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**JUDGMENT ON UNFAIR COMPETITION
DISPUTE BETWEEN BAIDU ONLINE NETWORK
TECHNOLOGY (BEIJING) LTD. CO.
AND BEIJING 3721 TECHNOLOGY LTD. CO.**

Translated by Pengyue Li[†]

I. TRANSLATOR'S NOTE

On October 20, 2003, Baidu Online Network Technology (Beijing) Ltd., Co. ("Baidu"), a Nasdaq-listed company known as the "Google of China,"¹ filed a suit against its competitor Beijing 3721 Technology Ltd. Co. ("3721")² in Beijing Chaoyang District Court for copyright infringement and unfair competition. The case is regarded as China's first copyright-infringement dispute involving website search-engine technology. Legal experts, the Chinese media, and the Supreme Court of China have paid close attention to the case, especially as it is related to China's ongoing legislative effort to improve protection of intellectual property. The translation below is the appellate opinion in this case issued by Beijing No. 2 Intermediate People's Court in April 2004.

A. *Summary of the Case*

Beijing-based software company 3721 provides Internet search services with a focus on address bar searches in the Chinese language. 3721 first released its address bar search software "3721 Network Real Name" in 1998 and has updated it many times since then. In June 2003, 3721 added a "cnsminkp" file to its software, which appeared to block the downloading and installation of Baidu's tool bar search software "Baidu SoBar."

[†] J.D. expected in 2007. The author would like to thank Professor Dongsheng Zang and the editorial staff of the *Pacific Rim Law & Policy Journal* for their excellent suggestions and assistance. The author is also grateful to her husband, Xin Li, for his support.

¹ Baidu is a Chinese search engine which can search text and images. Baidu.com is often called the "Google of China" due to its resemblance and similarity to Google. See e.g. Matt Krantz, 2 *Search Engines, 2 Different Outcomes*, USA TODAY, October 10, 2005, at 5B.

² 3721 is a provider of Chinese Keyword services in China. Keyword service enables Internet users to search for relevant on-line information using real names rather than having to remember the domain names. 3721 Chinese Keywords: About Us, <http://www.3721.com/english/about.htm> (last visited November 16, 2006). 3721 maintains a technology alliance with Hong Kong 3721 Network Software Co.Ltd., which was acquired by Yahoo! in 2003 for \$120 million. *Yahoo! Acquires Leading 3721*, PEOPLE'S DAILY, Nov. 22, 2003, available at http://english.people.com.cn/200311/22/eng20031122_128796.shtml.

Appellee 3721 claimed that this was only a common software conflict, and that it had continuously informed the users about the problem. However, Baidu believed that 3721 maliciously used the software to prevent Baidu users from accessing and downloading “Baidu SoBar” from its website, which infringed upon its copyright over “Baidu SoBar” and constituted unfair competition.

The People’s Court of the Chaoyang District rejected Baidu’s copyright infringement claim for lack of evidence. However, it held that 3721’s conduct constituted unfair competition, because it reduced Baidu’s business opportunities. According to the trial court’s judgment, 3721 must stop interfering with the normal installation of “Baidu SoBar” by “left-clicking” and compensate reasonable litigation fees incurred by Baidu. However, the trial court did not grant Baidu’s request for damages in the amount of RMB³ 500,000, nor did it grant the request for a public apology.

Both parties appealed. Baidu believed that the trial court erroneously applied the law by not granting its request for damages. It also pointed out that notwithstanding the fact that the search engine software was free, 3721 made enormous profits through its monopoly status in the market, as it maliciously prevented Baidu from entering the market. Moreover, although the judgment concluded that the conduct of 3721 resulted in unfair competition, it was not strong or specific enough to deter 3721 from further infringement. On the other hand, 3721 believed that it did not engage in unfair competition and that the trial court did not understand the nature of the technology involved in this case. 3721 also claimed that, in the absence of any statutory requirements, there should not be an obligation for software providers to make their products compatible with those of others. Overall, 3721 believed the trial court’s decision would negatively influence the development of China’s information technology industry.

Baidu asked the appellate court to order 3721 to stop its interference with the downloading and installation of “Baidu SoBar” in any manner, not just the interference with the normal way of downloading “Baidu SoBar” by left clicking the download button on its website. It also asked the court to grant damages and a public apology. 3721 requested the court to overrule the trial court’s judgment and order Baidu to bear the litigation fees.

