**FINAL**



**Question Q234 问题Q234**

**National Group:** AIPPI China

**国家组别**

**Title: 问题 Relevant public for determining the degree of recognition of famous marks, well-known marks and marks with reputation**

**在认定著名商标、驰名商标以及有知名度商标过程中的相关公众**

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**Working Committee:** Lei ZHANG

**Date:** [please insert date]]

**日期**

**Questions**

**问题**

The Groups are invited to answer the following questions under their national laws.

**各分会在回答问题时请结合本国法律**

Analysis of current law and case law 现行法律及案例法分析

1. How is the relevant public for purposes of determining the degree of recognition of famous, well-known and reputed marks defined in your jurisdiction? Is it the general public at large or a relevant sector of the public that is considered to be the relevant public in determining the knowledge, recognition or fame of a mark?

**在认定驰名商标、著名商标以及有一定知名度商标的过程中相关公众的确认标准在贵国是如何确定的？在判断消费者对某一商标的了解、认可及知名度的过程中，所述的消费者是指全体大众消费者还是被叫做“相关公众”的一部分相关的消费者？**

According to Article 14 of the Chinese Trademark Law, (which was amended in October 2001)

***Account shall be taken of the following factors in establishment of a well-known mark:***

1. ***reputation of the mark to the relevant public…***

But other than the introduction of the term “relevant public”, the Trademark Law itself does not define the term or discuss how it should be determined.

On Oct 16, 2002, the Supreme Court issued ***Interpretation of Several Issues Relating to Application of Law to Trail of Cases of Civil Disputes over Trademarks***.

Article 8 provides that “***The relevant public under the Trademark Law shall refer to the relevant consumers of a goods or service indicated by the trademark and other traders closely related to the marketing of the said goods or services***”.

This is the first time the term “relevant public” is defined. But in the Supreme Court’s ***Interpretation***, the concept of ***relevant public*** does not only applies to the well-known mark clauses, but also applies when deciding the distinctiveness of a mark, and deciding whether two marks are confusingly similar or not.

On April 17, 2003, the Trademark Office issued ***Provisions for the Establishment and Protection of Well-known Trademarks*.**

Article 2 provides that ***For the purpose of these Provisions, the well-known mark shall refer to a mark which is widely known to the relevant section of the public and enjoys a relatively high repute in China.***

***The relevant section of the public shall include the consumers concerned with a class of goods or service designated by a trademark in use, other operators who manufacture said goods or provide services and the marketing people involved or those concerned in the channel of commerce.***

The above provision, is by far the most detailed provision issued by the competent department addressing to the term “relevant public” in the protection of a well-known mark.

Based on the literal meanings of the above provisions, the term “relevant public” refers to a

relevant sector of the public instead of the general public at large.

根据中国商标法（2001年10月修订版）第14条的规定

认定驰名商标应当考虑下列因素：  
（一）相关公众对该商标的知晓程度；

……

但除了引入“相关公众”这一名词之外，商标法本身并没有进一步对这一名词做出限定，或者讨论其该如何划分。

2002年10月16日，最高人民法院发布了《最高人民法院关于审理商标民事纠纷案件适用法律若干问题的解释》。

第八条规定　“商标法所称相关公众，是指与商标所标识的某类商品或者服务有关的消费者和与前述商品或者服务的营销有密切关系的其他经营者。”

这是首次对“相关公众”的定义。但在高院的这一解释中，“相关公众”的概念不仅仅应用于驰名商标的认定， 同时还应用于商标是否具有显著性、两商标是否会出现混淆等事项。

2003年4月17日， 商标局颁布了《驰名商标认定和保护规定》，其中第二条规定“本规定中的驰名商标是指在中国为相关公众广为知晓并享有较高声誉的商标。相关公众包括与使用商标所标示的某类商品或者服务有关的消费者，生产前述商品或者提供服务的其他经营者以及经销渠道中所涉及的销售者和相关人员等。”

上述条款是目前由相关部分颁布的关于保护驰名商标下如何划定“相关公众”最为详细的规定。

根据这一条款，“相关公众”指的是一部分相关的社会群体而不是全部社会群体。

1. Please clarify whether your jurisdiction uses several of the terms discussed in sections 22-26. If so, is the “relevant public” construed differently when determining the recognition of famous marks, well-known marks and marks with reputation respectively (and, if applicable, marks subject to another term)? Is the assessment made based on the same criteria?

**请说明在你所处的国家，是否使用说明中22-26段所述的多项条款。如果是，那么在判定某商标是否为著名商标、驰名商标或者有一定知名度的商标的过程中，“相关公众”的构成是否有所不同**

Under Chinese Trademark Law, reputation of a trademark is divided into three levels. The lowest level is common trademark, which does not enjoy any reputation. The middle level refers to a mark with certain reputation, but is not as popular as well-known trademark, which is described as ***a mark with certain influence*** in the Trademark Law. The highest level is well-known mark, which enjoys high reputation in the market and enjoys the maximum protection under the Trademark Law.

According to the Chinese laws and regulations, the criteria for the **relevant public** are the same for determination of these three levels of trademarks.

根据中国商标法，商标的知名度可以分成三个等级。最低一级是没有任何知名度的普通商标。中间一级是有一定知名度的商标，但其知名度没有达到驰名商标的水平，这种商标在《商标法》中被叫做“有一定影响”的商标。最高一级的为驰名商标，其在市场中的知名度最高而且享受《商标法》给与的最大的保护。

根据中国的法律和法规，认定“相关公众”的标准在确定这几个等级的商标的过程中是一致的。

1. If the relevant public can be a limited sector of the public please respond (if applicable with reference to statutory provisions and/or case law) to the following questions.

**如果相关公众会被限定为一部分社会公众（如果可以，请列明相关的法律法规和/或案例法）请回答下列问题:**

1. Please briefly describe the criteria for determining the relevant public. Is consideration taken e.g. to age, gender, geography, culture, groups with special interests, sophistication/skill of the consumer? Is consideration taken to the way the goods or services with the trademark in question are marketed?

**请简单的描述一下确定相关公众的标准。是否会考虑这些消费者的年龄、性别、所处地理位置、文化、特殊利益团体、社会阅历/技能？是否会考虑标有相关商标的产品或服务营销的方式？**

According to Article 2 of ***Provisions for the Establishment and Protection of Well-known Trademarks***, issued by the Chinese Trademark Office:

***The relevant section of the public shall include the consumers concerned with a class of goods or service designated by a trademark in use, other operators who manufacture said goods or provide services and the marketing people involved or those concerned in the channel of commerce.***

The provision, by far gives the most detailed definition to the term “relevant public”, itself does not address to the specific criteria, such as age, gender, geography, culture, groups with special interests, sophistication/skill, etc. of the consumers. However, the provision does emphasis on the connection between the goods/services and the relevant public. Only those would buy the goods/services concerned, and those who are involved in the manufacturing, providing or marketing of goods/services are considered as the relevant public. Therefore, although it is not explicitly stated in the laws or regulations, the specific features of goods and services decides that age, gender, geography, etc. of the customers are the criteria when defining the relevant public.

As explicated stated in the said provision, the marketing people and ***those concerned in the channel of commerce*** are defined as the “relevant public”. It is reasonable to deduce that the marketing methods of the goods/services are taken into consideration.

