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Contextualizing Michael Jordan v. Qiaodan Sports: I Don't Believe I Can Fly, or Do Business, in China

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Cover Page Footnote

J.D. Candidate, 2022, University of Georgia School of Law. I dedicate this Note to my family, friends and specifically my cousin and attorney-mentor Neil Anderson. I could not have written this piece without them.

CONTEXTUALIZING *MICHAEL JORDAN V. QIAODAN SPORTS*: I DON'T BELIEVE I CAN FLY, OR DO BUSINESS, IN CHINA

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I. INTRODUCTION

"Being named among the best at something is special and beautiful. But if there are no titles, nothing is won."[1] Everyone receives a name, but few are well known. The lust for notoriety is an inherent human desire, which explains why roughly a quarter of millennials—the current driving force behind America's economy—would prefer fame over a professional career in the law or medicine.[2]

As superficial as it seems, the rich and famous appear to have a certain "Midas Touch,"[3] and as such, domestic and international companies should have to obtain approval before they associate themselves with the names and images of rich and famous individuals. But trademark enforceability is a nuanced legal topic, and territorial issues often arise due to entities' geographical separation.[4] Ranking in terms of gross domestic product, the U.S. ranks first and China ranks second in their percentage shares of the global economy.[5] American brand owners are electing to conduct business in China in increasing numbers, yet China's trademark law has failed to afford them holistic trademark protection time and time again.[6]

An athlete may steal another player's signature fade-away, duplicate another player's specific workout routine, or clone another player's nutritional regimen to get a leg up on a competitor.[7] It would be nonsensical to argue that any of these acts rise to the level of infringement.

Michael Jordan's Nike endorsement deal of 1985, however, was the first of its kind–Converse never gave Magic Johnson, Larry Bird, or Julius Erving individual recognition on any of their signature sneakers.[8] From the 1980s well

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[1] Chad Nielsen, *What I Do Is Play Soccer*, ESPN (May 25, 2009), https://www.espn.com/espn/news/story?id=4205057 (providing Lionel Messi's response to an interview question).

[2] J. Maureen Henderson, *One in Four Millennials Would Quit Their Job to Be Famous*, FORBES (Jan. 24, 2017, 9:33 AM), https://www.forbes.com/sites/jmaureenhenderson/2017/01/24/one-in-four-millennials-would-quit-their-job-to-be-famous/?sh=4880a76f2c43.

[3] *Midas Touch,* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

[4] *See infra* notes 61-63 and accompanying text (discussing some of the implications of China's "first-to-file" system when Chinese courts have to determine which user has priority in a concurrent use proceeding over a geographic territory).

[5] Caleb Silver, *The Top 20 Economies in the World*, INVESTOPEDIA (Mar. 18, 2020), https://www.investopedia.com/insights/worlds-top-economies/.

[6] *Nike, Adidas See Golden Opportunity in China*, NBC NEWS (Oct. 3, 2007, 1:47 PM), http://www.nbcnews.com/id/21116990/ns/business-sports_biz/t/nike-adidas-see-golden-opportunity-china/#.X3oNDZNKhTY.

[7] Tony Manfred, *Kevin Durant Taught Himself Dirk Nowitzki's Signature Move, and It's Unguardable*, BUS. INSIDER (Dec. 12, 2014, 11:36 AM), https://www.businessinsider.com/kevin-durant-stole-dirk-nowitzkis-shot-2014-12 (quoting Kevin Durant's saying that "Dirk's got a lot of moves" he is trying to steal).

[8] *David Falk – Part 1*, *The Business of Sports Podcast with Andrew Brandt*, at 56:47 (May 5, 2020) (downloaded using Apple Podcasts) ("There was no precedent . . . no one had ever done it.").

into the twenty-first century, Chinese articles, media reports, and television broadcasts documented Jordan's legacy.[9] During this time, Qiaodan Sports Company ("Qiaodan Sports") filed bad faith trademark registrations for the right to use Jordan's name and image.[10]

This Note serves to: (1) explore the ways in which Jordan's fame has impacted the sports business industry and China's trademark law; (2) examine the reasoning underlying Jordan's claims for exclusive trademark protection; and (3) resolve the ambiguity in China's trademark framework as to the determination of whether to grant image rights to retrial applicants.

II. BACKGROUND

The following section provides background information on Jordan's decade-long trademark dispute with Qiaodan Sports. This section facilitates the reader's understanding of the pervasiveness of bad faith trademark registration globally.

A. AN UNCANNY RESEMBLANCE

1. A Race to the China Trademark Office

In 1997, 17-year-old giant Yao Ming was on the cusp of bringing about a paradigm shift in the popularity of Chinese basketball, which spawned much conversation among NBA scouts.[11] Later that year, a Fujian company formed a business entity under the name Qiaodan Sports and began selling swimwear, shoes, and raincoats.[12] It is important to note that all of China understands the word "Qiaodan" to be a rough transliteration, or audible pronunciation, of Michael Jordan's surname in the Chinese language.[13] At that time, Qiaodan Sports used Jordan's name and, confusingly, aimed its products towards a target market of swimmers and other water athletes.[14]

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[9] Zui Gao Fa Xing Zai No. 32 (邁克爾杰弗里喬丹訴商標評審委員會和喬丹體育有限公司) [Michael Jeffrey Jordan v. TRAB and Qiaodan Sports Co., Ltd.], https://mp.weixin.qq.com/s/SpZTEWS7aXI476yYCL_6UA, at 2 (Sup. People's Ct. 2018) (China).