The appellate court, Beijing No. 2 Intermediate People’s Court, upheld the trial court’s decisions as follows: (1) Baidu is the copyright owner of the “Baidu SoBar” software; however, it failed to prove that 3721’s

³ RMB is the abbreviation for “Renminbi,” which is the legal tender in the mainland of the People’s Republic of China. It is issued by the People’s Bank of China, the monetary authority of the People’s Republic of China.

software infringed upon its copyright; and (2) Baidu and 3721 are competitors, and 3721's conduct constituted unfair competition. It is notable that the appellate court stated its holding more broadly than the trial court did in that it ordered 3721 to stop any unfair competition involved in this case, not just the interference with downloading "Baidu SoBar" by way of left clicking the download button on its website. Moreover, the appellate court rejected Baidu's demand for RMB 50,000 damages and a public apology, but required 3721 to compensate Baidu for reasonable litigation fees.

B. China's Efforts to Regulate the Internet

The opinion reflects China's judicial effort to enhance protection of legitimate copyright in the context of Internet technology. Since 1978, China has been moving toward a socialist market economy that is increasingly integrated into the world market. Many major improvements in China's intellectual property laws were made as it prepared to join the World Trade Organization ("WTO")⁴ and to meet its commitments under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).⁵ By the end of 2001, China had completed amendments to major intellectual property laws, and after entering the WTO China continued to issue regulations that implement and guide interpretation of the laws. Those legal changes have moved China generally in line with international norms in most key areas of intellectual property protection. However, new legislation might be required in certain "cutting-edge" areas such as Internet-related copyright infringement—an issue of growing importance given China's status as the world's second-largest user of the Internet.⁶

When the Copyright Law was being revised in 2001, the legislators, taking into consideration the development of information technology, added the "right of communication through information network" to the law.⁷ That is, the right to make a work available to the public by wire or wireless means, so that the Internet users may have access to the work from a place and a time individually chosen by them. Accordingly, article 47 of the

⁴ See VAI IO LO & XIAOWEN TIAN, *LAW AND INVESTMENT IN CHINA: THE LEGAL AND BUSINESS ENVIRONMENTS AFTER WTO ACCESSION* 152 (2005).

⁵ See *id.*

⁶ See Wei Yanliang & Feng Xiaoqing, *Comments on Cyber Copyright Disputes in the People's Republic of China: Maintaining the Status Quo while Expanding the Doctrine of Profit-Making Purposes*, 7 *MARQ. INTELL. PROP. L. REV.* 149, 151 (2003).

⁷ See *Zhonghua Renmin Gongheguo zhu zuo quan fa* [Copyright Act of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1991) (amended 2001), art. 10(12) (P.R.C.) [hereinafter Copyright Act].

Copyright Law provides that in the case of making any work available to the public through information network without permission of the copyright owner, the infringer shall bear civil liability and may be subject to remedies such as ceasing the infringement, eliminating the bad effects of the act, making an apology, or paying for damages.⁸ This revision provides many copyright holders, such as Baidu, a cause of action in online copyright disputes.

It is notable that the court mentioned the *Public Pledge of Self-regulation and Professional Ethics for China Internet Industry* (the “Pledge”), which was drafted by the Internet Society of China (the “ISC”). The ISC is a nationwide, non-profit social organization whose goal is to promote healthy Internet development in China and make it an active part of the world Internet community.⁹ Under the Pledge, all participants who voluntarily joined it agreed to observe the law and restrain themselves from engaging in unfair competition conduct. The Pledge indicates the increasing awareness of China’s Internet industry of the need to fight unfair competition.

C. *Chinese Judicial System*

China’s legal system is similar to a civil law system. The mandatory legal authorities are statutes and relevant regulations, and interpretations issued by the Supreme Court. Court opinions are not binding precedents. Although Chinese lawyers, like their American colleagues, often try to predict the result of a lawsuit based on a court’s prior decisions, they are not expected to cite those cases in their briefs or in presenting their case in court. For this reason, readers will not see any citations of cases in the translated opinion.

In China, there are four levels of general-jurisdiction courts. The four levels of courts include the Supreme People’s Court at the national level, high people’s courts (about 31 in all)¹⁰ at the level of province, autonomous region, or municipality directly under the central government, intermediate people’s courts (about 380)¹¹ in districts or municipalities within provinces or autonomous regions as well as municipalities directly under the central

⁸ See Copyright Act, art. 47.

⁹ See Internet Society of China - Introduction at <http://www.isc.org.cn/Introduction/index.htm>.

¹⁰ VAI IO LO & XIAOWEN TIAN, *supra* note 4, 15; see also ALBERT HY CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA 137-38 (3rd ed. 2004).