根据商标局《驰名商标认定和保护规定》第二条的规定，“相关公众包括与使用商标所标示的某类商品或者服务有关的消费者，生产前述商品或者提供服务的其他经营者以及经销渠道中所涉及的销售者和相关人员等”。

这一目前定义“相关公众”最详尽的法律条文本身并没有对相关公众的特殊标准做任何规定，例如“年龄、性别、所处地理位置、文化、特殊利益团体、社会阅历/技能”等。但是这一条文强调了商品/服务与相关公众的关系。只有那些会购买相关商品或服务的人，以及涉及到生产相关商品或者提供服务的人才被认定为相关公众。因此，尽管法规中并没有明确规定，但商品和服务的特性就已决定了在认定相关公众的过程中会涉及的诸如消费者的年龄、性别、地理位置等等的标准如何。

如上述条文中明确了“经销渠道中所涉及的销售者和相关人员等”也属于相关公众。也就可以推断商品/服务的营销方式也会在认定相关公众的过程中予以考虑。

1. Would the relevant public be populated by actual/potential consumers/buyers of the products/services in question only or a larger public? Please explain how the delimitation is made.

**相关公众是否仅由相关商品/服务的实际/潜在的消费者/买家构成或者还是指更大的一个群体？请解释是如何界定的?**

According the above-mentioned provision, “***The relevant section of the public shall include the consumers concerned with a class of goods or service designated by a trademark in use, other operators who manufacture said goods or provide services and the marketing people involved or those concerned in the channel of commerce***”.

It is clear to see that “relevant public” does not refer to the public at large, nor it is restricted to consumers/buyers only. It is populated by a larger public, ranging from manufactures of the goods, providers of the service, marketing people etc. The term “those concerned in the channel of commerce” at the end of the provision is rather broad, which could be extended the advertisement agency; export and import agency; wholesaler; franchisers etc.

The provision says that the relevant public “shall include” all the above mentioned parties who have direct connections with the goods or services. It is not provided that the relevant public “equals to” those parties only. It is because in practice, when it comes to consumer goods, even those who have indirect connections with the goods or services could be the relevant public.

The Chinese Trademark Office’s publishes all the marks recognized as well-known marks from the opposition/dispute actions or from various legal actions on their website. (<http://sbj.saic.gov.cn/cmsb/index.html>) In the lists of well-known marks, one could find several marks relating to Chinese distilled spirit, such as 茅台 (Mao Tai), 五粮液 (Wu Liang Ye) etc. These marks are not only well-known among people who manufacture, market, sell or buy these spirits, but also well-known among people who don’t drink. For those who don’t drink nor buy liquors, they get to know these well-known marks from the advertisement, news report as well as their friends or family members.

A close look of the lists, one could find quite a number marks for cosmetics mainly for women, and marks for neckties mainly for men. For men who don’t buy cosmetics or women who don’t buy neckties, these marks are well-known to them as well.

Therefore, in China, the relevant public is populated by a larger public other than actual/potential consumers/buyers of the products/services in question

根据上述条款，“相关公众包括与使用商标所标示的某类商品或者服务有关的消费者，生产前述商品或者提供服务的其他经营者以及经销渠道中所涉及的销售者和相关人员等。”

可见相关公众并不等同于全体社会公众，也不局限于消费者/买家。它由一个更大的社会公众构成，涵盖了商品的生产者、服务的提供者、营销者等等。条款中最后所述的“经销渠道中所涉及的相关人员”是一个较宽泛的概念，可以延伸到广告商、进出口商、批发商、加盟商等等。

该条款规定相关公众“包括”上述有直接关系的当事人。但该条款并未说相关公众就等同于上述所有人。因为在实践中，当涉及到日用品的时候，就算与相关商品和服务有间接联系的人也可能是相关公众。

中国商标局将其在异议/争议或工商查处案件中认定所有驰名商标均公布在网站上。在这些驰名商标名单中，可以看到很多中国白酒的商标，例如茅台、五粮液等等。这些商标并不仅仅在生产者、营销者、销售者或购买者之间驰名，同样也在不喝酒的人中驰名。对那些不饮酒的人来说，他们可以从广告、新闻媒体或者家人朋友处了解到这些商标。

仔细研究这些名单，还可以发现很多驰名商标是女士用的化妆品或男士用的领带这些领域。对于那些不买化妆品的男士或不买领带的女士来说，这些商标对他们来说也是驰名的。

因此，在中国，相关公众的构成不仅仅是相关商品/服务的实际/潜在的消费者/买家，还应包含一个更大的群体。

1. Could the relevant public be composed of business /professional end consumers?

**相关公众是否可以由商业/专业最终用户？**

According the above-mentioned provision, “***The relevant section of the public shall include the consumers concerned with a class of goods or service designated by a trademark in use***”. As the term ***consumers*** are not further specified in the provision, the consumers that form the “relevant” public, do not necessarily have to be private consumers only.

According to the lists of well-known marks published on the Trademark Office’s website, one could find quite a lot of marks which are not used on consumer goods. For instance “安科+ A device” Reg. 3524058, which is used on sorting machines for industry in class 7. Sorting machines are widely used in agricultural industry, tea industry, tires industry, etc. Such products are clearly not consumer goods. The end consumers can only be business/professional consumers who operate tea manufacture, tire manufacture business etc.

A case was cited in the response to question 3 g, in which companies are held as relevant public.

The lists on the CTMO’s website does not contain marks for consumer goods only, but also contain well-known marks for complex machines, large-scale apparatus, etc. Therefore, in Mainland China, the relevant public could be composed of business/professional end consumers.

根据上述条款，“相关公众包括与使用商标所标示的某类商品或者服务有关的消费者”。由于这一条款中的消费者并没有做进一步限定，因此构成“相关公众”的消费者并应当仅仅是私人消费者。

根据商标局网站公布的驰名商标名单，可以看到很多商标均不是用于日常消费品领域的。例如第3524058号“安科及图”商标，其用在第7类的工业用拣选机上。拣选机广泛应用于农业、制茶业、轮胎制造业等领域。这样的商品显然不是日用品。终端用户也只能是从事茶叶制造、轮胎制造等工业的商业或专业消费者。

在答复下述3g 问题中，就引用了一案例，其中的相关公众就被认定为单位。

商标局网站的驰名商标名单并不仅仅是日用品，还涵盖了大量用于复杂机器或大型设备的驰名商标。因此在中国，相关公众可以由商业/专业用户构成。

1. Could the relevant public be composed of people in the trade of the goods or services in question, such as distributors, licensees and retailers?

**相关公众是否可以由相关商品或服务的从业人员构成，例如分销商、许可人以及零售商？**

According the above-mentioned provision, “***The relevant section of the public shall include the consumers concerned with a class of goods or service designated by a trademark in use, other operators who manufacture said goods or provide services and the marketing people involved or those concerned in the channel of commerce***”.

Based on the provision, the relevant public is ranging from manufacturers of the goods, providers of the service, marketing people etc. The term “those concerned in the channel of commerce” at the end of the provision is a broader term, which could be extended the advertisement agency; export and import agency; wholesaler; franchisers, licensees and retailers etc, i.e. parties quoted in the question as “people in the trade of the goods or services in question”.

根据上述条款，“相关公众包括与使用商标所标示的某类商品或者服务有关的消费者，生产前述商品或者提供服务的其他经营者以及经销渠道中所涉及的销售者和相关人员等。”

据此，相关公众保护商品的生产者、服务的提供者以及销售商等等。条文最后的“经销渠道中所涉及的相关人员”是个较为宽泛的概念，可以延伸到广告上、进出口商、批发商、加盟商、被许可人以及零售商等等，也就是本题所述的“相关商品或服务的从业人员”。

1. Could the relevant public be "mixed" in a sense that it is composed of persons involved in trade, professional/business end customers and private end customers?

**相关公众是否可以由与贸易领域所涉及的人员、专业/商业的最终用户和私人最终用户“混合”构成。**

According to the ***Provisions for the Establishment and Protection of Well-known Trademarks, issued by the Chinese Trademark Office,*** the definition of the “relevant public” include the ***consumers*** as well as ***those concerned in the channel of commerce***. The provision does not divide the consumers into professional/business end customers and private end customers. Given the various well-known marks as cited above, profession/business end customers and the private end customers are both eligible consumers.

