



MMLC Group 

北京铭辉达知识产权代理有限公司

China Update

Lawyers and Consultants

1 February 2016

BEIJING
709, Tower W3
The Towers
No.1 East Chang An Avenue
Dongcheng District 100738
Beijing, China
北京东城区东长安街1号东方广场东方经贸城
西三办公楼709室, 邮编100738
writer's p: +86 10 8515 1091
f: +86 10 8515 1089
w: mmlcgroup.com

Legal News

Intellectual Property

OEM Export does not Constitute Trademark Infringement

On November 26, 2015, the Supreme People's Court issued a civil judgment concerning the retrial of "PRETUL" trademark infringement case in relation to original equipment manufacturing. According to the judgment, it was decided that the use of "PRETUL" mark on locks produced by the applicant of the retrial, Pu Jiang Ya Huan Lock Co., Ltd. (the Applicant), upon entrustment of a Mexican company, did not constitute the use of the mark from the perspective of the Trademark Law, since all were made in China for export.

According to the Supreme Court, the said Mexican company is the trademark owner of the "PRETUL" word mark and the "PRETUL and design" mark. Upon entrustment of the Mexican company, the said "PRETUL" mark was used on the lock products manufactured by the Applicant. The said lock products were all exported to Mexico and would not be sold in the Chinese market. Therefore, the Supreme Court considered that such marking will not have the function of identification within China, and would not cause confusion and misidentification as to the source of goods between products bearing the said mark and the products produced by the rightful owner of the "PRETUL and design" mark in China.

This case is a landmark case in China, as until it was issued, court decision were divided throughout the country. It remains to be seen if Customs, Chinese Trademark Office and the SAIC officials will follow this line of reasoning when look at alleged infringements and use issues. We are sure to see developments in this area over the next 12 months.

China Handles Most Patent Applications in Five Years

According to the State Intellectual Property Office (SIPO), China handled more than 1.1 million patent applications in 2015, an 18.7% increase year on year. It is said that 60.5% of the authorized

BEIJING

With support offices in Brisbane and Sunshine Beach
Matthew Murphy Ellen Wang Hong Mei Yu Du
Xia Yu Sarah Xuan Fei Dang

Partners and Associates in the MMLC Group are admitted to practice law in China, Australia and Europe (UK)

patents went to Chinese enterprises, an annual increase of 4.1 percentage points. There were 263,000 out of 359,000 invention patents, granted to domestic applicants, 100,000 more than in 2014. This figure brought the number of invention patents owned by every 100,000 Chinese persons to 6.3, which is staggeringly high. It is reported that Sinopec obtained 2,844 patents, being the most among all Chinese firms, followed by telecom giants ZTE and Huawei.

China Sets up Intellectual Property Operations Funds

On December 31, 2015, the first IP Operations Fund jointly funded by the Chinese central and local governments, Beijing Key Industry IP Operations Fund amount was established. According to an official from the Beijing Intellectual Property Office, this fund is the largest IP operations fund in China, and it was set up by the way of limited partnership, with an initial duration of 10 years. Currently, the first 400 million Yuan has been subscribed and it will mainly focus on mobile Internet and biopharmaceutical industries and support IP in those areas. In addition to the said fund established in Beijing, there is also a Sichuan Intellectual Property Operations Fund with capital of 700 million Yuan set up in Sichuan Province – others will be established over the next 12 months.

State Council releases a further draft of the amendments to the Patent Law

On December 2, 2015, the State Council issued its third draft amendment of the Patent Law for public opinion – comments were due by January 1, 2016. The draft outlines the following amendments:

- Enhancing protection of patent and maintaining right owners' legal rights, such as improving relevant evidence rules, specifying validity of administrative mediation agreement, clarifying liability of indirect infringement and online service provider as well as establishing files of patent protection credit information;
- Promoting implementation and use of patent, including: clarifying scope of the on-duty invention, allowing inventor or designer to implement the patent technology and obtain relevant profit in accordance with agreement signed with employer, stating the implied license system of essential standard patent, and adding a principle rule of preventing abuse of patent.
- Clarifying responsibilities of state and local patent administrative departments.
- Improving patent examination systems, including: broadening protected scope of patent, adding protection to partial design patent, extending protection period of design patent, as well as optimizing relevant patent application, examination, reexamination and invalidation procedures.