[10] *Id.*

[11] Fay Bou et al., *Beyond Yao: The Future of Chinese Basketball*, KNOWLEDGE @ WHARTON (Jan. 26, 2011), https://knowledge.wharton.upenn.edu/article/beyond-yao-the-future-of-chinese-basketball/.

[12] Laura Wen-yu Young, *Understanding Michael Jordan v. Qiaodan: Historical Anomaly or Systemic Failure to Protect Chinese Consumers?*, 106 TRADEMARK REP. 883, 883-884 (2016).

[13] *Id.*

[14] *Id.*

To date, Qiaodan Sports has filed hundreds of trademark applications in connection with Jordan's name and image including, but not limited to, applications for the right to use the full names of Jordan's two sons "Jeffrey Jordan" (Jie Fu Li Qiaodan) and "Marcus Jordan" (Ma Ku Si Qiaodan).[15] The presumption was that Jordan's sons themselves would generate additional revenue as famous NBA basketball players,[16] which didn't happen.[17]

Further indicia of Qiaodan Sports' ill-will is endless; its 1997 logo depicting a baseball player with white gloves[18] went public three years after Jordan's brief stint of playing baseball for the Chicago White Sox.[19] In the early 2000s, presumably as a result of Jordan's return to basketball, Qiaodan Sports then changed its logo to an airborne basketball player and reinvented its inventory to mirror that of Nike's Air Jordan brand ("Air Jordan").[20]

Nike was the first to hold Chinese trademarks to "MICHAEL JORDAN" and Jordan's black silhouette "JUMPMAN."[21] Qiaodan Sports' subsequent registrations support allegations of "a deliberate intention to associate [] with, or trade on the fame and goodwill of, Michael Jordan's trademarks" in China.[22]

China's World Trade Organization membership, Yao Ming's NBA promise,[23] and Beijing's 2008 Olympics[24] bid would all benefit Qiaodan Sports' enterprise, if not for anything else, due to sheer confusion among Chinese consumers about whether Qiaodan was actually Jordan's brand.[25]

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[15] *Id.* at 884–85.

[16] *Id.* at 885.

[17] Patrick Pinak, *Michael Jordan's Kids Have a Life Outside of His Airness' Shadow*, FANBUZZ (July 15, 2021, 5:37 PM), https://fanbuzz.com/nba/michael-jordan-kids/.

[18] Bob Garcia IV, *Michael Jordan Lawsuit Win in China's Supreme Court Protects His $2.1 Billion Net Worth*, SPORTSCASTING (Apr. 19, 2020), https://www.sportscasting.com/michael-jordan-lawsuit-win-in-chinas-supreme-court-protects-his-2-1-billion-net-worth/.

[19] Phil Thompson, *25 Years Ago, Michael Jordan Played for the White Sox Against the Cubs at Wrigley Field — and Got 2 Hits*, CHI. TRIB. (Apr. 7, 2019, 7:30 AM), https://www.chicagotribune.com/sports/white-sox/ct-spt-white-sox-michael-jordan-cubs-wrigley-field-20190407-story.html.

[20] Young, *supra* note 12, at 883-884.

[21] *Id.* at 885.

[22] *Id.*

[23] *Id.*

[24] Liuqian Huang, *Research on Effect of Beijing Post-Olympic Sports Industry to China's Economic Development*, ENERGY PROCEDIA 5 2097-2101 (2011), at 2101 (noting that post-Beijing Olympics, the domestic sporting goods industry in China has developed into a golden age).

[25] Zui Gao Fa Xing Zai No. 32 (邁克爾杰弗里喬丹訴商標評審委員會和喬丹體育有限公司) [Michael Jeffrey Jordan v. TRAB and Qiaodan Sports Co., Ltd.], https://mp.weixin.qq.com/s/SpZTEWS7aXI476yYCL_6UA, at 1 (Sup. People's Ct. 2018) (China) (finding that interview respondents in China's cities believed Qiaodan Sports was Michael Jordan's own brand in China); *Jordan sues Chinese Company,* SINA.COM (Feb. 24, 2012), http://english.sina.com/business/p/2012/0224/442988.html.

It's no surprise, then, that Jordan's global ascension helped finance Qiaodan Sports. In 2013 alone, the company reported upwards of $270,000,000 revenue in more than 5,700 outlets in China.[26] But while American commentators have displayed public outrage about how Chinese authorities have deprived Jordan of the right to his own identity, similar situations have occurred in the United States.[27]

2. Parallelism in the U.S. Federal Courts

Trademark law in the U.S. aims to prevent a person from selling goods with "any word, term, name, [or] symbol . . . which is *likely to . . . deceive as to the affiliation*, connection, or association of such person with another person."[28] But still, the U.S. federal courts referenced below have struggled with the dichotomy of whether to protect foreign companies or the American companies whose trademark applications they challenge.