It is therefore reasonable to deduce that the relevant public could be composed of persons involved in trade, professional/business end customers and private end customers.

根据商标局《驰名商标认定和保护规定》第二条的规定，“相关公众”不仅包含消费者，同时还包含经销渠道中所涉及的相关人员”。这一规定并未将消费者划分为商业/专业消费者和私人消费者。鉴于上述举例的多个驰名商标，商业/专业消费者以及私人消费者均为规定所述消费者。

因此，可以推断相关公众可以由与贸易领域所涉及的人员、专业/商业的最终用户和私人最终用户“混合”构成。

1. How limited in terms of quantification can the relevant sector of the public be to constitute the relevant public? Is there a clear established “lowest level”?

**就人数而言，在决定相关公众的过程中，是否有一个明确的“最低标准”？**

According to the Chinese trademark related laws and regulations, there is no specification on how limited in terms of quantification can the relevant sector of the public be to constitute the relevant public, nor there is a clear established “lowest level”.

中国与商标有关的法律法规的规定并未对构成相关公众的当事人数量做任何限制，也并未明确规定“最低标准”。

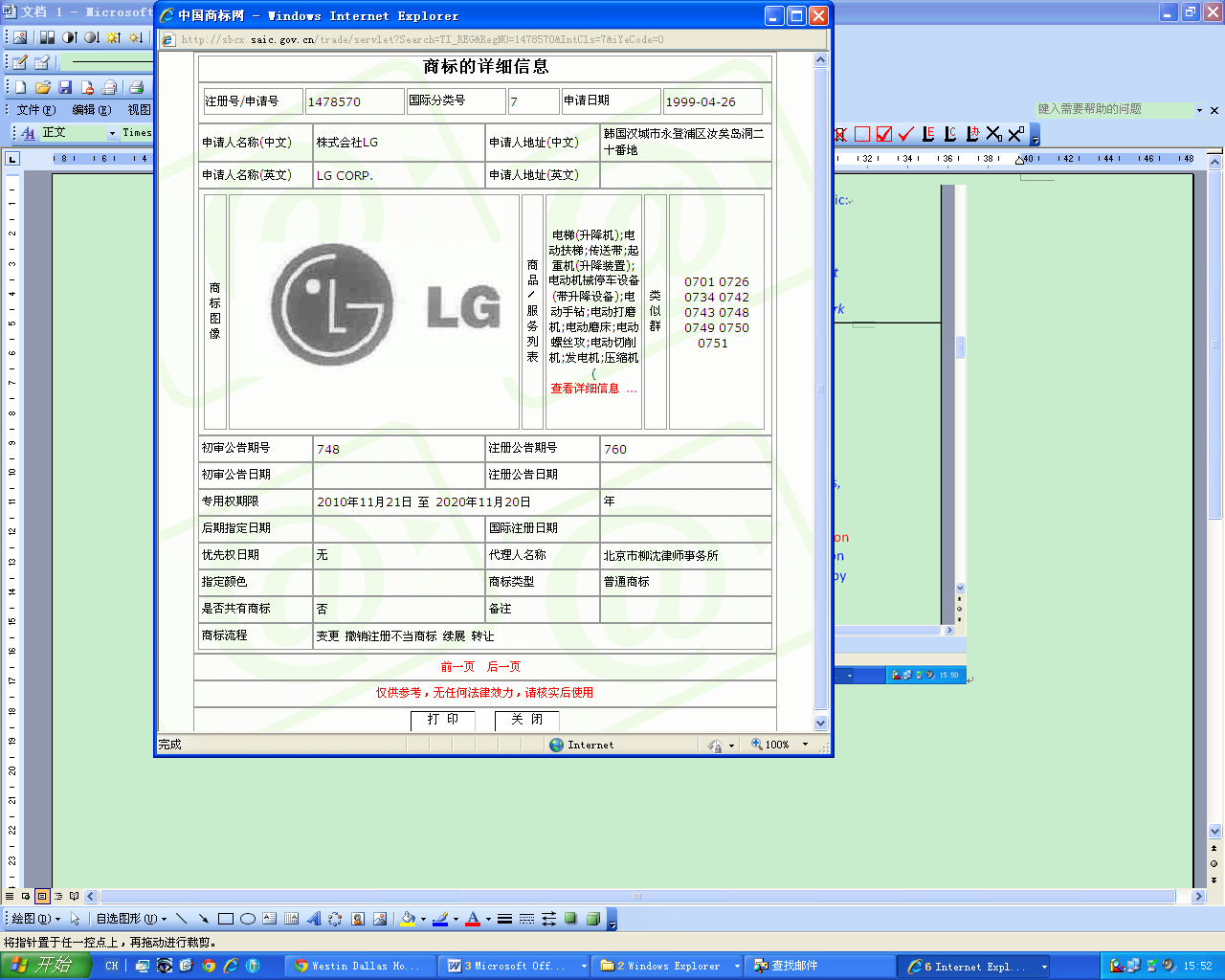
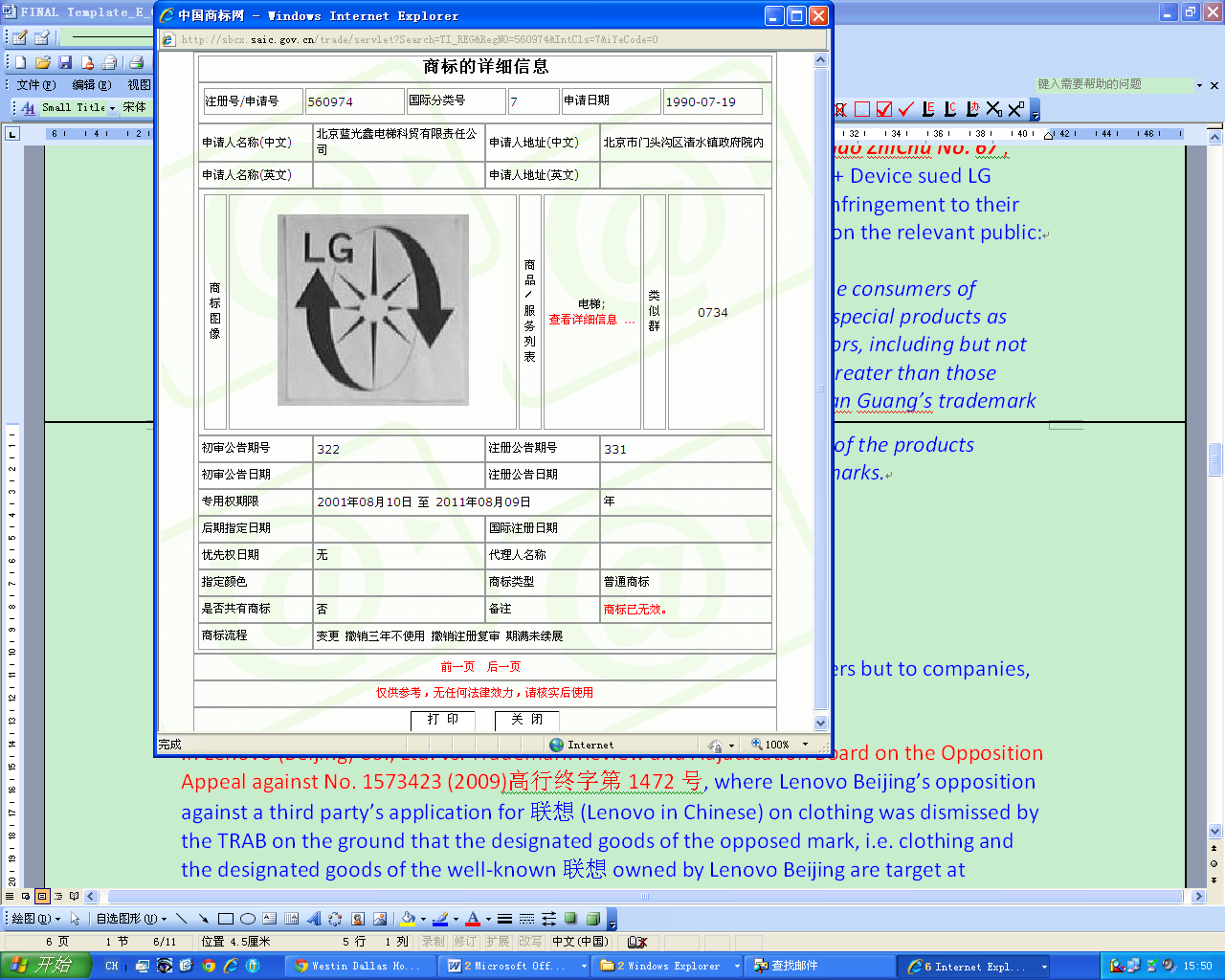
1. Is it possible to see any differences for different products/ industry sectors in respect of the delimitation of the relevant public?