China has one of the world's most efficient patent offices and it is thought that the amended law will further enhance patent owner's rights and clarify various issues.

China's Copyright Registration System in Focus

According to statistics issued by the National Copyright Administration, the total number of copyright registrations between January and October 2015 rose to 689,700 - a new record. Once a copyright registration is approved in China, the owner of such copyright registration can record the registered work on the General Customs IP System to prevent infringing goods from being imported into China or exported from China. Registration is not a precursor for protection as China is party to the Berne Convention, but it certainly aids in enforcement in the courts and agency actions.

Technology, IT and Telecoms

China Releases Anti-Terrorism Law, Impacting Telecom and Online Business

The first Anti-Terrorism Law of the People's Republic of China became effective on January 1, 2016. Many have raised concerns as to provisions, which could be used to overly impact on privacy:

- Telecom and Internet service providers should provide technical support and assistance, including provision of technical interface and decryption, to the public security authorities for the prevention of or investigation into terrorist activities (article 18);
- Telecom and Internet service providers shall censor the content and prevent the spread of information containing terrorism or extremism. In case of finding such information, the said providers shall immediately stop the transmission thereof, retain records, delete the said information and report to the relevant government agencies (article 19).
- The said service providers are also required to verify identities of their users, and shall not provide service to users who do not have clear identities or refuse to verify identities (article 21).
- In case of failure to perform the said obligations above, the said service providers may be subject to administrative fines, and the persons in charge may also be subject to administrative fines as well as administrative detention of 5 to 15 days (article 84).

Although an officer from the legislative, the Standing Committee of the National People's Congress said in a news release conference that the said law would not affect the normal operation of enterprises, nor enterprises' IP rights, and implied that implementing regulations and notices would be issued to provide comfort to commentators who had expressed concerns.

MIIT Proposes Rules for Supervising Pre-Installed Mobile Phone/Device Applications

The Ministry of Industry and Information Technology of China (MIIT) has released a draft Regulation for Mobile Smart Device Applications (APP) for Pre-installation and Distribution last December for public opinion.

According to the said draft, the pre-installed applications installed at smart phone/mobile devices shall not have functions that are irrelevant with the services it is aimed to provide, nor bundling and promoting irrelevant applications will be permitted. It says that manufacturers and Internet service providers shall not be permitted to collect users' personal information without express consent, nor forcibly impose applications on consumers. It further states that manufacturers of smart phone/mobile devices shall ensure that applications (excluding software with basic functions) should be able to be uninstalled by users, and such uninstallation must not affect normal use of the smart phone/mobile devices. Many consumer groups have welcomed this draft regulation, but others expect that device makers and application developers will simply update their terms and conditions to work with the law.

China Issues the Latest Classification Catalogue of Telecommunications Services

On December 25, 2015, the MIIT issued the latest revision of the Classification Catalogue of Telecommunications Services. This is the third revision of the Classification Catalogue since its first issuance in 2000, in order to better adjust to recent developments in new technologies and business environments.

According to the revised Classification Catalogue, there are some obvious changes made in the basic telecommunications services, such as IP telephone services, cellular mobile communications

services, internet data transmission services and network access equipment services etc, in order to reflect the new technological developments in China. It is also worth of noting that the said Classification Catalogue also made adjustments to welcome private enterprises entering the market of the basic telecommunications services. As to changes in the value-added telecommunications services, it broadens the definition and scope of information services, such as information publishing platform and delivery services, information search and inquiry services, community information services, real-time interactive information services and information protection and processing services. Also, it adds new sub-catalogue the Internet Resources Collaboration Service under the Internet Data Center. The revised Classification Catalogue will become effective on March 1, 2016.