The Second Circuit has put forth a particularly functionalist ruling on this subject. In the 1980s, a foreign company, ITC, owned and operated restaurants in India, acquiring trademark rights about a decade later to a certain "Bukhara" logo through the United States Patent and Trademark Office ("USPTO").[29] But the plaintiffs at ITC were unsuccessful in challenging a defendant's simultaneous and conflicting use of their logo in America, even though this defendant knowingly appropriated the Bakhara logo for his own opportunistic gain.[30] The Second Circuit found that because the plaintiffs had abandoned their logo for a three-year period, the plaintiffs could no longer demonstrate a right to use their own logo in the United States, in which case this court grants no famous mark exception to the territoriality principle.[31]

In *Grupo Gigante SA De CV v. Dallo & Co.*, however, the Ninth Circuit court followed a more pragmatic approach.[32] The case involved a dispute between a Mexican-Arizonian plaintiff and a San Diegan defendant over a "Gigante" logo.[33] First, the court found that the plaintiff's fame depended on what its logo

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[26] Gwynn Guilford, *A Chinese Sportswear Company Has Trademarked Michael Jordan's Sons' Names*, QUARTZ (Apr. 29, 2013), https://qz.com/79234/michael-jordan-versus-qiaodan-sports/.

[27] *See infra* notes 29-37 and accompanying text (showing tension among the U.S.'s Second and Ninth circuit courts when analyzing geographic rights with respect to geographically separate users who expand their trademark uses to other countries).

[28] 15 U.S.C. § 1125(a) (emphasis added); *see also* Starbucks Corp. v. Wolfe's Borough Coffee, Inc., 588 F.3d 97, 105 (2d Cir. 2009)(noting that dilution by blurring arises when the similarity between a mark or trade name and a famous mark impairs the distinctiveness of the famous mark).

[29] ITC, Ltd. v. Punchgini, Inc., 482 F.3d 135, 155 (2d Cir. 2007).

[30] *Id.* at 156.

[31] *Id.* at 147, 154 (noting that unfair competition claims on "likelihood of confusion" grounds are not available unless a plaintiff can demonstrate a present right of trademark use).

[32] 391 F.3d 1088, 1092 (9th Cir. 2014).

[33] *Id.* at 1091.

meant to a "*substantial* percentage of consumers" in the defendant's relevant geographic market: San Diego.[34] The court then noted additional considerations to take into account, like whether the defendant intentionally copied, or whether consumers would think the defendant was patronizing, the same logo in a different country or province.[35]

Therefore, if an alleged infringer later duplicates a logo without knowledge of the true owner's earlier local use, what the logo means to local consumers in the given territory would determine who receives priority.[36] This shows the circumstances under which an earlier user's logo might trigger in the minds of the public a desire to identify the source of that product, rather than the product itself, rendering the earlier user's region of use irrelevant.[37] If a court finds that there is a showing of bad faith on the part of a defendant, adopting a limited famous mark exception seems more logical than the Second Circuit's outright denial to conduct any inquiry into the conflicting party's fame whatsoever.

Historically, the China Supreme People's Court's ("SPC") views aligned with *ITC* in preserving the rights of its domestic constituents.[38] But in *Michael Jordan v. Qiaodan*, China's highest court adopted something similar to a famous mark exception, though particular questions still remain under China's trademark law with respect to American brand owners' logos, which the next section details further.

B. MICHAEL JORDAN V. QIAODAN SPORTS CO.

The nuances of China's trademark law further complicate court interpretations of the same. Particularly relevant in *Michael Jordan v. Qiaodan Sports Co.* is the extent to which a famous trademark may grant a retrial applicant not only name rights but also image rights.

And perhaps the most notable famous mark inquiry in China over the past decade came courtesy of Jordan's application to the Trademark Review and Adjudication Board (the "Board") in an effort to revoke Qiaodan Sports' "Jordan and Figure" registrations.[39] After an administrative court had maintained Qiaodan Sports' disputed registration, Jordan appealed his case to the SPC.[40]

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[34] *Id.* at 1098.

[35] *Id.*

[36] *Id.* at 1097.

[37] *Id.* at 1095, 1097.

[38] Zui Gao Fa Xing Zai No. 32 (邁克爾杰弗里喬丹訴商標評審委員會和喬丹體育有限公司) [Michael Jeffrey Jordan v. TRAB and Qiaodan Sports Co., Ltd.], https://mp.weixin.qq.com/s/SpZTEWS7aXI476yYCL_6UA, at 1 (Sup. People's Ct. 2018) (China).

[39] China Trademark Reg. No. 6020578.

[40] Jordan v. TRAB and Qiaodan Sports Co., Ltd., SPC [Sup. People's Court], Zui Gao Fa Xing Zai No. 32 at 11 (2018) (China).

Reversing in part a previous ruling in which it denied Jordan's right to protect his contestably registered name, the SPC credited Jordan's "long-term and extensive reputation to the relevant public, and his well-known scope of popularity, which is not limited to the basketball field."[41] During all times relevant to the court's findings, Jordan was "a public figure in China."[42] The court held that Qiaodan Sports had registered Jordan's prior name rights as a trademark without permission, and consequently, mislead the relevant public to mistakenly believe that its goods have a specific connection with Jordan's natural person, like an endorsement or license.[43] As such, the court enforced Jordan's prior name rights to the word "QIAODAN" in Chinese commerce.[44]

Nevertheless, the court further held that the JUMPMAN logo is protectable only if it is recognizable and contains "enough physical features to enable the public to identify the corresponding subject of the right."[45] The court effectively granted Jordan a famous mark exception for a right to his tradename but did not grant Jordan an image right because it determined the JUMPMAN logo to lack the actual characteristics of any specific natural person.[46]

The presumption is that this ruling does not enjoin Qiaodan Sports from using a different name to sell its existing inventory, (which fashions a logo that is substantially similar to the JUMPMAN logo), as long as such products do not have the disputed name affixed to them. Having declined to recognize Jordan's claim that the object of name protection is not limited to one's full name, but also "includes other subject identification symbols that can establish a corresponding relationship with the right holder,"[47] the court unnecessarily limited its grant of right to Jordan regarding the name "QIAODAN" under China's trademark law.[48]

But still, the court's record shows that there is an acquired distinctiveness of the JUMPMAN logo, namely, it is a black silhouette, which outlines "[Jordan's] body performing a specific dunking motion."[49] This trademark dispute arises because of Jordan's popularity as a highflying basketball player and Qiaodan Sports' intention to associate with his accompanying legend by creating a confusingly similar dunking logo. Qiaodan Sports' registrations regarding Jordan's image, then, should fall within the purview of "obtaining registrations

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[41] *Id.* at 1.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* (recalling the judgment of the court of second instance).

