

Network Game's IPR Infringement and Unfair Competition Problems — Discussing from “Kai Xin Xiao Xiao Le” Case

Yimei Guo

Abstract—In this article, it does case study on the most recent “Kai Xin Xiao Xiao Le” Case involving copyright and trademark right infringement and unfair competition at first, then discusses the IPR infringement and unfair competition problems in general and tries to present some solutions. This article hopes network game industry goes to the healthy and sustainable development path.

Index Terms—Copyright, network game, trademark right, unfair competition.

I. INTRODUCTION

On December 15, 2016, China game industry annual meeting 2016 released “China Game Industry Report 2016”, China game market actual sales revenue was RMB 165 billion 570 million yuan, self-developed online games overseas market sales rose over 30%. 2016 China game market actual sales revenue increased by 17.7%, Growth rate slowed down, but sales revenue increments remained stable; promoted by intellectual property right (IPR), independent R&D network game market actual sales revenue was RMB 118 billion 250 million yuan, annual increase was 19.9%; approved domestic games published about 3800 models, mobile games accounted for over 90%, game user size reached 566 million, annual increase was 5.9%; users closed to 3/4 pay for games.

Industry insiders pointed out that e-sports games have become an important part of the game industry; games and Internet broadcast, video and other industries to accelerate the integration; with virtual reality (VR) hardware gradually forming, in 2016 VR game has become the focus of innovation in the field of game entrepreneurship, VR game is gradually asymptotic. [1].

Video games were a big industry more than and 30 years ago. [2] While the game industry is developing rapidly, The disputes among main bodies such as game developers, game live platforms and gamers etc. in the copyright ownership and interests distribution float on the table. For example, in Blizzard Entertainment, Shanghai Wang Zhiyi technology development Co. Ltd. v. Chengdu Seven Travel Technology Co., Ltd. *et al* for preliminary or injunction of copyright infringement and unfair competition dispute case (2015), [3] Plaintiff Blizzard Entertainment is the copyright owner of game series “World of Warcraft”. Plaintiff Wang Zhiyi Co, is the exclusive operator of such game in Mainland China area.

Two Plaintiffs claimed that Defendant Seven Travel Co. developed and Defendant Split Time Inc. exclusively operated and Defendant Dynamic View Co. provided downloading the accused “All the world of Warcraft” (originally named “Chief Sal”) infringed their copyright of the work of art. Defendant Split Time Inc. simultaneously constituted unfair competition conduct of arbitrarily using Plaintiff’s specific name, decoration of well-known game and false advertising.

Also, in Guangzhou Betta Network Technology Co. Ltd. v. Shanghai Yao Yu Cultural Media Co., Ltd. copyright infringement and unfair competition disputes appeal case(2015),[4] in 2014, Yaoyu obtained the exclusive video broadcasting right in Mainland China for 2015 DOTA2 Asian Championship. Douyu, without authorization, made a live broadcast of such event by way of putting up the screenshots of the event accompanied by the comments of the host while watching the event on the client side and used the mark of Yaoyu during live broadcast, thus was sued by Yaoyu.

In this article, it does case study on the most recent “Kai Xin Xiao Xiao Le” Case involving copyright and trademark right infringement and unfair competition at first, then discusses the IPR infringement and unfair competition problems in general and tries to present some solutions.

II. “KAI XIN XIAO XIAO LE” CASE STUDY

A. Fact

Le Yuansu Technology (Beijing) Co. Ltd. (hereinafter Le Yuansu Co.) enjoyed the copyright of “Kai Xin Xiao Xiao Le” and trademark right of the words of “Kai Xin Xiao Xiao Le”, he found out that Defendant Zhejiang Gu Chuan Technology Inc. (hereinafter Gu Chuan Inc.) also developed a similar kind of San Xiao kind game, and used the game name similar with “Kai Xin Xiao Xiao Le”, in both game propaganda and downloading interface used the words of “Kai Xin Xiao Xiao Le 2015” similar with Plaintiff’s name and “Kai Xin Xiao Xiao Xiao” etc. Le Yuansu Co. claimed that Gu Chuan Inc. infringed his copyright and trademark right and constituted unfair competition, thus asked the court to order Gu Chuan Inc. issue announcement on various media platforms and Defendant’s official website to apologize to Plaintiff for his conduct of infringing Plaintiff’s right and eliminate effects for his conduct of unfair competition, at the same time asked the court to order Defendant compensate economic losses and reasonable fee more than RMB 3,200,000 yuan.