¹¹ *Id.*

government, and basic people's courts (about 3,000)¹² at the level of county, municipality, or district within a municipality.

China adopts a two-trial system, namely, one trial at the court of first instance and one appeal at the court of second instance. In each court, there are various divisions. Most courts have criminal, civil, and administrative divisions. Some courts also have other divisions, such as commercial, intellectual property, and bankruptcy divisions.¹³ China also has special people's courts, such as military courts, maritime courts, railway transportation courts, and forest courts.¹⁴

II. TRANSLATION OF "JUDGMENT ON UNFAIR COMPETITION DISPUTE BETWEEN BAIDU ONLINE NETWORK TECHNOLOGY (BEIJING) LTD., CO. AND BEIJING 3721 TECHNOLOGY LTD., CO."

Judgment on Unfair Competition Dispute between Baidu Online Network Technology (Beijing) Ltd., Co. and Beijing 3721 Technology Ltd., Co.

Beijing No. 2 Intermediate People's Court
(2004) ERZHMZH No.2388

Appellant (the plaintiff in the trial court): Baidu Online Network Technology (Beijing) Ltd., Co., domicile¹⁵ 9-922 HaiTai Plaza, 229 Bei Si Huan Zhong Lu, Haidian District, Beijing.

Legal representative¹⁶: Yong Xu, chairman of the board of the company.

Authorized agent¹⁷: Dan Guo, male, Han nationality, born on October 27, 1974, employee of Baidu Online Network Technology (Beijing) Ltd., Co,

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Translator's Note*: article 22 of the Civil Procedure Law of the People's Republic of China provides that "a civil action brought against a citizen shall be subject to the jurisdiction of the people's court in the location of the defendant's domicile." See *Zhonghua Renmin Gongheguo min shi su song fa* [Civil Procedure Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991), art. 22 (P.R.C.) [hereinafter Civil Procedure Law]

¹⁶ *Translator's Note*: article 49 of the Civil Procedure Law provides that "any citizen, legal person or other organization may be a party to a civil action. Legal persons shall be represented in litigation by their legal representatives, while other organizations shall be represented by their principal person in charge." See Civil Procedure Law, art. 49.

¹⁷ *Translator's Note*: this is a literal translation. "Authorized agent" is a person who is designated or retained by a company to represent it in a lawsuit. An "authorized agent" can be an employee of the company or an attorney.

residing at 7-1107 Jin Qiu Jia Yuan, Luo Zhuang Bei Li, Haidian District, Beijing.

Authorized agent: Jianming Hua, attorney at Beijing Jian Yuan Law Offices.

Appellee (the defendant in the trial court): Beijing 3721 Technology Ltd., Co., domicile: B-610 HeQiao Plaza, 8 Guang Hua Lu, Chaoyang District, Beijing.

Legal representative: Huan Hu, general manager of the company.

Authorized agent: Zhenyu Xie, male, Han nationality, born on December 15, 1974, manager of client software division of Beijing 3721 Technology Ltd., Co., residing at 3-503, Building 4 of Fang Zhi Xiao Qu, Chaoyang District, Beijing.

Authorized agent: Anjin Yang, attorney at Beijing Jin Cheng Law Offices.

Appellant Baidu Online Network Technology (Beijing) Ltd., Co (“Baidu”) and appellee Beijing 3721 Technology Ltd., Co. (“3721”) both appealed from Beijing Chaoyang District People’s Court’s decision on December 23, 2003 regarding the unfair competition dispute between them. This court accepted the appeal on January 11, 2004, formed a collegiate bench pursuant to the law, and tried the case publicly¹⁸ on March 3, 2004. The representatives of appellant Dan Guo and Jianming Hua as well as the representatives of appellee Zhenyu Xie and An Yang appeared in court. The case has been decided.

In its complaint at trial, appellant Baidu alleged as follows: our company is a software technology provider and platform operator which enjoys a good reputation in the domestic IT¹⁹ industry. We independently developed “Baidu SoBar,” a search tool integrated into the Microsoft IE browser. “Baidu SoBar” was completely compatible with other software

¹⁸ *Translator’s Note:* In China, appellate courts review both the finding of facts and the application of the law of trial courts. Generally, appellate courts should form a collegiate bench and try the case publicly. However, appellate courts have the discretion to decide to review the appeal without a public trial. See Civil Procedure Law, art. 151 and art. 152.