[48] *Id.* (stating that according to Article 99 of China's Civil Law and Article 2 of China's Tort Law, people not only have the right to name but also the right to names used in combination with graphics).

[49] *Id.*

through practices that deceive consumers" as stipulated in China's trademark law.[50]

Beyond this showing of peculiarity in judgement, the record demonstrates that Air Jordan products themselves, each of which fashion a certain JUMPMAN logo, had garnered significant media attention and accolades in the clothing and apparel industry.[51] By way of illustration, Retro Air Jordan releases are collectible items worth upwards of $104,000 depending on the games in which Jordan wore the respective sneakers.[52] As Jordan himself states, "When the shoes were at their peak, I played at a high level, and [as] consumers saw that, [] it basically authenticated everything about that shoe."[53] The Air Jordan brand is Jordan's DNA; the brand is who he is, and the brand goes as far as he goes.[54]

With the rise of E-commerce over recent decades, sneaker collectors in China are a few clicks away from purchasing Jordan's sneakers and realizing large profits. Irrespective of whether all Air Jordan products specifically inscribe the surname "Jordan" on them, one can locate a classic JUMPMAN logo on every product. Time Magazine recently ranked the JUPMAN logo among the 100 most influential images of all time.[55] And for every Air Jordan brand consumer who Qiaodan Sports deceives with their replica brand, Qiaodan Sports reignites a settled debate.

Two notable survey reports sampled people who actually purchase Qiaodan Sports' products and those who do not and found that a majority of Chinese consumers are uncertain about what constitutes Michael Jordan's "DNA" in China's sports apparel industry.[56] While courts typically differ in their interpretations of the accuracy of population surveys, courts in the Republic of China, in particular, find population surveys more reliable when they employ "multi-stage stratified random sampling" methods based on demographic distribution characteristics of the actual population that mirror those of China's National Consensus.[57] Authentication is an objective factor. When a surveyor

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[50] Zhōngguó shāngbiāo fǎ (中国商标法) [Trademark Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 12, 1982, effective July 1, 1983) World Intell. Prop. Org., art. 7, para. 2.

[51] Jordan v. TRAB and Qiaodan Sports Co., Ltd., SPC [Sup. People's Court], Zui Gao Fa Xing Zai No. 32 at 10 (2018) (China).

[52] Morgan Baylis, *The Top 10 Most Expensive Air Jordans in StockX History*, STOCKX (Feb. 12, 2020), https://stockx.com/news/most-expensive-air-jordans/.

[53] Cigar Aficionado, *The Uncut Interview with Michael Jordan*, YOUTUBE (Oct. 14, 2020), https://www.youtube.com/watch?v=JfJYyN2GGts.

[54] *Id.*

[55] Nathaniel Meyersohn, *Nike Triumphs in Michael Jordan Jumpman Logo Lawsuit*, CNN BUSINESS (Apr. 10, 2019, 10:53 AM), https://www.cnn.com/2019/03/25/business/nike-michael-jordan-jumpman-logo-lawsuit/index.html.

[56] Jordan v. TRAB and Qiaodan Sports Co., Ltd., SPC [Sup. People's Court], Zui Gao Fa Xing Zai No. 32 at 4 (2018) (China).

[57] *Id.*

installs technology such that the survey bans answer interception and adopts a common interpretative software, the survey is typically more accurate,[58] as was done in the above-mentioned surveys.

In addition, Qiaodan Sports' registrations regarding Jordan's children's names contributed to this consumer confusion.[59] When viewed in tandem, these findings are probative of Qiaodan Sports' underlying deceptive motive in its use of an uncannily similar logo.[60] As such, Jordan's notion that his pose, angle, and body juxtaposition all comprise his logo makes sense, being that these attributes are existential identifiers with respect to his public image in China.

The SPC could have analyzed Jordan's right to image in light of the fame his logo has historically had, and now has, in China. Or the SPC could have factored policy considerations into its reason for not addressing Jordan's right to image, as opposed to dismissing his image claim altogether due to a territorially distinct trademark law. And, even if the SPC were to hold on appeal that the two companies' logos are virtually different, Qiaodan Sports' bad faith provides a stand-alone civil trademark claim regarding Jordan's right to image.

III. REPEALING CONTESTABLE TRADEMARK REGISTRATIONS

"A fundamental principle of trademark law is first in time equals first in right,"[61] but whether "first" means earlier use or earlier registration is at the crux of most complex trademark disputes in China.[62] If an individual proves that his brand or entity has local fame among Chinese consumers, that individual then has a heightened burden of proof, regarding varied elements of unfair competition, if he or she is to receive sole and exclusive famous mark protection.[63] The following sections discuss how, although the SPC is territorially restrictive in its interpretation of Chinese trademark law surrounding bad faith and prior rights, Jordan's potential claim for image rights is all but moot.