Manuscript received August 12, 2017; revised November 20, 2017.

Yimei Guo is with School of Law, University of Xiamen Xiamen, China (e-mail: ymguo@xmu.edu.cn).

Gu Chuan Inc. contended that he neither developed relevant game, nor existed infringing act, “Xiao Xiao Le” had become generic term, therefore he asked the court to refute all of Plaintiff’s litigation claims.

B. Judgment

In late November 2016, after hearing the case, Beijing Haidian District People’s Court decided that Le Yuansu Co. enjoyed the copyright of “Kai Xin Xiao Xiao Le” game, Le Yuansu Co. in this case claimed that Gu Chuan Incorporation’s 5 games-“Kai Xin Xiao Xiao Le 2015”, “Kai Xin Xiao Xiao Xiao”, “Kai Xin Xiao Xiao Xiao 2015”, “Kai Xin Xiao Xiao Le· Jewelry Edition” and “Kai Xin Xiao Xiao Le· Candy Legemd” constituted tort. Gu Chuan Inc. contended that he enjoyed the legitimate operation right toward the game involved and he was only responsible to operation and promotion, was Internet service provider (ISP) not the owner and copyright holder and should not bear direct tort liability. Combined with the evidence of this case, Gu Chuan Inc. was the copyright holder of “Kai Xin Xiao Xiao Le 2015” and “Kai Xin Xiao Xiao Xiao”, and he uploaded and operated the accused games on Music.com, Yoyou.com, 47473 website, Suning App. Store, 7k7k, Mumayi, Paojiao.com, Game Dog, Bachelor Game, Android Mall, yy138, Iqiyi etc. The court made a comparative analysis of the different pictures advocated by the plaintiff, decided that “Kai Xin Xiao Xiao Le -the splash screen”, “Kai Xin Xiao Xiao Le -the graphic character” and “Yellow Chicken series” art works used by Gu Chuan Inc. constituted the same and similar with Le Yuansu Co., infringed the copyright of Le Yuansu Co.

Regarding the registered trademark’s exclusive right, without Plaintiff’s permission, using the same or similar trademark with Plaintiff’s trademark on the same commodity, constitutes infringement of the registered trademark’s exclusive right. Besides, to determine whether or not constituting a trademark infringement must use whether or not it is sufficient to cause the relevant public confusion as the condition. In considering whether or not it is sufficient to cause confusion to the relevant public, the degree of approximation between the trademark of the trademark owner and the accused infringing mark and the distinctiveness and popularity of trademark and the specific circumstances of the use of the alleged infringing mark etc. should be taken into account. Gu Chuan Inc. in his games used “Kai Xin Xiao Xiao Le 2015”, “Kai Xin Xiao Xiao Xiao”, “Kai Xin Xiao Xiao Xiao 2015”, “Kai Xin Xiao Xiao Le· Jewelry Edition” and “Kai Xin Xiao Xiao Le· Candy Legend” as the games’ name, and highlighted in the game publicity to use the words “Kai Xin Xiao Xiao Le 2015” and “Kai Xin Xiao Xiao Xiao· Candy Legend”, the way of use explicitly identified the resource of the relevant game, had the function of identifying the source, was the use of trademark. Inter alia, “Kai Xin Xiao Xiao Le 2015”, “Kai Xin Xiao Xiao Le· Jewelry Edition” and “Kai Xin Xiao Xiao Le· Candy Legend” trademarks’ main part to have the function of identifying the source was “Kai Xin Xiao Xiao Le” and was the same as Plaintiff’s trademark, “2015”, “Jewelry Edition” and “Kai Xin Xiao Xiao Le· Candy Legend” were used as different editions of game, and “Kai Xin Xiao Xiao Le” and “Kai Xin