**在界定相关公众的过程中，不同的商品/产业是否有不同的标准。**

The provision used by Chinese Trademark Office to determine the relevant public does not outline the criteria of the parties concerned, which instead is mainly focused on the connection between the “relevant public” and the “goods or services” concerned. For different goods or services, different relevant public will be delimitated.

In Beijing Lan Guang Elevator Co., Ltd. vs. LG Corporation （（2001）Gao ZhiChu No. 67）, where Lan Guang the owner of trademark registration No.  560974 LG+ Device sued LG Corporation’s use of their registration No. 1478570 on elevator is an infringement to their prior registration No. 560974. The Court made the following holdings on the relevant public:

*Products concerned in this case are elevators, not consumer goods.  The consumers of elevators are mainly companies, who, when purchasing and installing special products as elevators, would normally pay more attention to the purchased elevators, including but not limited to the trademarks used on the elevators.  Such attentions are greater than those given by ordinary consumers when they purchase daily products.  As Lan Guang’s trademark and LG Corp’s trademarks are not identical nor similar, the consumers of the products concerned with due attention, are unlikely to be confused by the two marks.*

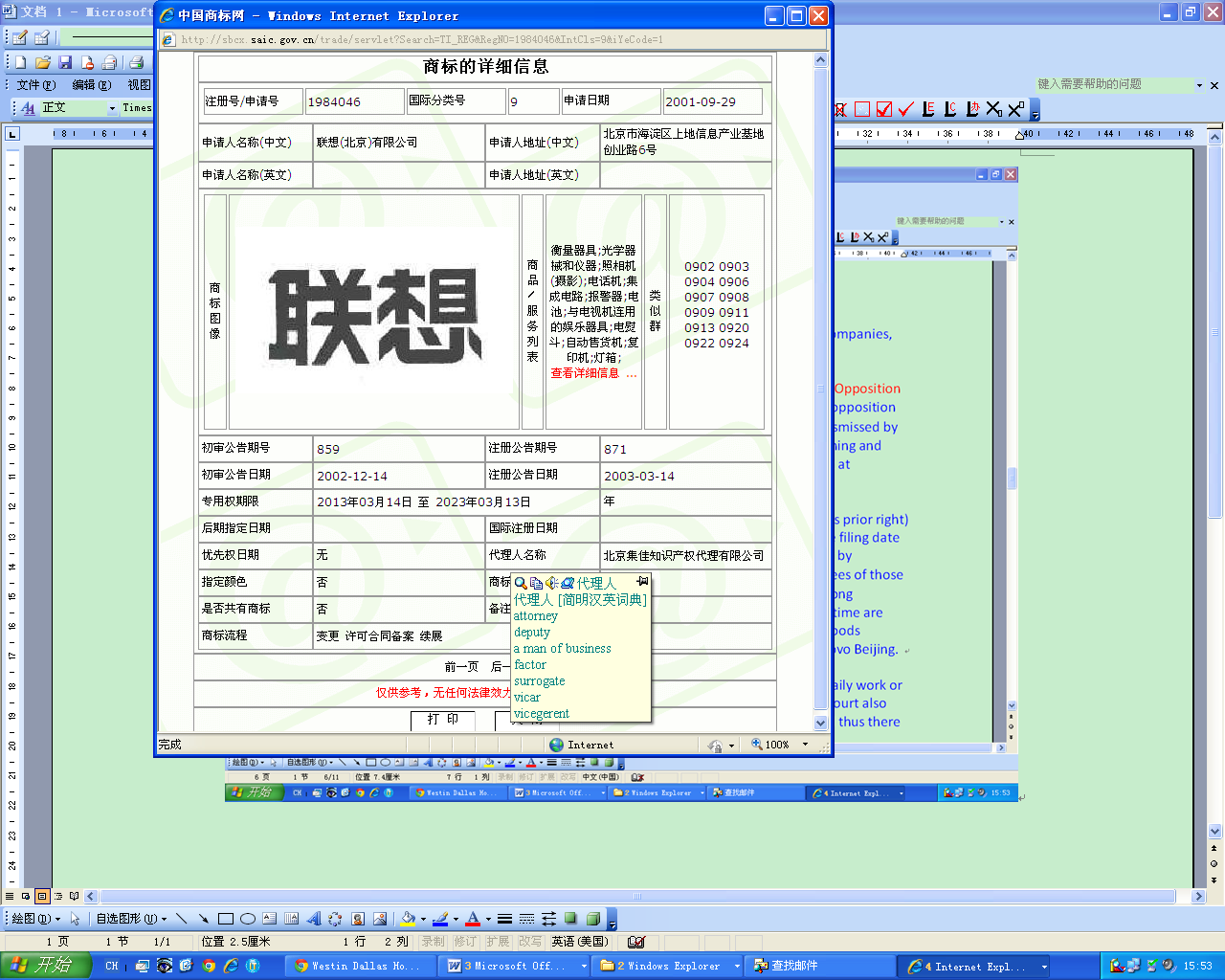


Lan Guang’s mark LG’s mark

In this case, the relevant public is not delimitated to ordinary consumers but to companies, due to the uniqueness of the goods concerned.

In Lenovo (Beijing) Co., Ltd. vs. Trademark Review and Adjudication Board (TRAB) on the Opposition Appeal against No. 1573423 ((2009) Gao Xing Zhong No. 1472), where Lenovo Beijing’s opposition against a third party’s application for 联想 (Lenovo in Chinese) on clothing was dismissed by the TRAB on the ground that the designated goods of the opposed mark, i.e. clothing and the designated goods of the well-known 联想 owned by Lenovo Beijing are targeted at different consumers, and thus there is no ground for confusion.

*It is held in the Beijing High Court’s decision that “the cited mark (Lenovo Beijing’s prior right) is a well-known on computer related goods. As claimed by the third party, before filing date of the opposed mark, computers are not consumer goods, and are mainly bought by companies. It is just through the use of computer with the mark 联想 by employees of those companies and other computer uses, the mark 联想 has become well-known among computer users before filing date of the opposed mark. These users at the same time are part of consuming groups for clothing. Therefore, the consuming groups of the goods designated by the opposed mark comprise those of the goods designated by Lenovo Beijing.*



Opposed mark Lenovo’s mark

In the above case, as computers and clothing are mainly used by people for the daily work or life, the criteria of relevant public focuses on people instead of companies.

Therefore, it is can be seen that different features of the goods/services lead to the different criteria for the delimitation of the relevant public.