People's Bank of China Issues Administrative Measures for Online Payment Businesses

On December 28, 2015, the People's Bank of China published the Administrative Measures for Online Payment Business of Non-bank Payment Institutions to regulate matters concerning online payment among non-bank institutions. According to the said Measures, the payment institutions therein mean non-bank institutions that obtain the Payment Business Permit in accordance with laws and are allowed to handle online payment businesses, such as online payment, mobile payment, fixed-line payment, digital TV payment and so on. It requires these non-bank institutions to follow the principle of "Know Your Client" and establish identity verification mechanism. In other words, the said institutions must conduct real-name administration of their clients, including registering and verifying clients' identities, keeping a copy of ID card and so on. Meanwhile, it also requires the non-bank institutions to collect, use, store and transfer client's information based on the principle of minimization, and the said institution shall not disclose the client information to other institutions or individuals, unless it is specified otherwise or confirmed and authorized by the client. The said Measures will become effective on July 1, 2016.

Advertising

Shanghai AIC Releases Typical Cases of Illegal Advertisements

The Shanghai Administration of Industry and Commerce ("Shanghai AIC") recently released a report on enforcing the Advertisement Law in 2015. According to the Shanghai AIC, it has investigated and punished 1,983 false or misleading advertising cases, and imposed fine amount to 55.57 million Yuan. Among the 10 typical cases listed in the AIC report, a company was fined RMB 200,000 Yuan for use of "best" to describe its products online, which in violates article 9 of the Advertisement Law. A kitchen cabinets brand was also fined 820,000 Yuan for making a false representation in violation of article 28.2.2 of the Advertisement Law. In this case, the said brand claimed that its cabinets are coated with oil-resistant surfaces, whereas only one of the surfaces of the cabinets is covered with oil-resistant surface.

Environment

160 Million Yuan Penalty for Water Pollution Uphold by the Chinese Supreme Court

On January 21, 2015, the PRC Supreme Court tried its first environmental public interest case, and upheld the original ruling which ordered six companies to pay more than 160 million Yuan (US\$26 Million) for water pollution. Three years ago, Tai Xing Jin Hui Chemical Co., Ltd., the applicant who applied for the retrial to the Supreme Court, as well as other five companies were exposed by media for discharging pollution to two local rivers. Before the case was brought to the Supreme Court, the first and second instance courts for the case determined that, during the period from January 2012 to February 2013, the said six companies sent more than 20,000 tons of

dangerous waste to an unqualified company to discharge those waste into rivers illegally at the price of 20 -100 Yuan per ton. Thus, the courts determined that the said companies should be liable for environmental remediation and ordered them to pay for the said record penalty.

Business News

China Plans to Further Cut Coal Capacity

Recently, the National Development and Reform Commission (NDRC) and other relevant departments began soliciting opinions for a measure that is aimed to further cut coal capacity. The proposed measure include suspending new coal mine projects, closing outdated production facilities, directing “zombie” companies to close and accelerating coal-electricity integration. According to Xinhua news, China plans to close 4,300 coal mines, remove outdated production capacity of 700 million tons and relocate 1 million employees in the following three years. At the end of 2015, there were about 11,000 coal mines in China with a total capacity of 5.7 billion tones.

Tax Reform Will be Implemented in Four Industries

In a recent meeting held by the Chinese Premier Li Keqiang, the Chinese Government proposed to fully implement a tax reform program, which is to replace sales tax with value-added tax or VAT, in order to further lessen enterprises’ tax burden. The said tax reform program was first implemented in Shanghai in January 2012. And then, industries, such as transportation, post and telecommunications, modern services, culture and sports and so on, have been incorporated into the said reform. Now, four more industries, being construction, real estate, financial services and consumer services will be involved as well. According to analysts, since the said four industries takes account for 75% of taxes paid by sales tax taxpayers, once the said reform is finished, it will have a profound affect on many aspects of China, such as GDP, investment and employment figures.