Xiao Xiao Xiao” 5 words have the same 4 words, those 5 trademarks accused infringement were identical with Plaintiff’s trademark involved, was easy to make the relevant public mistakenly believe that Defendant’s 5 games were different editions of Plaintiff’s game, confused the public with the source of service. Plaintiff also submitted a notarized document displaying that there existed users downloading Defendant’s game and in the game there were malicious chargeback phenomenon to make consumers mistakenly believe that the installation was installed in Plaintiff’s game and make them generate mistake, then expressed relevant comment to cause damage on Plaintiff’s good will.

Gu Chuan Inc. contended that “Kai Xin Xiao Xiao Le” contained the generic term “Xiao Xiao Le”, trademark owner has no right to prohibit other’s due use and the constituted composition of “Kai Xin Xiao Xiao Le” lacks distinctive characteristic. The court decided that Gu Chuan Inc. didn’t provide sufficient and valid evidences to prove “Xiao Xiao Le” had become the name of goods or services of national standard, industry standard or convention, esp. didn’t provide sufficient and valid evidences to prove that elimination kind games are equivalent to “Xiao Xiao Le”. From relevant report submitted by Le Yuansu Co., it had mentioned many times the unified name of elimination games as “San Xiao Kind” or “elimination Kind” and there was no evidence that “Xiao Xiao Le” can mean elimination kind games.

Although the words “Kai Xin” indicated happy emotion, “Xiao Xiao Le” according to general understanding might realize that such kind of game was elimination kind game, but the composition of “Kai Xin Xiao Xiao Le” was exclusively created by Le Yuansu Co., had distinctiveness, and through long time and mass propaganda and use by Le Yuansu Co., relevant trademark in game sector had higher publicity and distinctiveness, therefore the court did not accept Defendant’s argument that “Kai Xin Xiao Xiao Le” contained the generic term “Xiao Xiao Le” and such trademark did not have distinctiveness. Without the permission of Le Yuansu Co., Gu Chuan Inc. used identical or similar trademark with Plaintiff’s trademark, constituted infringing Plaintiff’s registered trademark’s exclusive right.

Regarding unfair competition, the court decided that Gu Chuan Incorporation’s related conduct constituted infringing the specific name of Le Yuansu Company’s famous service, violated Item (2), Art. 5 of Anti-Unfair Competition Law, constituted unfair competition conduct. But the court did not support Le Yuansu Company’s litigation claim that the page directly used in the game’s propaganda by him constituted his special decoration. Regarding whether or not the accused conduct constituted unfair competition conduct of false advertisement, Para. 1, Art. 9 of Anti-Unfair Competition Law stipulates that: “Undertakings shall not use advertisement or the other methods to make a false propaganda for the quality, composition, function, usage, producer, time of efficacy and place of production of commodities.” It means that while doing propaganda for their services, undertakings should not adopt false description so as to obtain the business interests which should not be obtained.

In this case, Plaintiff claimed that the way of Defendant’s conduct of false propaganda was mainly divided into the

following two kinds : first, the propaganda words toward users' number and ranking situation was false; second, the propaganda words toward the game's resource and content was false. The captioned propaganda of Gu Chuan Inc. constituted false advertisement conduct , violated Para. 1, Art. 9 of Anti-Unfair Competition Law, constituted unfair competition conduct.