商标局采用的划定相关公众的条款并没有具体列出相关当事人的标准，而是将焦点集中在相关公众与商品或服务的关系上。商品或服务的不同也就意味着相关公众的不同

在北京市蓝光电梯公司与（韩国）LG产电株式会社、（韩国）LG电子株式会社侵犯商标专用权纠纷案（（2001）高知初字第67号）中。第560974号LG及图商标的所有人蓝光公司告LG株式会社在电梯上使用其第1478570号商标的行为侵犯了其在先注册的第560974号商标的权利。法院就相关公众的认定如下：

本案中涉及使用注册商标的商品是电梯，而不是普通的日用品。电梯的消费者一般是单位，单位在购买安装电梯这种特殊商品的过程中，对所购买的电梯，包括电梯上使用的商标施加的注意力，要较普通消费者对普通日用品施加的注意力大得多。由于蓝光公司所有的“LG加图形”注册商标与LG电子株式会社所有、LG产电株式会社使用的“LG及图”商标的图形和文字不相同也不近似，其商品的消费者在对其施以注意力的情况下，不会造成误认。此外，蓝光公司从未生产过电梯整梯，仅生产电梯的核心部分和进行电梯维修，从此角度而言，起码截至到蓝光公司提起诉讼时止，蓝光公司所有的“LG加图形”注册商标与LG电子株式会社所有、LG产电株式会社使用的“LG及图”商标，在电梯这种商品上，在客观上没有使消费者造成误认的可能。

在本案中，因涉案商品的特殊，相关公众就并没有划定为普通消费者而是公司。

在国家工商行政管理总局商标评审委员会等与联想（北京）有限公司商标行政纠纷上诉案（(2009)高行终字第1472号）中，联想公司针对第在三人在服装上的第1473423号商标的异议复审被商评委以被异议商标的指定商品，即服装与联想公司驰名的“联想”商标的指定商品不同为由，认定消费者群体不同，不存在混淆可能。

北京高院做如下认定“引证商标在计算机商品上为驰名商标，正如杨大明上诉所称，计算机商品在被异议商标申请注册前并非普通消费品，多为企业购买，但是正因为企业职工和其他计算机用户经过使用带有“联想”商标的计算机商品，才使得引证商标在被异议商标申请注册前已为广大计算机用户所知晓。这些计算机用户也同时构成了服装商品的消费者的一部分，因此被异议商标指定使用商品的消费者与引证商标核定使用商品的消费者之间存在包含关系，即在消费对象上有关联。”

在上述案件中，由于计算机和服装主要是人们在日常生活和工作中均会使用到的，划定相关公众的标准主要集中在个人而非公司。

因此可以看出商品/服务的特性不同会导致划分相关公众的标准也有所不同。

1. Are there any differences between the "relevant public" concept when assessing the recognition of trademarks in respect of e.g. dilution, free riding, or when determining likelihood of confusion in infringement proceedings?

**在商标淡化、搭便车或在侵权诉讼中确定混淆性近似的过程中，划分“相关公众”的概念是否有所不同。**

There are no specific provisions in laws or regulations on the differences between the “relevant public” concept when assessing the recognition of trademarks in respect of dilution, free riding, or when determining likelihood of confusion in infringement proceedings.

在商标淡化、搭便车或在侵权诉讼中确定混淆性近似的过程中，划分“相关公众”的概念在法律法规中并没有不同。

1. When does the assessment of the relevant public come into play e.g. in registration matters, proceedings in respect of wrongful use such as free riding, dilution, infringement proceedings, and opposition proceedings?

**认定相关公众的工作在何时起作用，例如在注册过程中，在认定搭便车、淡化、侵权的商标违法使用及商标异议的过程中？**

The assessment of the relevant public is frequently used in various trademark related proceeding. The Supreme Court issued the **Opinions on Several Issues Concerning the Trial of Administrative Cases Involving the Authorization and Determination of Trademark Rights.** According to these Opinions, the term “relevant public” appears 7 out of 20 provisions, which is considered an important part when determining the distinctiveness of mark, whether the mark is exaggerating or not, likelihood of confusion, well-knowness / reputation of a mark, infringement, which are as follows:

1. With regard to trademarks under dispute that have not been widely used, a People's Court, while trying trademark granting and validation administrative cases, can impose strict trademark granting and validation criteria in accordance with the law in the examination and judgment of granting and validation conditions, such as trademark similarity and goods similarity, and in handling of conflicts with the prior trademark right (or enterprise name). The People's Court shall take into full consideration the interests of consumers and peer business operators, effectively suppress misconducts of preemptive registration, focus on protecting the interests of business marks, such as prior existing trademarks and enterprise names with higher profile and stronger distinctiveness, and try to eliminate the likelihood of confusion between trademarks. With regard to those trademarks under dispute that have been used for a long period of time, have established considerable market visibility, and have attracted the relevant public, the People's Court shall accurately understand the legislative spirit of the Trademark Law to balance protecting the interests of earlier business marks and maintaining market order, fully respect the fact that public consumers have already objectively distinguished the relevant trademarks from one another, and attach importance to protecting the market order that has been established and stable.  
  
2. In actual practice, certain marks or components thereof are exaggerated but not sufficient to be misleading, based on daily life experience or general perception of the relevant public. For such circumstances, a People's Court is advised not to deem those marks as marks with exaggerated publicity and deceiving intentions.

5. A People's Court, on the trial of trademark granting and validation administrative cases, shall examine and judge from an overall perspective whether a trademark has distinctiveness based on common perception of the relevant public, with regard to commodities designated to be used with the disputed trademark. If the descriptive elements in the mark do not affect its overall distinctiveness, or the descriptive mark is expressed in a unique way by which the relevant public can identify the origin of the commodities, it shall be concluded that the trademark possesses distinctiveness.

6. The People's Court, on the trial of trademark granting and validation administrative cases, shall examine and judge whether a foreign language trademark in dispute has distinctiveness based on the general perception of the relevant public within the territory of China. Although foreign words in the mark at dispute have inherent meanings, the determination of its distinctiveness would not be affected as long as the relevant public can identify the origin of commodities by the mark.

7. The People's Court, while determining whether the trademark at dispute is a generic name, shall examine whether it is a statutory or conventional commodities name. Those trademarks that belong to generic names according to the law, national standards, or industrial standards shall be deemed to be generic names. If a name can designate commodities of a category according to the relevant public, such a name shall be deemed as a generic name. Commodities names listed in professional reference books and dictionaries can be used as reference to determine conventional generic names.

15. The People's Court, while examining and judging the similarity of the relevant commodities or services, shall consider whether, among other things, the function, use, manufacturing units, sales channels, and consumer groups of the commodities are identical or highly associated; whether the purpose, content, method, and recipients of the services are identical or highly associated; whether the commodities and services are highly associated; whether it tends to make the relevant public believe that the commodities and services are provided by the same entity; or whether the providers are related in a particular way. International Classification of Commodities and Services for Trademark Registration and Table of Distinction between Similar Commodities and Services can be used as references to determine the similarity between commodities or services.

18. According to the Trademark Law, an applicant shall not, via improper means, file preemptive registration for a trademark of others that has been put in use and has certain popularity. If an applicant filing preemptive registration for a trademark of others that has been put in use and has certain popularity is or shall be aware of such facts, the applicant shall be deemed to have taken improper means.  
Trademarks practically used within the territory of China and known by the relevant public within a certain region shall be deemed as trademarks that have been put in use and have certain popularity. Where evidence proves that a priortrademark has been in use for a certain time period, in a region, or has been sold or advertised to a certain extent, the trademark can be deemed to have certain popularity.

Although the above opinions are issued by the Supreme Court guiding the examination of trademark related cases at courts at different levels, these standards are also applicable in trademark opposition/disputes/rejection at the Trademark Office or at the TRAB level.