¹⁹ *Translator’s Note:* IT is the abbreviation for “information technology.” Information technology and communication(s) technology is a broad subject concerned with technology and other aspects of managing and processing information, especially in large organizations. In particular, information technology deals with the use of electronic computers and computer software to convert store, protect, process, transmit, and retrieve information.

according to our testing. In June 2002, after formally marketing the software, we found that 3721 updated its “3721 Network Real Name” to purposefully disable and delete “Baidu SoBar.” Since 2003, 3721 has added a program (called the *cnsminkp* file) into its “3721 Network Real Name.” The file did not help the operation of “3721 Network Real Name” but ran exclusively for the purposes of disabling “Baidu SoBar” and preventing users from downloading “Baidu SoBar” from Baidu’s website. The file caused all computers installed with “3721 Network Real Name” to be unable to download and run “Baidu SoBar” properly, therefore causing us huge economic losses. In addition, users lost confidence in the stability of our software, and our business reputation was seriously damaged. We believe that 3721’s conduct violated the principle of good faith and recognized business ethics, infringed upon our rights of modification, distribution, and disseminating information through the Internet over “Baidu SoBar,” and constituted unfair competition. Therefore, we ask the court to order 3721 to stop infringement immediately, apologize publicly on the websites of 3721.com and baidu.com, pay damages for our economic losses arising from the copyright infringement and unfair competition in the amount of RMB 500,000 and other economic losses in the amount of RMB 5,000, and bear the litigation costs.

Appellee 3721 alleged in its answer as follows: Baidu failed to provide evidence for its alleged copyright ownership; therefore, there were no grounds to determine that our company infringed upon Baidu’s copyright. The *cnsminkp* file is a component of many software products developed by our company, including “3721 Network Real Name” and “Online Assistant.” It is a support module for progress and file management. Deleting this file will not affect the apparent function of “3721 Network Real Name,” but it does not mean that it will not affect the software’s other functions. The situation that has arisen between our software and Baidu’s is a normal software conflict. Our company has informed users of the situation and provided them with plausible resolutions. Moreover, users can by all means make their own choice as to which software they would like to use. In sum, we were never exposed to the code and other files of “Baidu SoBar” and did not partake in any copyright infringement or unfair competition. Therefore, we do not agree with Baidu’s claims.

The trial court made the following factual findings: Baidu first promoted its tool bar search software, “Baidu SoBar,” on its website for users’ free downloading in June of 2002. On July 28th, 2003, when users logged onto Baidu’s website (web address: <http://bar.baidu.com/baidubar/>) to download and install “Baidu SoBar” through a computer that did not have a

cnsminpk file, the software operated properly. However, when users logged onto 3721's website (web address: <http://www.3721.com>) and installed "3721 Network Real Name" onto the same computer, a cnsminpk file would be downloaded onto the computer. When users uninstalled "Baidu SoBar" and restarted the computer, they found that they were no longer able to download "Baidu SoBar" by simply left clicking the "download" button as had worked previously, due to the existence of the cnsminpk file. They could only download the software through the "save as" option by right clicking the mouse, but the installation would fail. Now, after the cnsminpk file was deleted, users could again only install "Baidu SoBar" through the "save as" option by right clicking the "download" button, but now "Baidu SoBar" could be installed and operated properly. The content of the "Baidu SoBar" installation software downloaded on computers installed with the cnsminpk file was different from those not installed with the file. "3721 Network Real Name" also contains a cnsmincg.ini file, which has strings of "Bai Du," "Baidu" and "baidu.com." Beijing Guoxin Notary Office notarized the above situation.²⁰ However, Baidu did not prove how the cnsmincg.ini file affected the operation of "Baidu SoBar," neither did it prove there were any changes in "Baidu SoBar" itself after users installed "3721 Network Real Name." Nevertheless, Baidu alleged that if users deleted the cnsmincg.ini file, "Baidu SoBar" could be downloaded and installed properly. 3721 did not agree with this allegation.

In 1998, 3721 started marketing its address bar search tool, "3721 Network Real Name," and has updated the software many times since then. The cnsminpk file was added into the software in June 2003. The file was also contained in 3721's "Online Assistant" software. Deleting the file from "Online Assistant" would disable its security and restoring functions. 3721 alleged that it informed users about this situation around the end of May of 2003 and the beginning of June of 2003 but failed to provide evidence for such an allegation.

In addition, Baidu incurred RMB 5,000 notary fee for this lawsuit.