In Conclusion, the court decided that Gu Chuan Incorporation's conduct infringed Le Yuansu Company's copyright toward relevant work, infringed the trademark right of "Kai Xin Xiao Xiao Le" trademark, and simultaneously violated Item (2), Art. 5 and Para. 1, Art. 9 of Anti-Unfair Competition Law, constituted the unfair competition conduct, should bear legal liability of ceasing tort and compensation according to law. Comprehensively considering the factors of Defendant's subjective fault degree, mobile phone's profit characteristic etc., the court discretionarily decided the compensation amount. Viewing from the evidences submitted by Plaintiff, those games involved indeed existed the situations of long lasting time, obvious tort intention, various tort performance and possibly higher profit, thus comprehensively considering the captioned factors; the court discretionarily decided the compensation amount. Regarding Plaintiff's payment of notary and attorney fee, the court combined the notarized situation of this case, the attorney's larger workload and the more complex fact of this case, discretionarily supported it. Ultimately, the court determined that Defendant compensate Plaintiff economic losses RMB 2 million yuan, reasonable expenditure RMB 20,000 yuan, and at the same time considered the unfair competition conduct involved implemented by Defendant indeed misled the relevant public, damaged Plaintiff's corresponding commercial interests and disrupted the normal market competition order, should eliminate the corresponding influence, ordered Gu Chuan Inc. continued 48 hours to publish announcement to delete influence. [5].

III. FURTHER THOUGHT ON NETWORK GAME'S IPR PROTECTION AND UNFAIR COMPETITION PROBLEM AND FEASIBLE SOLUTION

With 731 million Internet users currently active in China as of December 2016 [6] and 112 million mobile Internet users in China as of February 2017 [7] , the country now has the largest online user base in the world, of which two-thirds engage in online game play. China is the source of some of the largest gaming companies in the world, including Tencent, NetEase and more, and has been increasingly developing and acquiring popular online games throughout the world. According to the latest forecast report titled "China Online Gaming Market and Users (Mobile, PC Online Client Games, Web), the market is expected to reach close to USD 50 billion through the year 2020. China Online Gaming Market is largest market globally and it's even bigger than USA and Japan [8].

Nevertheless, there have been copyright infringement and unfair competition disputes involving network game in recent years. For example, in Beijing LOCOJOY Science Co.Ltd. v. Beijing Kunlun Yuexiang Network Technology Co.Ltd. *et al* computer software copyright belonging case (2014), [9]

LOCOJOY enjoys the copyright of the mobile terminal game "I'm MT" on line and "I'm MT 2" (hereinafter refers as "I'm MT"), which adapted from the serial 3D comic "I'm MT" . LOCOJOY Company enjoys the exclusive licensee right to use the game name and character name as well as the artwork copyright of the character image. LOCOJOY claimed that the three Defendants infringed its copyright because they used the names and characters in the game "Super MT" , among which, the names and characters were similar to those in the game "I'm MT" . In addition, the three Defendants plagiarized the name of the game "I'm MT" in their game "Super MT" and the character names in the two games were extremely similar. The terms relevant to the game "I'm MT" was used in the promotion. The acts of the three defendants have constituted unfair competition act, which violated Item (2), Article 5 and Para. 1, Article 9 of the *Anti-unfair Competition Law*.

Beijing Intellectual Property Court held that because the involved game name and character name did not constitute artwork and the involved game did not use the original expression in the adapted work of LOCOJOY, the acts of the three defendants did not infringe the copyright of LOCOJOY; being aware of that the game name and character name of LOCOJOY constituted unique name of the service under the class of mobile game, the three defendants provided the download and promotion of the accused game, which constituted the act of using the unique name of the well-known service of Plaintiff without authorization. Kunlun Yuexiang, Kunlun Online and Kunlun Web made false promotion because the contents were not factual at all. Accordingly, the Court made judgment that the three defendants shall cease the acts of unfair competition and compensate economic loss and reasonable expense totaling RMB 535,000 yuans.

As the branch of emerging cultural industry, mobile game is the combination of culture and technology, thus receiving extensive attention because of huge development space and broad market prospect. This case is indeed a dispute over copyright infringement and unfair competition involving mobile game. The Accused infringing game "Super MT" was similar to the game "I'm MT" in respects of the game name, character name, promotion of the game and head portrait of App., so this case included trivial and complicated facts with various and difficult legal issues. This case made elaborate and delicate analysis of the following issues: the allocation of responsibility concerning the copyright ownership of the mobile game, whether or not the short phrases of game names and character names could constitute literary works, the copyright protection of the adapted works, the determination of the efficacy of the notarial certificate containing defects, whether or not the name of mobile game could constitute the unique name of well-known commodity and the determination of the act of false promotion. Concerning the civil liability, the Court took the market share of the game (which enjoyed the copyright) and the subjective fault of the accused infringer into consideration, therefore protected the interests of the copyright owner of the game at the highest level. Defining the idea and direction of the intellectual property legal protection of the mobile game, this case had

significant influence and exemplary effects by promoting healthy and orderly development of the industry of mobile game [10].