相关公众的认定多次出现在不同种类的商标案件中。在最高法院颁布的《最高人民法院关于审理商标授权确权行政案件若干问题的意见》中，“相关公众”出现在20项条文中的7项中。“相关公众”在认定商标的显著性、商标是否有夸大宣传问题，是否混淆，商标驰名及知名程度以及侵权中都是重要的不同。现列举如下：

1. 人民法院在审理商标授权确权行政案件时，对于尚未大量投入使用的诉争商标，在审查判断商标近似和商品类似等授权确权条件及处理与在先商业标志冲突上，可依法适当从严掌握商标授权确权的标准，充分考虑消费者和同业经营者的利益，有效遏制不正当抢注行为，注重对于他人具有较高知名度和较强显著性的在先商标、企业名称等商业标志权益的保护，尽可能消除商业标志混淆的可能性；对于使用时间较长、已建立较高市场声誉和形成相关公众群体的诉争商标，应当准确把握商标法有关保护在先商业标志权益与维护市场秩序相协调的立法精神，充分尊重相关公众已在客观上将相关商业标志区别开来的市场实际，注重维护已经形成和稳定的市场秩序。

2. 实践中，有些标志或者其构成要素虽有夸大成分，但根据日常生活经验或者相关公众的通常认识等并不足以引人误解。对于这种情形，人民法院不宜将其认定为夸大宣传并带有欺骗性的标志。

5. 人民法院在审理商标授权确权行政案件时，应当根据诉争商标指定使用商品的相关公众的通常认识，从整体上对商标是否具有显著特征进行审查判断。标志中含有的描述性要素不影响商标整体上具有显著特征的，或者描述性标志是以独特方式进行表现，相关公众能够以其识别商品来源的，应当认定其具有显著特征。

6. 人民法院在审理商标授权确权行政案件时，应当根据中国境内相关公众的通常认识，审查判断诉争外文商标是否具有显著特征。诉争标志中的外文虽有固有含义，但相关公众能够以该标志识别商品来源的，不影响对其显著特征的认定。

7. 人民法院在判断诉争商标是否为通用名称时，应当审查其是否属于法定的或者约定俗成的商品名称。依据法律规定或者国家标准、行业标准属于商品通用名称的，应当认定为通用名称。相关公众普遍认为某一名称能够指代一类商品的，应当认定该名称为约定俗成的通用名称。被专业工具书、辞典列为商品名称的，可以作为认定约定俗成的通用名称的参考。

约定俗成的通用名称一般以全国范围内相关公众的通常认识为判断标准。对于由于历史传统、风土人情、地理环境等原因形成的相关市场较为固定的商品，在该相关市场内通用的称谓，可以认定为通用名称。

申请人明知或者应知其申请注册的商标为部分区域内约定俗成的商品名称的，应视其申请注册的商标为通用名称。

15. 人民法院审查判断相关商品或者服务是否类似，应当考虑商品的功能、用途、生产部门、销售渠道、消费群体等是否相同或者具有较大的关联性；服务的目的、内容、方式、对象等是否相同或者具有较大的关联性；商品和服务之间是否具有较大的关联性，是否容易使相关公众认为商品或者服务是同一主体提供的，或者其提供者之间存在特定联系。《商标注册用商品和服务国际分类表》、《类似商品和服务区分表》可以作为判断类似商品或者服务的参考。

18. 根据商标法的规定，申请人不得以不正当手段抢先注册他人已经使用并有一定影响的商标。如果申请人明知或者应知他人已经使用并有一定影响的商标而予以抢注，即可认定其采用了不正当手段。

在中国境内实际使用并为一定范围的相关公众所知晓的商标，即应认定属于已经使用并有一定影响的商标。有证据证明在先商标有一定的持续使用时间、区域、销售量或者广告宣传等的，可以认定其有一定影响。

尽管上述意见是最高院指导各地方法院在审理与商标有关商标案过程中的规定，这些标准也适用于在商标局或商评委阶段的商标的异议/争议/驳回等案件中。

1. Is the relevant public determined by a test, a specific procedure or in some similar manner, or rather on a case-by-case basis? Please give a brief description of how the test or analysis is made.