The trial court concluded as follows: Baidu had the right to permit others to modify, distribute, and disseminate the software through the

²⁰ *Translator's note:* article 67 of the Civil Procedure Law provides that "a people's court shall take legal acts, legal facts and documents notarized pursuant to legal procedures as a basis for ascertaining facts, except where contrary evidence is sufficient to invalidate the notarial certification." *See* Civil Procedure Law, art. 67. Notary office assistance in evidence collection is a common practice in China, as evidence collection by an interested party himself is sometimes limited by time, place and condition, and some evidence is hard to keep. It is even more so for an interested party to prove and keep online evidence. Therefore, it is essential for a notary office to notarize evidence and an evidence collection process to prove the objectivity of the evidence collected.

Internet as the copyright owner of “Baidu SoBar.” Baidu did not provide evidence to show that 3721 amended or deleted any parts of “Baidu SoBar” or changed commands or orders of the software without Baidu’s permission. Neither did Baidu provide any evidence to prove that 3721 provided the public with the original file or copies of the software, or distributed the software through the Internet. From the facts found by the court, the problem caused by the *cnsminpk* file incorporated in “3721 Network Real Name” could be resolved by uninstalling “3721 Network Real Name,” by deleting the *cnsminpk* file, or through other technical methods. Therefore, it could be inferred that “3721 Internet Real Name” did not completely disable the downloading and installation of “Baidu SoBar.” It only set barriers for the software’s distribution and dissemination through the Internet as opposed to completely preventing its distribution and dissemination. Therefore, the court did not agree with Baidu’s claims that 3721 infringed upon its copyright and was liable for its economic losses.

There was competition between 3721 and Baidu based upon the fact that “3721 Internet Real Name” and “Baidu SoBar” were both commercial software with a search function and made available for Internet users’ free downloading.

After the installation of “3721 Network Real Name,” users could not properly download, install, or run “Baidu SoBar.” It also caused changes in the content of “Baidu SoBar” installation software, for which 3721 failed to provide any reasonable explanations. Furthermore, 3721 did not prove evidence to counter Baidu’s allegation that the situation was caused by “3721 Network Real Name.” “3721 Network Real Name” is address bar search software, while “Baidu SoBar” is tool bar search software. They have different search functions. The two software programs could have coexisted, but 3721’s conduct made the uninstallation of the address bar search software, “3721 Network Real Name,” a prerequisite to the installation of the tool bar search software, “Baidu SoBar.” Meanwhile, because the *cnsminpk* file incorporated in “3721 Network Real Name” disabled the downloading and installation of “Baidu SoBar” and set up unnecessary technical barriers for users, it may cause users to give up using “Baidu SoBar” and leave their needs unsatisfied. Therefore, by gaining an advantage on competition through unfair methods, 3721’s caused Baidu to lose business opportunities. 3721’s conduct violated the principles of fairness and good faith, and constituted unfair competition.

Because 3721’s conduct did not completely disable the downloading and installation of “Baidu SoBar,” and it was possible for Baidu to help its users download and install the software through other methods, the trial

court did not support Baidu's claim that 3721's conduct caused users' loss of confidence in its software and seriously damaged its reputation. Therefore, the court did not support Baidu's request for public apology from 3721.

3721 alleged that both "Baidu SoBar" and "3721 Network Real Name" had the functionality of address bar searching, that what it did was for the purposes of resolving the technical problems of the exclusiveness of tool bar resources, and that it notified users with respect to the situation. However, 3721 did not provide evidence to show that "Baidu SoBar" also had the functionality of address bar searching. Therefore, the trial court did not support the defenses raised by 3721. But, because "Baidu SoBar" is free download software, 3721's conduct did not completely disable the downloading and installation of "Baidu Sobar," and Baidu did not provide evidence for its economic losses, the trial court did not support Baidu's claim for damages. Nonetheless, 3721 should compensate Baidu's reasonable litigation costs arising from this lawsuit.

In sum, the trial court entered judgment as follows: pursuant to article 64(1) of the Civil Procedure Law of the People's Republic of China,²¹ and Articles 2(1)²² and 20(1)²³ of the People's Republic of China Against Unfair Competition: (1) 3721 must stop interfering with the normal installation of "Baidu SoBar" through left clicking on the mouse; (2) 3721 must pay Baidu RMB 5,000 litigation costs within ten days from the date this judgment becomes effective; and (3) all of Baidu's other claims are dismissed.