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[58] *Id.*

[59] *Id.* at 8.

[60] *Id.* at 4.

[61] Grupo Gigante S.A. de C.V. v. Dallo & Co., 391 F.3d 1088, 1093 (9th Cir. 2004).

[62] Anne M. Wall, *Intellectual Property Protection in China: Enforcing Trademark Rights*, 17 MARQ. SPORTS L. REV. 341, 372 (2006) (comparing Chinese law's "first-to-file" principle to the general "first-to-use" principle in the U.S. and noting that trademark disputes tend to arise in China because, unaware of China's trademark system, westerners enter Chinese commerce without prior registration of IP rights).

[63] Zhōngguó shāngbiāo fǎ (中国商标法) [Trademark Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 12, 1982, effective July 1, 1983) World Intell. Prop. Org., art. 31; *id.*, art. 10, para. 7.

A. UNFAIR COMPETITION

1. Bad Faith

Bad faith concerns arise when American brand owners register Chinese translations of their names and logos, begin using them, and Chinese imitators then usurp their prior rights by claiming earlier filing.[64] Chinese trademark law expressly prohibits rushing "to register in an unfair manner a mark that is already in use by another party [who] enjoys substantial influence."[65] Jordan would have to prove that Qiaodan Sports' registered its infringing logo, like it registered its infringing name, "by investment and promotion of a trademark" to create "substantial influence" using Jordan's fame.[66]

This legal framework, much like that of the U.S. Second Circuit in *ITC*[67], grants the right to whichever party is the first to use a trademark in a specific region. But Jordan's prior use begs the question of whether his famous tradename grants him prior logo rights, together with his prior name rights, to cancel Qiaodan Sports' registration of its logo. In earlier judgments, the SPC found no evidence that "QIAODAN" was the famous trademark of Jordan[68], but with its recent ruling that the name "QIAODAN" belongs to Jordan, the athlete's claim of bad faith registration presumably has merit.[69]

In the Prospectus of Qiaodan Sports, the company recorded "[r]isk factors that require special attention."[70] For example, "the issuer's *trade name and the main product mark are the same as the American former NBA player Michael Jordan*."[71] This is particularly concerning because an executive then pondered, "[s]ome consumers may misunderstand or confuse the issuer and its products with Michael Jordan. I would like to draw the attention of investors here."[72] Deeply embedded in Qiaodan Sports' promotional techniques are deceptive trading practices, which exploit the appearance of an association with Jordan to disseminate

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[64] Young, *supra* note 12, at 893.

[65] Trademark Law of the People's Republic of China, art. 32, para. 1.

[66] Young, *supra* note 12, at 894.

[67] ITC, Ltd. v. Punchgini, Inc., 482 F.3d 135, 155 (2d Cir. 1923).

[68] Zui Gao Fa Xing Zai No. 32 (**邁克爾杰弗里喬丹訴商標評審委員會和喬丹體育有限公司**) [Michael Jeffrey Jordan v. TRAB and Qiaodan Sports Co., Ltd.], https://mp.weixin.qq.com/s/SpZTEWS7aXI476yYCL_6UA, at 1 (Sup. People's Ct. 2018) (China) (noting that the court of second instance erred in finding that the name "Jordan" is an ordinary surname and also erred in holding that Michael Jordan's evidence is insufficient to prove that Qiaodan's subsequent use points to Michael Jordan).

[69] Young, *supra* note 12, at 894.

[70] Zui Gao Fa Xing Zai No. 32 (邁克爾杰弗里喬丹訴商標評審委員會和喬丹體育有限公司) [Michael Jeffrey Jordan v. TRAB and Qiaodan Sports Co., Ltd.], https://mp.weixin.qq.com/s/SpZTEWS7aXI476yYCL_6UA, at 7 (Sup. People's Ct. 2018) (China).

[71] *Id.*

[72] *Id.*

misinformation to investors so that consumers never actually know whose goods they are purchasing.

Further, the Lenovo Survey Reports[73] (National and Shanghai) gathered information by asking local Chinese consumers questions about the relationship between Qiaodan Sports and Michael Jordan. 93 percent of active Qiaodan Sports consumers responded that they thought Qiaodan Sports and Michael Jordan were related.[74] Regarding the specific relationship between Qiaodan Sports and Michael Jordan, different proportions of interviewees from high to low considered the two to be each other's spokesperson, authorized user, and business founder.[75]

According to the company's filings and actual statistical studies detailing public confusion among China's local residents, Jordan's claim appears valid– that Qiaodan Sports' conduct rises to the requisite level of bad faith under Chinese trademark law as necessary for Michael Jordan to establish such a claim.[76] But still, bad faith is interwoven with many causes of action under Chinese trademark and civil law, and therefore, invalidating registrations on the basis of bad faith alone is quite complex.[77]

2. Prior Rights

In spite of the general protection of individuals' and enterprises' names and logos, China's trademark law expressly prohibits unfairly competitive behaviors with respect to previously registered trademarks.[78] While Jordan has established local Chinese fame, his next hurdle is proving that Qiaodan Sports reproduced or imitated a trademark that Jordan first registered in the U.S., and that Qiaodan Sports confused its commodities with those of Air Jordan brand, which impaired his interests.[79] Because a well-known logo might necessitate a prior image right even if a foreigner does not own the right to the disputed registration in China's filing system, the success of Jordan's claim ultimately hinges upon whether the object of this fame inquiry would be Jordan himself, the JUMPMAN logo itself, or both.[80]

If Jordan appeals the SPC's ruling on the fame of his JUMPMAN logo, Jordan's assertion of prior image rights could urge the court to shift its focus

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[73] *Id.* at 4.