**相关公众的认定是通过测试、一个特殊的过程或者任何类似的形式，或者只是个案认定？请简要介绍一下测试或分析是如何进行的。**

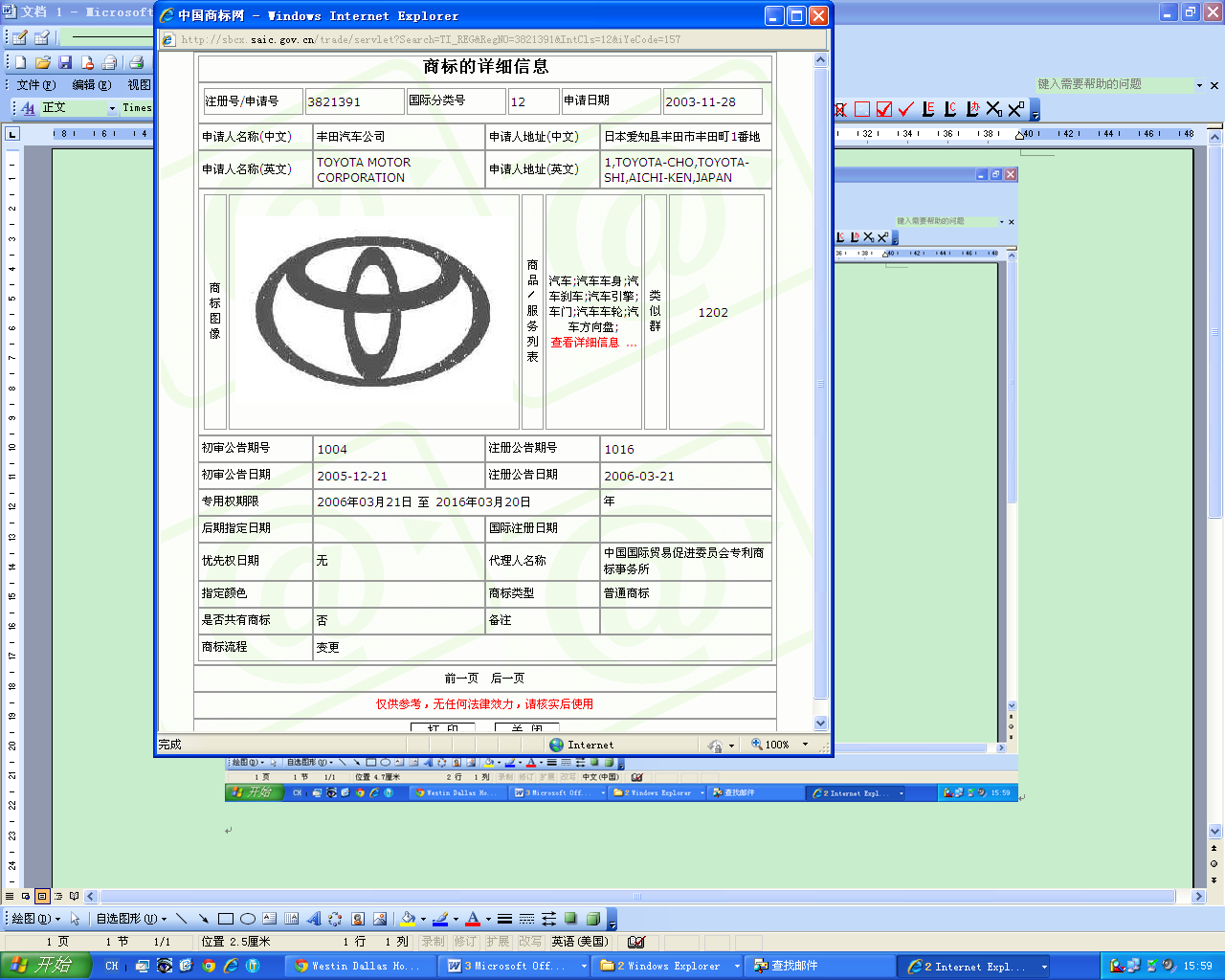
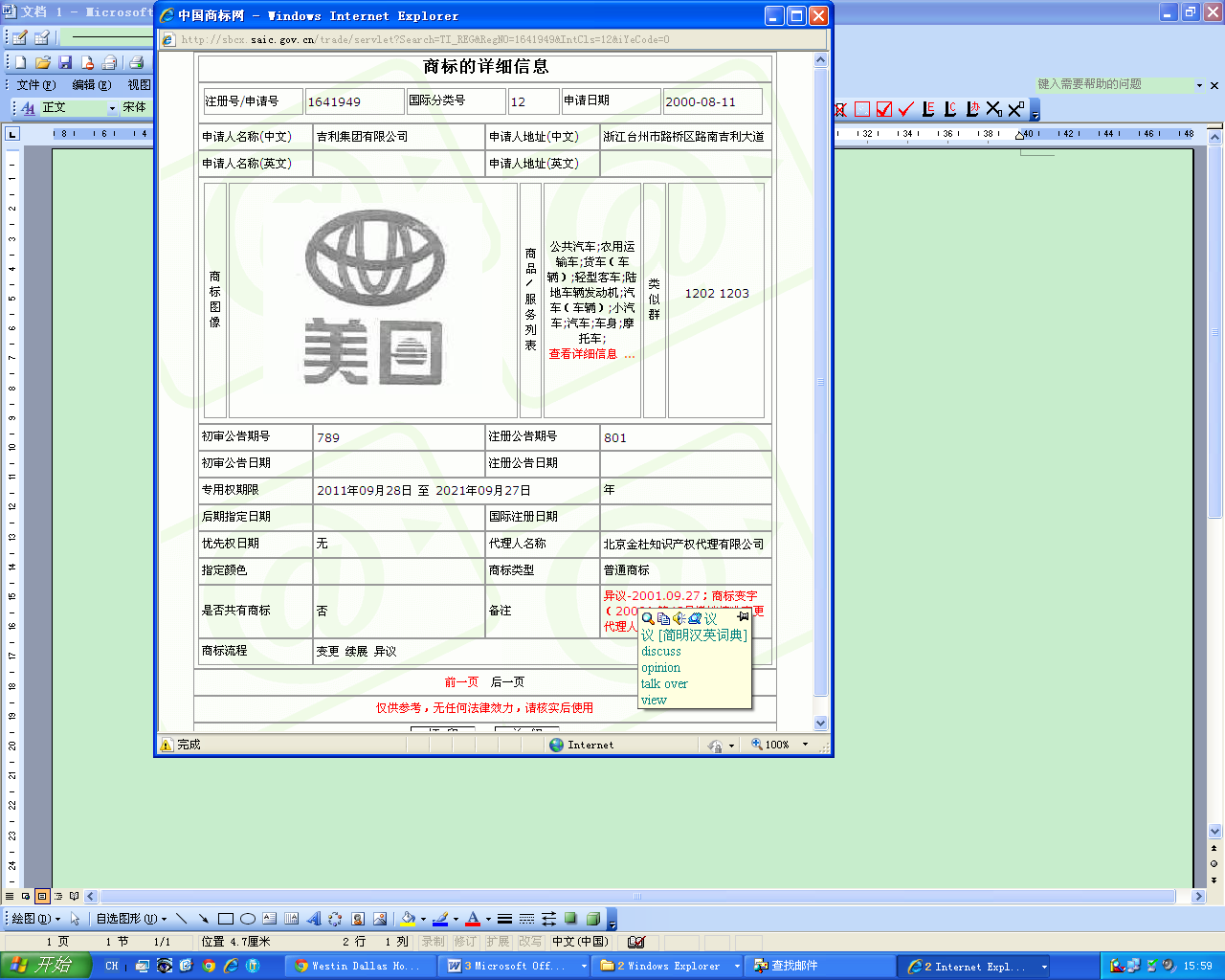
There is not an established test or other specific procedure to determine the relevant public, which is determined on a case-by-case basis.

As mentioned in question 3 (a), the criteria to determine the relevant public are usually closely connected with features of the goods/services. Therefore, in practice, the determination of relevant public is always followed by the analysis of features of the goods/services in question.

For instance, in the Toyota Motor Corporation vs. Zhejiang Geely Holding Group Co., Ltd. on trademark infringement and unfair competition over the mark 美日+ device （ (2003) Er Zhong Min Chu No. 06286）.

It is held by Beijing Second Intermediate Court that “*The basic function of a trademark is to facilitate the customers to differentiate sources of the goods. The defendant’s mark 美日+ device is used on cars, which are also the designated goods of the plaintiff’s device registration. According to laws and regulations, the determination of likelihood of confusion should be based on common attention given by the relevant public. The so-called relevant public refers to the consumers concerned with the goods or service designated by the trademark in use as well as those concerned in the trade of the goods or service concerned. In this case, the product concerned is car. The relevant consumers should be the buyer of user of cars as well as those concerned in the trade of car sale, repair, etc. Therefore, the relevant public in this car shall refer to the buyers or users as well as operators selling, repairing cars and other related services. The said consumers include potential consumers who have plan to buy a car, consumers who are making the purchase, as well as those who have purchased the car and who are using the car. Comparatively speaking, cars are considered as goods of high value. Consumers normally will conduct detailed searches on the trademark, performance, price and manufacture of cars. Before they make the purchase, they will do a lot of comparison among cars of the same or different levels. The purchase order will be made after through thoughts and comparison. After the purchase, the relevant consumers will deepen the understanding and knowledge of the trademark as well as the manufacture through use, maintenance and repair of the car, and will follow the other products of the same trademark. The said operators normally are very familiar with the cars with the trademark concerned and are with strong recognition ability to differentiate the cars of different trademarks.*

*In practice, because the long and extensive use of the device mark by Toyota and the effective marketing activities by Toyota, the device mark has acquired a relatively high distinctiveness and reputation. For the relevant public for cars, because they have a certain knowledge of the shape, performance, facilities and origins of the cars involved in this case, and are able to notice the obvious differences between the market positioning, price of the cars bearing the two marks concerned. Thus the relevant public shall not mistaken the origin of cars with the 美日 + device mark, or think that there is any connection between Geely’s car with Toyota’s car*. “



Geely’s mark Toyota’s mark

Although the above case is on the determination of likelihood of confusion, it however also discusses the well-knowness of Toyota’s device mark. As the delimitation of relevant public in different trademark matters are the same, the above analysis and procedure is quite typical when determining the reputation of a mark in China.