Appellant Baidu appealed and asked this court to overrule the trial court's judgment and enter the following orders: 3721 stops identifying "Baidu SoBar," deletes any misleading users' notices, and stops the conduct infringing upon Baidu by hindering the proper downloading, installation, and operation of "Baidu SoBar"; 3721 makes public apologies on the websites of "3721.com" and "baidu.com"; 3721 compensates Baidu's economic losses of RMB 500,000, and other losses of RMB 5,000 arising

²¹ *Translator's note:* article 64(1) provides that "a party to an action shall be liable to present evidence to support its own assertions." See Civil Procedure Law, art. 64(1).

²² *Translator's note:* the Law of the People's Republic of China Against Unfair Competition was adopted at the third session of the standing committee of the eighth national people's congress on September 2, 1993. See *Zhonghua Renmin Gongheguo fan bu zheng dang jing zheng fa* [Law of the People's Republic of China Against Unfair Competition] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993) (P.R.C.) [hereinafter *Against Unfair Competition Law*]. Article 2(1) of the law provides that "business operators shall firmly adhere to the principles of voluntariness, equity and fairness, maintain honesty and trustworthiness, and observe the generally accepted commercial ethics in the conduct of trade." See *Against Unfair Competition Law*, art. 2(1).

²³ *Translator's note:* article 20(1) of the Law of the People's Republic of China Against Unfair Competition provides that "a business operator whose rights were infringed upon may file a lawsuit with the People's Court in cases where its legitimate rights and interests have been infringed upon by acts of unfair competition." See *Against Unfair Competition Law*, art. 20(1).

from 3721's copyright infringement and unfair competition; 3721 bears the litigation costs of this lawsuit. Baidu's grounds for its appeal are: (1) the trial court applied the law erroneously in concluding that 3721's conduct did not infringe upon Baidu's copyright. "3721 Network Real Name" changed the content of the "Baidu SoBar" software package, which infringed upon Baidu's software modification right over "Baidu SoBar"; "3721 Network Real Name" prevented Baidu from providing its users with "Baidu SoBar," and hindered its dissemination, which infringed upon Baidu's rights of distribution and dissemination through the Internet over "Baidu SoBar." (2) The trial court's judgment was not sufficient to deter 3721 from further infringement. "3721 Network Real Name" disabled the downloading, installation, and operation of "Baidu SoBar." However, the trial court only ordered 3721 not to interfere with the installation and operation of "Baidu SoBar" by the method of left clicking of the mouse. This order was insufficient to have 3721 stop its infringement. (3) The trial court's judgment that 3721 did not need to compensate Baidu's economic losses or make apologies lacked factual and legal bases. "Baidu SoBar" could bring enormous economic benefits to Baidu. 3721 maliciously prevented Baidu from entering the market of online search in order to gain profits by forming a monopoly. The court should consider 3721's illegal income and the scope and nature of its infringement, exercise its discretion properly, and order 3721 to compensate Baidu's losses. The trial court held that "3721 Network Real Name" set up unnecessary barriers for "Baidu SoBar's" downloading, installation, and operation, and caused users to lose their confidence in the reliability of "Baidu SoBar." This would necessarily damage Baidu's reputation, which warrants that 3721 should apologize publicly to Baidu.

3721 answered: Baidu changed its claims on appeal, which should not be approved by the court. The evidence provided by Baidu on appeal does not qualify as admissible new evidence and should not be considered. Baidu did not prove that 3721 infringed upon its copyright. The situation involved only happens when a user installs "3721 Network Real Name" and "Baidu SoBar" simultaneously. The business opportunities for both parties are equal. Baidu's so-called losses should not be attributed to 3721.

Appellee cross-appealed, asking the court to overrule items one and two of the trial court's judgment and order Baidu to pay litigation costs. The grounds for its appeal are as follows: (1) the trial court did not find the real cause of the situation involved in this case; therefore, it should not conclude that 3721 was at fault. The situation involved may be attributable to other factors such as hardware condition, other software installed, whether the uninstallation of "Baidu SoBar" was complete, and whether the process was

correct. In order to prove causation, further determination should be made as to whether the situation was actually caused by a software conflict. Long-term, close cooperation between the parties is needed to resolve the software conflict and underlying technical problems. Software conflicts can happen among different types of software. Users have a right to choose among them when conflicts arise. As to the situation involved in this case, 3721 already notified users of the possibility of software conflict and provided them with resolutions through public channels. (2) The trial court's judgment would cause negative impact on the Internet industry and lacks feasibility. The industry of network keyword searching is a new industry, and its technical factors are very complicated. The development of the industry is yet to be regulated. The dispute in front of this court is beyond its review, and should be resolved by the industry.