[74] *Id.*

[75] *Id.* (showing that the Zero Company used a multi-stage stratified random sampling method to interview consumers from Beijing, Shanghai, Guangzhou, Chengdu, and Changshu).

[76] Jordan v. TRAB and Qiaodan Sports Co., Ltd., SPC [Sup. People's Court], Zui Gao Fa Xing Zai No. 32 at 7 (2018) (China).

[77] Wall, *supra* note 62, at 403.

[78] Zhōngguó shāngbiāo fǎ (中国商标法) [Trademark Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., August 12, 1982, effective July 1, 1983) World Intell. Prop. Org., art. 3, para. 7.

[79] *Id.*

[80] *Id.*

from the physical similarities of the dunking figures in the two entities' logos to a broad evaluation of Air Jordan brand's market popularity from the start of his career to today's date.[81] Previously, in *Michael Jordan v. Qiaodan Sports Co.*, Jordan argued that his specific basketball image was well-known in China; yet, the record shows that Chinese consumers were somewhat confused as to the full extent of Jordan's connection with China.[82] In the event that Jordan elects to appeal the SPC's ruling, he would have the ability to use precedent that he helped establish, and in doing so, he might convey to the court the notion that his name and image are one in the same. As proof, Nike Air Jordan brand might produce further evidence which depicts the increasing commercial value of Air Jordan brand during the relevant period, the viewership of Chinese NBA broadcasts in the 1990s, regional sales of Nike Air Jordan Brand commodities, and Jordan's participation in global commercial activities.[83]

Even if the court were to decide to use a narrow assessment, as it previously did in the case at issue, it is more logical to conclude that Jordan would successfully assert the local fame of his JUMPMAN logo since his Air Jordan sneakers are popular globally.[84] Further, if the SPC granted Jordan prior name rights because Qiaodan Sports misled Chinese consumers as to association, how much more would Qiaodan Sports' use of a "Jordan-esque" logo—with a new, random and different name—confuse Chinese consumers in the future?

These and other questions would lead one to believe that Jordan would likely receive exclusive trademark protection concerning his name and image on appeal. But Chinese trademark law presumes that the Chinese citizen has acquired a trademark legally, and Chinese authorities use sets of codes and beliefs that define morals and values uniquely[85]—an issue which the next section discusses more specifically.

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[81] Young, *supra* note 12, at 900 (noting that a celebrity must demonstrate that the trademark "had some degree of fame in China at the time a local registrant began its competition").

[82] Zui Gao Fa Xing Zai No. 32 (邁克爾杰弗里喬丹訴商標評審委員會和喬丹體育有限公司) [Michael Jeffrey Jordan v. TRAB and Qiaodan Sports Co., Ltd.], https://mp.weixin.qq.com/s/SpZTEWS7aXI476yYCL_6UA, at 4 (Sup. People's Ct. 2018) (China).

[83] *See* D. Tighe, *Nike's Revenue in Greater China 2009 to 2021, by Segment*, STATISTA (July 28, 2020), https://www.statista.com/statistics/241724/nikes-sales-in-the-asia-pacific-region-by-area-since-2007/ (explaining that Nike's revenue in China surpassed $6 billion from June 1, 2018 to May 31, 2019—a company in which Jordan holds substantial equity); *see also NBA Game Played in China Amid Backlash Over Hong Kong Tweet*, VOA NEWS (Oct. 10, 2019, 5:03 PM), https://www.voanews.com/east-asia-pacific/nba-game-played-china-amid-backlash-over-hong-kong-tweet#:~:text=China%20said%20its%20state%20television,the%20NBA%20in%20July%202019 (reporting that Tencent media platforms streamed NBA preseason games that were played in China to 490 million fans).

[84] Jordan v. TRAB and Qiaodan Sports Co., Ltd., SPC [Sup. People's Court], Zui Gao Fa Xing Zai No. 32 (2018) (China); Baylis, *supra* note 52.

[85] *See infra* notes 86-92 and accompanying text (indicating how policy rationales according to China's trademark regime differ from those of American jurisprudence).

B. THE PUBLIC POLICY DILEMMA

The overarching problem with China's tepid trademark system is that it seems to reward trademark squatting entities like Qiaodan Sports for their local reproductions of existing logos. Alternative avenues of trademark protection for American brand owners are inherently retroactive and appear to fall short of the mark.[86] Chinese trademark law provides blanket protections for the "goods of a natural person" providing that a competitors' goods "may not conflict with the *legitimate rights obtained by [that natural person] earlier*."[87] The loophole in Chinese trademark law is, while a retrial applicant in Jordan's situation might tangentially prove bad faith according to an objective standard of human existence, said applicant then has the burden of retroactively proving prior rights according to a subjective standard of legitimacy.[88] Overreliance on a public policy argument, like "unfair competition," can result in trademark assertions that the SPC would likely find to be unsubstantiated.[89] This public policy leaning then results in less than exclusive trademark protection for western brand owners, which is probably due to the divergent interests of Chinese and American governments regarding their customs and politics, respectively.[90]

For example, the "adverse effects" provision in Chinese trademark law purports to invalidate the registration of any logos that are "detrimental to socialist ethics or customs, or having other unwholesome influences."[91] Clearly, China is a socialist society,[92] but America is closer to a representative democracy.[93] Because of this distinction, American brand owners have an unreasonable burden of proof as to what constitutes an undesirable effect to Chinese consumers.[94] In *Michael Jordan v. Qiaodan Sports Co.*, the SPC simply found that "there is no situation in which the disputed trademark identification may have a negative impact on China's political, economic, cultural, religious, ethnic

[86] *See infra* notes 87-93 and accompanying text (pointing to the somewhat confusing language in China's Trademark Code which requires a showing of "legitimate rights" by the senior user to be afforded protection under this provision).