Also, in Chengdu Yegame Tech Co.,Ltd. , Chengdu Ze Hong Brand Marketing Planning Co, and Guangzhou Fei Yin InfoTech Co.,Ltd., Guangzhou Weidong Co. copyright belonging, tort dispute and unfair competition case (2015) [11], Ze Hong Co. claimed that it enjoyed copyright of “*Our Universe*” novel’s network game. Yegame Tech Co. claimed that it enjoyed copyright of “*Our Universe*” game software work and the right and benefit of anti-unfair competition, and claimed that Fei Yin Company’s developing and Weidong Company’s operating “*Our Heaven and Earth*” web game constituted unfair competition. Therefore, Ze Hong Co. and Yegame Tech Co. sued to the court and asked the court to order Fei Yin Co. and Weidong Co. immediately cease the conduct of tort and unfair competition, apologize and compensate economic losses.

The first instance court held that Fei Yin Co. and Weidong Co. infringed the adaptation right of novel enjoyed by Ze Hong Co. and constituted unfair competition against Fei Yin Co. and Weidong Co., should immediately cease the conduct of tort and compensate economic losses separately and rebutted other claims of Fei Yin Co. and Weidong Company. [12] Fei Yin Co. and Weidong Co. did not satisfy with the judgment and filed appeal.

The second instance court held that concerning the determination of infringing the adaptation right and unfair competition conduct and the discretionary decision of two disputes’ compensation amount by the original trial should be supported, but there was some bias regarding two legal relationships’ right subject and tort subject of infringing the novel adaptation right and unfair competition, thus the judgment should be amended.

The second instance court strengthened the argument of infringing the adaptation right and unfair competition conduct. Concerning the determination of unfair competition conduct, the second trial gradually argued from the following aspects: whether or not “*Our Universe*” game is well-known commodity; whether or not “*Our Universe*” is specific name; and whether or not the name of “*Our Heaven and Earth*” web page game and “*Our Universe*” web page game constituted similarity.

The second instance court held that Fei Yin Co. and Weidong Co. had the unfair competition conduct of unauthorized use of well-known commodity specific name.

As to the captioned “Kai Xin Xiao Xiao Le” case, it involved several issues, its evidences were more than 3000 pages, the court analyzed the tort situations of copyright, trademark right and unfair competition conducts separately by twenty thousand word judgment document, finally determined the high amount compensation RMB 2 million and 20 thousand yuan. It has significant meaning toward hearing of mobile phone’s tort cases.

However, from the captioned case study we may know that following mobile Internet’s rapid development, mobile game becomes the industry’s hot stuff, tremendous economic benefit makes tort frequently occur in network game’s field. Tort cases occur frequently in network game’s market means

the lack of innovation awareness of the current market.

Combating tort act in the network game’s market not only needs perfecting legal provisions, popularizing legal knowledge, enhancing people’s IPR awareness, but also in the meantime needs vigorously develop the cultural and creative industry economy so as to sufficiently guarantee healthy development of network game market.

IV. CONCLUSION

Nevertheless, it is worthy to notify that in response to network game problems of piracy rampant, malicious “Shan Zhai” (means counterfeit products from imitation, copying and plagiarism) and unfair competition etc., Internet protection of digital copyright has become an important part of China’s Internet Governance. China has for many years to carry out “Sword Action” to combat network infringement. 2016 “Sword Action” outstandingly renovated tort and piracy conducts of illegal unauthorized dissemination of network literature, news, film and television works, On November 24, 2016, supported by Internet Copyright Committee of China Internet Association., “Online Games Anti Piracy and Industrial Protection Alliance” was announced to be established. Such Alliance was launched by Tencent, Zhang Qu, Chang You, Perfect World, Baidu, Sina, Ai Jiu You, Ju Li, Xi Shan Ju, YY Inc., Lian Zhong, Sogou, LeECO, Netease and Feng Huo Lian Cheng fifteen game operators, independent game producers and game platform companies.