Baidu answered: "3721 Network Real Name" was the cause of users' not being able to download, install, and run "Baidu SoBar." 3721 should provide evidence to show that the situation involved was merely a normal software conflict.

On appeal, appellant Baidu submitted a notarization statement affirming that the notices 3721 provided to users were false, that "3721 Network Real Name" disabled the proper downloading and installation of "Baidu SoBar," and that 3721 collected fees from enterprise users at a minimum rate of RMB 500. Appellee 3721 contended that such evidence was not obtained after the completion of the trial, and, therefore, it does not qualify as admissible new evidence according to relevant judicial interpretation. Even if the court concludes that this evidence is admissible new evidence, it can only indicate that the situation involved in this case did arise. However, there was still no evidence to prove that 3721 caused the situation.

At trial, Baidu contended that 3721 used illegal methods to prevent users from downloading and using "Baidu SoBar" and asked for damages. The evidence Baidu relied upon was the barriers caused by "3721 Network Real Name" for proper downloading and installation of "Baidu SoBar" and 3721's revenue generated from the sale of "3721 Network Real Name." 3721's conduct referred to in the evidence is deemed the continuation of its alleged infringing conduct during the period of appeal. Although 3721 believed the situation involved was not related to "3721 Network Real Name," it did not provide evidence to the contrary. Therefore, the court agrees that Baidu's evidence provided at trial was true and can be used to prove the situation involved in the instant case.

This court found that after the installation of “3721 Internet Real Name,” if users clicked the button “click here to download and install ‘Baidu SoBar,’” a warning message of software conflict would pop up and provide users with four options. However, no matter which option users chose, they could not download “Baidu SoBar.” Users could only download “Baidu SoBar” after uninstalling “3721 Internet Real Name” through the “add/remove program” in the control panel.

The court confirmed all other facts found by the trial court.

The key issues in front of this court are: whether 3721’s conduct infringed upon Baidu’s alleged copyright in “Baidu SoBar;” whether 3721’s conduct constitutes unfair competition; and whether 3721 should be ordered to stop infringement, apologize publicly to Baidu, and compensate Baidu’s alleged economic losses and litigation fees.

The first issue is whether 3721’s conduct infringed upon Baidu’s alleged copyright in “Baidu SoBar.”

According to relevant provisions in the Copyright Law of the People’s Republic of China, if there is no evidence to prove otherwise, a citizen, legal person, or non-incorporated entity whose signature is on a work is the author of the work. In the instant case, although Baidu is not the operator of the Baidu website (the web address is WWW.BAIDU.COM), its copyright statement on the website indicates that Baidu holds all rights to the relevant contents of the website. Thus, Baidu is the copyright owner of “Baidu SoBar,” and its copyright should be protected by law. Although 3721 disagreed that Baidu has copyright in “Baidu SoBar,” it did not provide any evidence to the contrary. Therefore, the court will not adopt its contention.

Because Baidu is the copyright owner of “Baidu SoBar,” others are not allowed to modify or disseminate the software through the Internet without Baidu’s permission. In this case, Baidu did not provide evidence to prove that 3721 amended, deleted some portions of, or changed any commands of “Baidu SoBar.” The copyright law defines the right of information dissemination through the Internet as a right to provide works to the public through wired or wireless networks, which enables the public to access them at a time and location of their choice.²⁴ In this case, although “3721 Internet Real Name” affects the downloading, installation, and operation of “Baidu SoBar,” the software is still available to users through the Internet. Because Baidu did not provide evidence to prove that 3721 modified or deleted any part of the software, or that 3721 interfered with its provision of the software to the public through the Internet, the court does

²⁴ See Copyright Act, art. 10(12).

not support the claim that 3721 infringed upon the copyright of “Baidu SoBar,” due to insufficient evidence.

The second issue is whether 3721’s alleged conduct constitutes unfair competition, and whether 3721 should be ordered to stop infringement, apologize to Baidu, and compensate Baidu’s alleged economic losses.

According to relevant provisions of our Competition Law, business operators should be in compliance with the principles of equality, fairness, honesty, and good faith, as well as accepted business ethics. The Internet, as an evolving industry, has been developing very quickly. To ensure the healthy development of the industry, among other laws and regulations enacted by the legislature, the Chinese Internet Association adopted a self-disciplinary document for the Internet industry: the Self-Discipline Agreement for China Internet Industry. This document encourages businesses engaging in Internet-related services to impose self discipline so as to support legitimate, fair, and orderly competition. It also provides that in order to create a good industry development environment, businesses should respect and protect the consumers’ and users’ legitimate rights and oppose making and disseminating any computer software that is able to maliciously attack the Internet and others’ personal computer information systems.

