portal websites operators could obtain from the exclusive rebroadcasting.⁹³ Consequently, the Petitioner's unauthorized rebroadcasting caused the substantial damages to the Respondent's legitimate economic interests.⁹⁴

3. The Petitioner's unauthorized rebroadcasting violated the generally-recognized business ethics.

The generally-recognized business ethics required under Article 2 of *Anti-Unfair Competition Law* refers to the acknowledged and accepted commercial practice in varied business field.⁹⁵ Accordingly, the break of such recognized commercial practice is indeed the violation of business ethics, which is further reflected as disrupting the market competition order as well as prejudicing other competitors' justified interests,⁹⁶ as concluded by domestic judicial practices.⁹⁷

⁸⁷ *iTalkTV v. CCTV Case*.

⁸⁸ *Yuqu v. Xuanmo and Maimiao Case*.

⁸⁹ *Douyu v. Yaoyu Case*.

⁹⁰ *iTalkTV v. CCTV Case*.

⁹¹ *Problem*, ¶6.

⁹² *Beike Network Safety Technology Co., Ltd. v. Heyi Communication and Technology Co., Ltd. Case*, Beijing First Intermediate People's Court, 2014.

⁹³ *Shanghai Qianshan Internet Technology Development Co., Ltd. v. Tianjin Feihu Internet Technology Co., Ltd. and Beijing Sohu Internet Information Service Co., Ltd. Case*, Shanghai Intellectual Property Court, 2017.

⁹⁴ *CCTV International Network Co., Ltd. v. Beijing Sina Internet Information Service Co., Ltd. Case*, Beijing Haidian People's Court, 2014.

⁹⁵ *Shandong Foods Imp. & Exp. Co., Ltd., Shandong Shanfu RiShui Co., Ltd., Shandong Shanfu Group Co., Ltd. and Qingdao Shengke Dacheng Trading Co., Ltd., and Ma Daqing Case*, Supreme People's Court of the PRC, 2009.

⁹⁶ *Yuqu v. Xuanmo and Maimiao Case*.

In the present Case, **firstly**, the rebroadcasting sports tournaments should gain the prior authorization of related copyright owners,⁹⁸ which is the generally-recognized commercial practice in the field of sports tournaments rebroadcasting.⁹⁹ **Secondly**, the Petitioner's unauthorized rebroadcasting broke such recognized commercial practice, causing damages to the Respondent and the competition order.¹⁰⁰ The Petitioner paid no fair consideration but gain the privileged competitive advantage,¹⁰¹ prejudicing the Respondent's right of exclusive rebroadcasting gained from valid Exclusive License Agreement¹⁰² and leading to the hostile competition environment. Therefore, the Petitioner violated the business ethics.

C. The Petitioner committed false and misleading propaganda prohibited under Article 8 of the Anti-Unfair Competition Law of the PRC by labeling and advertising the Sports Tournament Screens in August 2013.

Article 8 of *Anti-Unfair Competition Law* prohibited the false and misleading propaganda that would defraud or mislead consumers,¹⁰³ and advertising the goods in ambiguous language or in a misleading way is included as noted by judicial interpretation.¹⁰⁴ In the present Case, the Petitioner advertised its unauthorized rebroadcasting of Sports Tournament Screens,¹⁰⁵ labeling the misleading notes in ambiguous language "video broadcasting cooperation – P Network interactive broadcasting room".¹⁰⁶ Accordingly, the Petitioner committed the misleading and false propaganda.¹⁰⁷

IV. CONSEQUENTLY, THE JUDGMENT OF FIRST TRIAL SHALL BE SUSTAINED AND ALL THE CLAIMS PROPOSED BY THE PETITIONER SHALL BE OVERRULED.

⁹⁷ *Beijing Baidu Netcom Science and Technology Co., Ltd. v. Beijing Sogou Information Service Co., Ltd. Case*, Beijing Intellectual Property Court, 2016.

⁹⁸ *CCTV v. China City TV Case*.

⁹⁹ *Yilian Weida v. Tencent Case*.

¹⁰⁰ *CCTV International Network Co., Ltd. v. PP Live Co., Ltd. Case*, Shanghai Pudong People's Court, 2013.

¹⁰¹ *Shanghai Shichang Information Technology Co., Ltd. v. CCTV International Network Co., Ltd. Case*, Shanghai Intellectual Property Court, 2015.

¹⁰² *Problem*, ¶4.

¹⁰³ *Anti-Unfair Competition Law*, Article 8.

¹⁰⁴ Supreme People's Court of the PRC, *Interpretation of the Supreme People's Court of the PRC on Several Issues concerning the Application of Law in the Trial of Unfair Competition Civil Issues (2007)*, Article 8.

¹⁰⁵ *Problem*, ¶6.

¹⁰⁶ *Id.*, ¶14.

¹⁰⁷ *Shanghai Quan Toodou Cultural Communication Co., Ltd. v. Beijing Shuoshuo Changchang Cultural Communication Co., Ltd. Case*, Shanghai Intellectual Property Court, 2017.