Just as the general president Jiang Bo stated in the establishment ceremony, China’s network games industry is hidden behind the chaos of the rapid development of disorderly competition and tort conducts of IPRs’ rampant increase. The market is full of all kinds of plagiarism, change of skin, false propaganda of “Shan Zhai” game, copycats everywhere becomes an obstacle to the development of the industry. This time network game sector combines together, jointly declares war on piracy, through action of maintaining right and industry self-regulation will help promote the game industry genuine, goes to the healthy and sustainable development path [13].

REFERENCES

- [1] The annual income of mainland China’s game industry is more than RMB 160 billion yuan. [Online]. Available: <http://udn.com/news/story/7334/2172728>
- [2] T. M. S. Hemnes, “The adaption of copyright law to video games,” *University of Pennsylvania Law Review*, vol. 131, pp. 171-233, 1982.
- [3] See Civil Ruling of Guangdong High People’s Court Yue Gao Fa Li Min Zhong Zi No, 525.
- [4] Z. Hu and Z. Zi, *See Civil Judgment of Shanghai Intellectual Property Court*, no. 641, 2015.
- [5] K. Xin and X. Le, First instance result was released= le yuansu was acaered rmb 2 million and 20 thousand yuan. [Online]. Available: <http://www.anyv.net/index.php/article-912171>
- [6] PING CHINA, CNNIC released the 39th, “China internet development statistics report,” *The Size of Chinese Internet Users Reached 731 Million*. [Online]. Available: <http://www.pingchina.org/2017/199/>
- [7] MITI: China’s mobile internet users. [Online]. Available: <http://www.chinaeclaw.com/show.php?contentid=23122m>
- [8] China online gaming market expected to reach a mark of us\$ 50 billion by 2020. [Online]. Available: <http://www.free-press-release.com/news-china-online-gaming-market>

-expected-to-reach-a-mark-of-us-50-billion-by-2020-1479446051.html

- [9] *See Civil Judgment of Beijing Intellectual Property Court*, 2014.
- [10] See ten typical intellectual property cases in Beijing during 2015. [Online]. Available: <http://www.ciplawyer.com/article.asp?articleid=2824>
- [11] *See Civil Judgment of Guangzhou Intellectual Property Court Yue Zhi Fa Zhu Min Zhong Zi No. 30*, 2015.
- [12] *See Civil Judgment of Guangdong Province Tianhe District People's Court Sui Tian Fa Zhi Min Chu Zi No. 1870*, 2013.
- [13] Network game anti-piracy and industry protection alliance. [Online]. Available: <http://www.chinacourt.org/article/detail/2016/11/id/2356569>



Yimeei Guo was born in Taipei, Taiwan in November 1958. She received the bachelor of law (LLB) from National Taiwan University, Taiwan in 1980, received the master of comparative law (MCL) from Dickinson School of Law, USA in 1983, received the master of law (LLM) from Cornell University, USA in 1989 and received doctor of juridical science (SJD) from Tulane

University in 1991. Her major field of study are economic law, e-business law and intellectual property law.

She had been associate professor in Fengjia University in Taiwan from 1993 till 1999, visiting scholar in Law School of Qinghua University in Beijing from 1999 till 2000 and associate professor in Management School of Xiamen University from 2001 till 2006. Starting from 2007, she has been professor in Law School of Xiamen University. She has published the books as follows:

- ✧ “Economic Law” (Chinese version) (Beijing: China Machine Press 2013);
- ✧ “E-business Law” (Chinese version) (Xiamen: Xiamen University Press 2014) and
- ✧ “Research on Selected China’s Legal Issues of E-Business” (English version) (Springer 2015).

Guo is the member of experts committee on e-commerce association of Fujian province, PRC.