MMLC Group

北京铭辉达知识产权代理有限公司

Lawyers and Consultants

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

China Update

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Legal News

Intellectual Property

Supreme Court Confirms New Evidence Submitted at Retrial Stage is Admissible

In a recent trademark invalidation proceeding before China's Supreme Court, it was held evidence submitted at the retrial stage may be taken into consideration. Prior to this decision, numerous judges at the Intermediate Court and Higher Court levels have consistently rejected newly filed evidence, claiming that they should simply put themselves in the position of the TRAB when reviewing an appeal case. The contested trademark was filed and registered in 2003. In 2007, Lacoste filed an application for the invalidation of the contested trademark before the Trademark Review and Adjudication Board (TRAB) based on relevant articles of the Trademark Law. Therefore, the TRAB ruled the registration of the contested trademark to be cancelled for one of its classes and agreed the contested trademark was visually similar to Lacoste's cited trademark. However, both parties were dissatisfied with TRAB's decision and the case was brought before the Beijing First Intermediate Court and eventually the Beijing Higher People's Court for judicial review, to which both subsequently maintained the TRAB decision at first instance. Eventually, Lacoste submitted the case to the Supreme Court for final review and additionally submitted five additional pieces of evidence when it applied for retrial, to which the Supreme Court overturned the judgments of the two lower instances and the TRAB decision and confirmed that new evidence filed at any stage of an appeal from the Chinese Trademark Office is admissible.

New Balance Fined 98 Million RMB in Trademark Infringement

In a case marking the highest amount of compensation paid for trademark infringement cases in the Guangzhou Intermediate Court, the Chinese affiliated company of New Balance has been held guilty of trademark infringement and has been ordered to pay compensation of 98 million RMB for economic loss to an individual, Mr. Zhou, for the use of the trademark "新百伦" (pronounced Shin Bai Lun), for which he is the owner. New Balance was found to have used the trademark for its Chinese affiliated company's name, its stores in prominent places, in the introduction of each product, on its official website, and on promotional materials. New Balance's defences included its use of the trademark were based on good faith, and that the trademark is a Chinese translation of 'New Balance', therefore amounting to reasonable use and not infringing on Mr. Zhou's exclusive right to use the registered trademark.

However, the Court held the legitimacy of Mr. Zhou's registered trademark should be recognised, and New Balance's use of the trademark in the sales of its goods amounted to the nature of the trademark, as well as the fact that the Chinese translation of New Balance did not equal to the trademark, therefore its behaviour in the use of the trademark constituted to using the trademark as subjective malicious or in bad faith. Further, the Court explained that because of New Balance's success and its standing in the economy, it should bear the responsibility for prudent use of trademarks, and to take the initiative in good faith to avoid using any trademarks that may be identical or similar to another's registered trademark to achieve the objective of avoiding confusion and misidentification among the relevant public as well as market disorder. New Balance will be filing for an appeal.

Regulators target the abuse of intellectual property rights

As a result of the Qualcomm case, the National Development and Reform Commission (NDRC) has been directed by the Anti-Monopoly Commission (AMC), the top antitrust supervisor, to draw up guidelines to cover monopolistic conduct and the abuse of intellectual property rights, due to the lack of detail and guidance contained in the Anti-Monopoly Law. The guidelines will apply to intellectual property rights products and service providers, which is a broad group including the information technology and telecommunications industries, the medical sector, the motor vehicle sector, the machinery and seeds for the agriculture sectors, and other technology-sensitive activities.

The guidelines will carry the authority of the AMC, and will be seeking to further complement the State Administration for Industry and Commerce (SAIC) Provisions on the Prohibition of Abuse of Intellectual Property Rights to Eliminate or Restrict Competition in order to improve and refine principles and values already established. Therefore, the guidelines will be covering three major types of monopolistic conduct, including:

(a) intellectual property rights related price and non-price monopoly agreements;
(b) abuse of dominant market positions; and
(c) concentration of business operators.

The Qualcomm case was finalised on 9 February 2015 when the NDRC issued an Administrative Sanction Decision against US semiconductor giant Qualcomm with a record penalty of RMB 6.088 billion and a set of remedies around the company's patent licensing practices. It is significant because it imposes groundbreaking intrusive behavioural remedies, and therefore indicates the type of regulations to be included in the guidelines, including:

(a) offering licenses to its current 3G and 4G essential Chinese patents separate from licenses to its other patents;
(b) refraining from bundling SEPs with non-essential patents;
(c) refraining from imposing non-challenge clauses or other unfair clauses in licensing agreements;
(d) providing patent lists during the negotiation process;
(e) providing fair consideration to any rights if Qualcomm seeks to cross-license from another licensee as part of an offer;

(f) providing its existing licensees an opportunity to elect to take the new terms for sales of branded devices for use in China;
(g) lowering its royalties by 35%, though Qualcomm is still entitled to base the calculation of its royalties on the net wholesale price instead of the value of the smallest saleable unit, therefore potentially allowing Qualcomm to preserve some elements of its royalties formula and avoid a duty to license at the chip level; and
(h) committing not to charge wireless communication device markers within mainland China for expired patents.

China Raises its Profile in Intellectual Property

For the past 30 years, the leaders in patent filing were the United States and Japan, with European bobbing along in their wake. However, China has recently started to emerge as a significant force, with each year since 2011 bringing more patent applications that have been filed in China than any other intellectual property office around the world. Initially, they were domestically filed patents, but Chinese companies have also started looking into expanding their operations into the international market, with the latest data from the European Patent Office putting China fourth in the volume of patents filed in the EU last year, up from 12^{th} less than a decade ago. Therefore, China has recognised the essentiality of intellectual property and the opportunity for it to allow China to extend its reach internationally.