In this case, although “Baidu SoBar” is a toolbar search software program while “3721 Internet Real Name” is an address bar search software program, they are both commercial software made available for free downloading by Internet users. Baidu is not the operator of the Baidu website, but as the owner of “Baidu SoBar,” it provides search software and so does 3721. Therefore, Baidu and 3721 are competitors.

According to the evidence in front of the court, “3721 Internet Real Name” hindered the downloading, installation, and operation of “Baidu SoBar.” 3721 alleged that the above mentioned failure was caused solely by software conflict, or some other reasons, but it failed to provide any evidence to support such an allegation. The court concluded that the failure was related to the `cnsminkp` file incorporated in “3721 Internet Real Name.” Although 3721 alleged that the `cnsminkp` file had a special function for the operation of the software, it also had the function of hindering the downloading and installation of “Baidu SoBar.” Therefore, the court concluded that 3721 used unfair methods to encumber the downloading and installation of “Baidu SoBar.”

According to the facts found by the court, on February 17, 2004, any effort by users to install “Baidu SoBar” would fail after the installation of “3721 Internet Real Name.” A dialogue window would pop up, warning

users of a software conflict, and providing them with four options. However, installation would fail again no matter which option users chose from the dialogue window. Users could only download and install “Baidu SoBar” successfully once “3721 Internet Real Name” was uninstalled. The fact that none of the options given could be used to overcome the installation problem indicates that users were deprived of their right to choose. According to the industry competition standards for legitimate, fair, and orderly competitions in the Internet industry, this situation is far beyond the scope of normal software conflict, and 3721’s conduct amounts to unfair competition.

3721’s above-mentioned conduct not only made it impossible for users to choose, but deprived “Baidu SoBar” of an opportunity to be freely chosen by users, which caused Baidu to lose many business opportunities. Therefore, the court supports Baidu’s claim that 3721’s conduct constitutes unfair competition.

The court also supports Baidu’s claim that 3721’s conduct constitutes unfair competition, and it should be ordered to stop infringement and bear the litigation costs. However, because Baidu did not provide sufficient evidence to prove that 3721’s conduct damaged its business reputation, the court does not support Baidu’s claim that 3721 should apologize publicly. Moreover, Baidu made “Baidu SoBar” available for free downloading and did not prove that 3721’s conduct caused it any particular economic losses. Since ordering 3721 to stop the infringement is sufficient to protect Baidu’s legitimate rights and interests, the court will not award any damages to Baidu for economic losses.

According to articles 2(1) and 20(1) of the Law of the People’s Republic of China Against Unfair Competition and article 153(1)(iii)²⁵ of the Civil Procedure Law of the People’s Republic of China, it is so ordered:

1. Sustain the second item of the judgment of Beijing Chaoyang District People’s Court, providing that 3721 should make a payment of RMB 5000 to Baidu for litigation fees within ten days from the date on which the judgment takes effect.
2. Vacate the first and third items of the judgment of Beijing Chaoyang District People’s Court, providing that 3721 should

²⁵ *Translator’s Note:* article 153 of the Civil Procedure Law provides that “(1) a people’s court of second instance shall, after a hearing, dispose of a case of appeal in the manner outlined below according to the respective circumstances: (iii) where, in the original judgment, the facts were incorrectly or not clearly ascertained and the evidence was inconclusive, a ruling shall be issued to quash the original judgment and the case shall be remanded to the original people’s court for a retrial or, alternatively, a new judgment amending the original judgment may be issued after clarification of the facts.” See Civil Procedure Law, art. 153.

- not hinder the normal downloading and installation of “Baidu SoBar,” and dismiss Baidu’s other claims.
3. 3721 should stop using “3721 Internet Real Name” to hinder the downloading, installation, and operation of “Baidu SoBar” immediately.
 4. Dismiss Baidu’s other claims.
 5. This order is the final decision.

The litigation fee for the trial is RMB 15,035. Baidu is responsible for RMB 4,510 (paid) and 3721 RMB 10,525 (to be paid within seven days after this judgment becomes effective). The litigation fee for the appeal is RMB 15,035. Baidu is responsible for RMB 4,510 (paid) and 3721 RMB 10,525 (paid).

Chief Judge: Wei Liu
Acting Judge: Guang Song
Acting Judge: Lijun Liang
April 23, 2004
Court Clerk: Gang Feng