目前并没有一个规范化的测试或者特殊的过程来认定相关公众。相关公众是进行个案认定的。

如在3（a）问题答复中所述，相关公众的认定一般是紧紧与商品/服务相连的。因此，在实践中，相关公众的划分也是紧接着对涉案商品/服务特性的分析的。

例如，在(日本)丰田自动车株式会社诉浙江吉利汽车有限公司等侵犯商标权及不正当竞争纠纷案（(2003)二中民初字第06286号）中。

北京市第二中级人民法院的认定为“商标的基本功能在于使消费者能够识别商品及其来源。本案被告吉利公司的美日图形商标所使用的汽车产品与原告丰田图形注册商标所核定使用的商品属于相同商品。根据我国上述法律规定，判断商标近似要以相关公众的一般注意力为标准。所谓相关公众，是指与商标标识的某类商品或者服务有关的消费者和与前述商品或者服务的营销有密切关系的其他经营者。本案涉案产品为汽车，与其相关的消费者应指汽车的购买者或使用者，与其相关的经营者应指经销、提供汽车维修和其他服务的经营者，因此，本案中，相关公众应指汽车的购买者或使用者以及经销或提供汽车维修和其他服务的经营者。上述消费者包括有购买计划的潜在消费者、正在实施购买行为的消费者、购买后的消费者和使用者，相对而言，汽车应属高价位商品，他们对于所购买或所使用的汽车的品牌、性能、价格、制造厂商，一般都要进行较为仔细的了解，购买前会在相同或不同档次的汽车品牌之间进行充分的比对和反复的选择，深思熟虑后才会购买，购买后通过对汽车的使用、保养、维修等，能够进一步加深对该汽车品牌和制造厂商的认识和了解，并能够持续关注该品牌汽车的后续系列品牌的产品；上述经营者往往对所经营的汽车品牌有一定的熟知程度和较高水平的认识，并能够对不同品牌的汽车产品和制造厂商加以区别，具有较强的识别能力。”

尽管上述案件在探讨混淆是否存在，但同时也谈到了丰田商标的驰名情况。由于在不同商标案件中，划分相关公众的标准均相同，上述的分析和程序在认定商标驰名度的案件中也较为常见。

1. Proposals for harmonisation 法律协调的建议

Is harmonisation desired? If yes, please respond to the following questions.

**是否有需要协调的需要？如果是，请回答下列问题。**

1. Is it the general public at large or a particular sector of the public that should be considered as the relevant public in determining the knowledge, recognition or fame of a mark?

**在决定商标的了解、认知及知名度的过程中，应当将全体公众还是一部分公众考虑为相关公众？**

Among the 45 Nice classifications of goods and services, only a small sector of goods are consumer goods, such as clothing, foods or services relating to daily lives, such as restaurant, laundry, etc. For these goods/services, almost everyone, i.e. the general public at large, needs to buy such goods or need such services. As mentioned in the response to 3 b, although not everyone drinks liquor, well-known Chinese spirits marks are recognized among the general public. In these circumstances, when it comes to services or goods for daily lives, the relevant public equals to the general public at large in practice.

But for the rest of the goods/services, due to their uniqueness or technology requirement, their targeted consumers are not the general public at large. For instance, drugs treating diabetes are only important to people with diabetes. When determining the relevant public for trademarks used on diabetes drugs, it would be unfair and irrelevant to take the knowledge of such drugs of people without diabetes into consideration.

Based on the practice in China as well as the complex economic activities, it would be desired that a particular sector of the public that should be considered as the relevant public in determining the knowledge, recognition or fame of a mark.

在尼斯分类的45个类别中，只有一小部分是涉及日常生活的商品，例如服装、食品等，或涉及日常生活的服务，例如餐厅服务、洗衣服务等。对于这些商品/服务，几乎任何人，也就是社会大众均需要购买这类商品或接受这类服务。如在答复3(b)时所述，尽管并不是每个人都饮酒，但知名的白酒商标社会大众均有所了解。在这种情况下，当所涉及的商品和服务是用于日常生活的，在实践中，相关公众即等于社会公众。

但对余下的商品/服务而言，由于其特殊性及对科技的要求等，他们的目标消费者并不是社会大众。例如，治疗糖尿病的药物仅对糖尿病患者重要。当在划分治疗糖尿病药物商标的相关公众时，如果也考虑哪些非糖尿病患者对该商品的了解的话就显得不公平且不相干。

根据中国的实践以及复杂的经济活动，应当将一部分公众考虑为相关公众。

1. Please briefly set out the criteria to be used when establishing the relevant public for determining the degree of recognition of famous marks, well-known marks and marks with reputation.

**请简要列出在决定商标的了解、认知及知名度的过程中，确定相关公众的标准。**

Age, gender, occupation, geography, income, sophistication, skills, special needs of the customers, educational background should be the criteria.

年龄、性别、职业、地理位置、收入、社会阅历、能力、特殊需要、教育背景应当作为标准。

Should the relevant public be construed differently for famous marks, well-known marks or marks with a reputation? If so, please define the terms used and describe what criteria is to be used for the different types of marks.

**在认定著名商标，驰名商标或有一定知名度的商标的过程中，相关公众的构成是否应当不同？如果如此，请写明需要使用的标准并且说明不同的商标应当采取怎样不同的标准。**

The relevant public is needed only when determining the reputation of a trademark, whether it is well-known famous or with certain reputation, while reputation of the mark concerned should be an objective fact, which is not constantly changing at the time of the determination. In addition, as trademark is to be used on goods/services by consumers after all, and not merely standing on its own with its spelling or design, the targeted consumers of the goods/services concerned should also be consistent. Therefore, the relevant public for determining an objective fact should be the same group of people, i.e. people have connections with these goods/services.

Therefore, the relevant public should not be construed differently when accessing the reputation of a mark.

只有在认定涉案商标是否驰名以及其知名度的时候才需要认定相关公众。而商标的驰名程度应当是一个客观的事实，在认定的时刻是不会随时改变的。此外，由于商标最终是应用在消费者所使用或接受的商品或服务上的，而不是靠其文字或造型而独立存在，商品/服务的目标消费者也应当是一个固定的群体。因此，在认定这一客观事实的过程中应当是同一批人，即与相关商品/服务有关联的人。

因此，相关公众在认定商标的驰名程度的时候其构成应当是相同的。

1. Would it be possible or desired to establish a test or a specific method of establishing the relevant public or should this be done on a case-by-case assessment? How should the test or analysis be made?

**确立一个测试或一种特殊的认定方式可能性较大还是个案处理比较合适。这样的测试或者分析应当如何进行。**

As discussed above, different goods/services are targeted at different groups of consumers, i.e. different relevant public, while the relevant public could be business/professional end consumers as well as private end consumers or a mixture of both. Different goods/services are connected with different relevant public. One format of test or method might not fit into all the trademark cases. Therefore, it is desired that the relevant public should be determined on a case-by-case assessment.

When delaminating the relevant public, a thorough discussion of the goods/services should be made, as features of the goods/services should be the basis of the relevant public. After the analysis of the features, function, usage, etc. of the goods/services, the criteria of the relevant public can be decided. With the criteria, the relevant public could then be decided in that particular case.

如上所述，不同的商品/服务是面向不同的消费群体，也就是不同的相关公众。而这些相关公众既可以是商业/专业终端消费者也可以是私人消费者，或两者的混合体。不同的商品/服务与不同的相关群体相连。一种模式的测试或者方法并不适用于所有的商标案件。因此，对相关公众做个案认定比较合适。

在认定相关公众的时候，需要对商品/服务做详尽的分析，因为商品/服务的特性是决定相关公众的基础。在分析完商品/服务的特性、功能、用途等，相关公众的标准也就可以决定了。通过这些标准即可划分出在该案中的相关公众。

Summary

Under the Chinese laws and regulations, the relevant public refers to a special sector of the general public, instead of the public at large. The relevant public shall include the consumers concerned with a class of goods or service designated by a trademark in use, other operators who manufacture said goods or provide services and the marketing people involved or those concerned in the channel of commerce. Although the laws and regulations do not set out criteria of the relevant public expressly, they however emphasis the connection between the goods/services and the consumers. People falls within the connection are held as the relevant public. In China, the relevant public is determined on a case-by-case basis.

摘要

根据中国的法律法规，相关公众为社会公众中的一部分的特殊群体，而非全部的社会公众。相关公众包括与使用商标所标示的某类商品或者服务有关的消费者，生产前述商品或者提供服务的其他经营者以及经销渠道中所涉及的销售者和相关人员等。尽管法律法规未对相关公众的具体标准作出明文规定，但却强调了商品/服务与消费者之间的关系。在这些关系之内的消费者即为相关公众。在中国，相关公众是采取个案认定的原则。