[87] Zhōngguó shāngbiāo fǎ (中国商标法) [Trademark Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 12, 1982, effective July 1, 1983) World Intell. Prop. Org., art. 9; *Id.*, art. 11, para. 3 (emphasis added).

[88] *Id.*, art. 9 (providing that a trademark registration has to include noticeable characteristics to be readily distinguishable).

[89] Jordan v. TRAB and Qiaodan Sports Co., Ltd., SPC [Sup. People's Court], Zui Gao Fa Xing Zai No. 32 at 24-25 (2018) (China)(revoking relevant tradename registrations but maintaining Trademark No. 6020578 "Qiaodan Pictures").

[90] *See infra* notes 91-93 and accompanying text (suggesting that different ethnic, cultural, religious, and other norms result in different policy justifications, depending on the area).

[91] Trademark Law of the People's Republic of China, art. 10, para 8.

[92] *Id.*

[93] *Government and You*, USCIS, https://www.uscis.gov/sites/default/files/document/lesson-plans/Government_and_You_handouts.pdf (last visited Nov. 9, 2021).

[94] *See supra* note 63 and accompanying text (inferring that there are Americans who lack sufficient knowledge as it pertains to Chinese ethics, customs, and influences)..

and other social and public interests and public order."[95] This comes as no surprise. A socialist economy like China reaps numerous benefits from Qiaodan Sports' unauthorized use of a Jordan-esque image. However, the argument could be made that Qiaodan Sports' use of Jordan-related marks has caused widespread and serious public confusion, which has reached the level of harming public interests and public order.[96]

The inquiry would then shift to whether such public confusion has had an impact on the local Chinese economy,[97] which, if any such impact exist, would have boosted its economy. Because only a negative economic impact constitutes economic harm, Jordan would have to direct the court's attention to Qiaodan Sports' unwholesome influence on China's public order within the purview of cultural misappropriation.[98]

How many other territoriality-principled trademark cases involving famous celebrities like Jordan, Beyoncé,[99] and LeBron[100] have to reach the SPC for Chinese authorities to recognize the problem of protecting American brand owners in China? Beyoncé's administrative proceedings primarily revolved around her tradename—a name which the Board found to be "unusual" in light of her high levels of publicity.[101] Because there are currently two common Chinese transliterations of "BEYONCÉ," a few squatters have had registrations approved in her name.[102] In other administrative and legal proceedings involving LeBron James, Nike filed to register the tradename "LEBRON JAMES" in Chinese, but found that a squatter had already beat them to it.[103] Ten years of litigation later, following an appeal to China's highest court level, the SPC ultimately ruled in James' favor.[104] The principal difference between a Nike athlete like LeBron James and Michael Jordan is that Jordan has his own brand

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[95] Jordan v. TRAB and Qiaodan Sports Co., Ltd., SPC [Sup. People's Court], Zui Gao Fa Xing Zai No. 32 at 11 (2018) (China).

[96] *Id.*

[97] *Id.* at 23.

[98] Trademark Law of the People's Republic of China, art. 10, para 8.

[99] Young, *supra* note 12, at 892 (finding that while decisions in Beyonce's litigation are not publicly available and generally contain limited reasoning, an inference of success can be drawn from her success in opposing squatters' efforts in acquiring trademarks in connection with her name).

[100] China Trademark Reg. No. 4903847 for **勒布朗·詹姆斯**. Supreme People's Court decision (2015) Xing Ti Zi No. 7, available at: http://wenshu.court.gov.cn/content/content?DocID=5e74db08-3b47-46d2-8f72-0522db986fba&KeyWord=%E5%C8B%C92%CE5%CB8%83 %E6%9C%C97.%CE8%CA9%B9 %E5%A7%C86%CE6%C96%AF.

[101] Young, *supra* note 12, at 895 (finding that it is more difficult to challenge Chinese imitations that are "similar but are not the exact name or mark, as in the QIAODAN case.").

[102] *Id.* at 892 (noting, however, that Beyonce has successfully opposed several squatters' attempted trademarks of her name in connection with clothing items and restaurants in China).

[103] China Trademark App. No. 4001053 (showing Nike's opposition in 2011, after which opposition was granted then unsuccessfully appealed by the registrant).

[104] Young, *supra* note 12, at 894.

identity under Nike's umbrella.[105] And while the fact that Jordan has his own image to protect in Nike's marketing scheme alludes to his global fame, it also creates character ambiguity (between Jordan the individual and Nike the brand) that the SPC has to attempt to resolve if Jordan appeals the SPC's ruling as to his JUMPMAN logo.

IV. A MECHANISM FOR PROTECTION IN A "FIRST TO FILE" SYSTEM

Reworking China's trademark framework would likely take more than a landmark judgment. This section discusses the extent to which reexamining the priority of global considerations might safeguard against the issue of trademark squatting in China.