China’s IPO Fundraising Estimates to Hit \$40 Billion in 2016

According to PwC analyst, China’s new IPO fundraising is estimated to hit \$40 Billion in 2016, which will make the A-share IPO market the biggest worldwide. China will launch a registration-based IPO system in this March, in order to boost the role of the stock market and provide necessary financing for companies. It is said that the registration-based IPO system and the launch of the Strategic Emerging Industries Board will positively influence the IPO activities in China, and the acceleration of the registration system will further open up and enhance the A-share market.

China Accepts Discussion Request by US on Aircraft Import Tax

The Ministry of Commerce said that China accepted a “request of detailed discussion” by the US, with respect to China’s aircraft import tax. Last December, the US initiated a case in the WTO against China’s aircraft import tax, and the involved aircraft products include China's domestically made commercial aircrafts, regional passenger jets and agricultural airplanes. However, the aircraft maker in China, the Commercial Aircraft Corporation of China, denied that it was given

tax breaks by Chinese government, which breach WTO rules. It is said that all of the company's transactions (e.g. sales of planes, import of parts components etc.) are all subjected to regulations and taxes in accordance with all WTO rules.

Chinese Foreign Investment Hits Record

According to the latest data of the Ministry of Commerce, China's foreign investment reached \$126 billion in 2015, and it took in \$114 billion in non-financial investment in the first 11 months thereof, which ups 7.9% year on year. There were about 24, 000 foreign-funded enterprises founded in the first 11 months, 11% more than those in the same period in 2014. It is said that foreign capital flowed to the service sector and advanced manufacturing increased, due to guidance of the Chinese government, such as preferential policies implemented in the China's free trade zones.

MIIT Partners with Ping An Bank to Set up \$30bn Electronic Fund

On January 8, 2016, the Ministry of Industry and Information Technology of China (MIIT) announced that it will partner with Ping An Bank to set up a fund amount to 200 billion Yuan (about US\$30 billion) to support China's electronics industry. It is reported that the establishment of the said fund is aimed to solve problems faced by medium and micro sized enterprises. Recently, those enterprises has been facing pressure or bankrupted due to lack of funding.

Shanghai Disneyland to Open in June

On January 13, Walt Disney Company and its Chinese partner announced that the Disneyland theme park and resort in Shanghai was due to open on June 16, 2016, and there will be a grand opening ceremony held for days. It is said that the construction work has been completed, and the next step is to make intense preparation for fully operation. During this preparation period, the theme park has started recruitment and staff training. According to the general manager of the theme park, the set date for the opening was fully evaluated by the partners and approved by the Board of Directors of the cooperative enterprise. The Disneyland project in Shanghai started construction in 2011, and topped off the land mark Disney Enchanted Storybook Castle in May 2015.

Shenzhen-Hong Kong Stock Connect Program Ready for Launch

According to an officer from the Shenzhen Stock Exchange, the Shenzhen-Hong Kong Stock Connect Program will be launched this year, after months of preparation and testing. It is said that the technological and rule preparations are ready for a link program which will allow investors to trade on both bourses under a quota based system. In 2014, a similar connection between the Shanghai and Hong Kong bourses was launched, which is a big step for the continued opening-up of China's financial markets.

GDP in 23 Provinces of China lodge returns of over 7%

Over the last week, 31 provinces in China released their respective local GDP data for 2015. The top three highest provinces were respectively Guangdong with 7.28 trillion Yuan (\$1.11 trillion), Jiangsu 7.06 trillion Yuan and Shandong 6.30 trillion Yuan. Among the 31 provinces, 23 of them reported GDP growth over 7 percent year on year. Some provinces, such as Chongqing, Guizhou and Tibet even reported double-digit GDP growth. In 2015, China's GDP growth slowed down to 6.9 percent, a 25-year low, from 7.3 percent in 2014. The GDP rate is expected to drop further this year, but will still add GDP the size of a G20 economy, every 12 months, as growth stabilizes.

This update is aimed at keeping our clients and partners informed as to the latest legal and business developments in the Greater China region. Whilst every care has been taken to ensure the accuracy of the information contained in this update, it should not be relied upon for any purpose prior to formal legal advice being obtained.