Ordinarily, parties begin by contesting trademark registrations in a Board hearing because administrative proceedings are subject to judicial review.[106] The underlying determination that the Board makes is whether to afford protection to a retrial applicant on the premise that his or her brand recognition rises to the level of a "well-known trademark."[107] The Board's administrative decisions are not publicly documented, but the Board purports to use Article 14 of Chinese trademark law as its standard.[108] In *Michael Jordan v. Qiaodan Sports Co.*, the SPC considered factors such as the strength and value of the trademark rights asserted, the duration in which the plaintiff's trademark has been in use, the good faith ignorance by the junior user of the mark, the geographical scope of all publicity operations carried out for the plaintiff's trademark, and whether a corresponding relationship can be established in the cognition of the relevant public.[109]

But still, despite its recognition of Jordan's great fame and reputation, in arriving at its judgment as to the disputed logo the SPC turned away Jordan's claims of adverse effect and malicious registration.[110] What went wrong? If the court were willing to weigh each of these factors against each other, these considerations would, on balance, favor Jordan. While such balancing acts may

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[105] *See* Cigar Aficionado, *supra* note 53 (indicating that Michael Jordan is the only "Nike" athlete to have a signature shoe that fashions his personal JUMPMAN logo without a corresponding Nike sign).

[106] Trademark Law of the People's Republic of China, art. 14, paras. 2-4.

[107] *Id.* art. 14, paras. 1-5.

[108] *Id.*

[109] Zui Gao Fa Xing Zai No. 32 (邁克爾杰弗里喬丹訴商標評審委員會和喬丹體育有限公司) [Michael Jeffrey Jordan v. TRAB and Qiaodan Sports Co., Ltd.], https://mp.weixin.qq.com/s/SpZTEWS7aXI476yYCL_6UA, at 2-11 (Sup. People's Ct. 2018) (China).

[110] *Id.* at 11.

occur more frequently in American courts of law,[111] certain themes prevail which are consistent across any jurisdiction.

As the SPC has held, the strength, value, and fame of the asserted trademark right deserve priority consideration.[112] This is effectively a famous mark inquiry similar to that which certain U.S. jurisdictions have accepted, and for which the SPC has recently carved out a limited exception.[113] But unabridged famous mark doctrine, under which the SPC subscribes to objective standards of fame and prior rights, would do more to protect American brand owners who conduct business in China. Further, the faith of the junior user is a necessary consideration with far-reaching implications.[114] A finding of good faith on the part of Qiaodan Sports might have changed the outcome of *Michael Jordan*. But the company's acts of bad faith, alternatively, have uncovered the grave misinformation and confusion the entity intended to disperse throughout China's local populous.[115]

A potential factor to consider, which is currently beyond the scope of China's trademark framework, is the plaintiff's diligence in enforcing the mark.[116] Jordan had vigorously asserted his trademark rights in the face of substantial copying by sending out warning letters, promptly initiating litigation against Qiaodan Sports and its predecessors, and making public appearances in China.[117] Though his legal claims for remedy garner little sympathy given his high net worth, Jordan would prefer an injunction over monetary allowance.[118]

Approving of Qiaodan Sports' contested logo registration on appeal would have the consequence of blatantly allowing Qiaodan Sports to continue operating with a Jordan-replica logo. If Jordan appeals to the SPC with logo-specific trademark assertions, there are enough similarities between the courts' considerations in *Grupo Gigante* and *Michael Jordan* for the SPC to reach a favorable conclusion on this issue: the cancellation of Qiaodan Sports' right to use a Jordan-esque logo.

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111 *See* Grupo Gigante SA de CV v. Dallo & Co., 391 F.3d 1088, 1101-02 (9th Cir. 2014) (citing *E-Systems* factors regarding whether to allow a claim for either damages or injunctive relief in an action for trademark infringement).

112 Jordan v. TRAB and Qiaodan Sports Co., Ltd., SPC [Sup. People's Court], Zui Gao Fa Xing Zai No. 32 at 6 (2018) (China).

113 *Compare* Grupo Gigante, 391 F.3d at 1098, *with* ITC Ltd. v. Punchgini Inc., 482 F.3d 135, 172 (2d Cir. 2007). *But see* Jordan v. TRAB and Qiaodan Sports Co., Ltd., SPC [Sup. People's Court], Zui Gao Fa Xing Zai No. 32 (2018) (China).

114 *See* E-Systems, Inc. v. Monitek, Inc., 720 F.2d 604, 607 (9th Cir. 1983) (analyzing the good faith ignorance of a junior user when determining that its good faith investment in its tradename and trademark does not harm free competition).

115 Jordan v. TRAB and Qiaodan Sports Co., Ltd., SPC [Sup. People's Court], Zui Gao Fa Xing Zai No. 32 at 11 (2018) (China).

116 *Id.*

117 *Id.* at 1.

118 Cigar Aficionado, *supra* note 53 (stating that Jordan believes "it's not about the money" but instead wants to protect his identity).

V. CONCLUSION

Jordan is symbolic of all western brand owners. An individual with his level of influence will typically have sufficient resources to challenge a trademark squatter to the end, but start-up companies and small business owners might not have as much access to capital. The obstacles of conducting high-profile business in China currently outweigh the incentives of brand and entity exposure because of the trademark litigation that almost inevitably ensues. And with respect to famous mark inquiries, prospective regulations are more ideal than retroactive catch-all causes of action.

People often rush to China's E-commerce markets for "one-offs"—this practice has become an uncontrollable normalcy. Reproducing another person or entities' trademark on confusingly similar products is trademark infringement, no matter how geographically distant such companies are.