China SAIC's Crackdown on Online Counterfeiting Trading

Online counterfeiting is a significant issue facing consumers, industry and governments alike, and is an increasing practice due to the advancement of technology and the ability of the Internet to extend one's reach. Therefore, the State of Administration of Industry and Commerce (SAIC) has launched a campaign dubbed the 'Red Shield Net Sword' to crackdown on the trading of counterfeit goods online, and will especially focus on the responsibility platform operators have on supervising the sale of fake goods on their platforms. Alibaba Group, who is China's largest e-commerce retailer, reported at the end of last year a clearing of approximately 90 million goods that may have breached intellectual property rights on its e-commerce sites, Taobao and Tmall. Alibaba stated it had adopted an Internet-based big data pattern to deal with fake goods, and that the system had the ability to identify and track fake products, conduct complex algorithms, and spur the linkages between consumers, copyright owners, and governmental departments. Therefore, China is progressing in its protection of intellectual property rights to further innovation and productivity.

Telecommunications

Rules Governing the Use of Text Messaging

On May 19, 2015, China's Ministry of Industry and Information Technology promulgated its Provisions on the Administration of Short Messaging Services (the "Provisions"), effective as of June 30, 2015. Its main objectives include normalizing conduct related to short messaging services (SMS), protecting the lawful interests of users, and promoting the sound development of a market for SMS.

The Provisions establish certain basic operating requirements which SMS providers must observe in their text messaging campaigns, including:

(a) SMS providers must hold a telecommunications enterprise license;

(b) SMS providers user fees must be in accordance with applicable laws, regulations and standards;
(c) SMS providers must maintain records of the times of transmission, user receipts and any user un-subscriptions; and
(d) SMS providers must not use SMS systems to circulate or broadcast illicit content.

The Provisions also establish more detailed rules on the manner in which text messages may be sent to consumers, including the prohibition on sending commercially-purposed text messages to end users without user's consent or requests. Additionally, the Provisions establish practical channels by which consumer interests could be protected, including:

(a) establishing a system by which consumers can make complaints and file reports, specifically, a reporting and handling centre under the auspices of the Ministry of Industry and Information Technology, through which reports or junk short messages can be processed;
(b) clarifying the procedures under which infringements and violations involving text messages can be handled, and the associated punishments;
(c) strengthening the oversight and inspection system by clarifying the authority and duty of the regulatory authority to carry out such duties, and the corresponding duties of SMS providers; and
(d) establishing penalties for unlawful behaviour among SMS providers, short messaging providers, personnel of the supervisory authority, and personnel of the reporting and handlåing centre, with violations recorded in a permanent file, and responsible persons to be subject to supervisory discussion.

Finally, the Provisions extend to information delivery services similar to SMS that use the Internet, specifically in Article 38 which provides for delivery services that send information with the characteristics of a short message to fixed telephones, mobiles and other communications end-users via the Internet to be conducted with reference to the Provisions. Although fairly limited in scope due to its application on use and transmission of text messages only, the Provisions have the potential to materially increase operational requirements for those companies relying on use of text messages and how they may be held accountable for their activities.

<u>Environment Protection</u>

China's Protection over Desertified Land

The State Forestry Administration of China has rolled out guidelines on protecting China's desertified land, which provides for more than 1.2 million square kilometers of desertified land in China to be closed off as a protection zone so as to control drifting sand and improve the environment. Effective as of July, 2015 to the end of 2020, the guidelines demand activities such as cutting down trees, cultivating land, animal grazing, resource exploration, mining, and misuse of water be prohibited in the protected zones, to further prohibit the construction of railways and highways, and the prohibition of the settlement of immigrants. Therefore, such protected areas are important locations due to their impact on regional and national ecology, as well as having suffered from frequent human activity.

China's Pollution Taxes

In China's latest drive to improve the country's environment and adapt to a sustainable growth approach, the State Council of China has recently released a draft of a new law detailing several new tax measures aimed at reducing the pollution levels in China, including the imposing of a strict set of levies on the emission of solid waste, air pollutants, polluted water, and noise pollution. Under the regulations, water pollution will be levied at a rate of $1.4 RMB per 4 kilograms of waste, and solid waste to be charged at a rate of between $5 RMB and $30 RMB per ton, while air pollution will be taxed at a rate of $1.2 RMB per unit, with the definition of a unit varying based on the nature of the gas. Therefore, China has provided incentives to hopefully significantly decrease the output of pollution, and any businesses that currently emit a level of pollution which is below half of the national average will see the rate of tax on pollutants cut in half.

Dispute Resolution

Chinese Arbitrations Administered by Non-Chinese Arbitration Institutions

In China, arbitration is a fast growing industry, with over 200 arbitration institutions established in China, and thousands of cases processed every day. However, only a small fraction of these cases involve foreign elements, such as a non-Chinese party or a place or performance that is outside China. This is due to several factors, the prominent one of which is the fact that an arbitration agreement which provides for the seat of an arbitration to be administered by a non-Chinese arbitration institution, such as the ICC, in China is to have the agreement declared invalid when a successful party seeks to enforce an ensuing arbitral award.

In China, arbitrations are regulated under the People's Republic of China Arbitration Law, which, among other things, requires the identification of an arbitration institution to administer arbitrations. Although the PRC Arbitration Law does not expressly limit the choice of arbitration institutions, Chapter II only refers to Chinese arbitration institutions, therefore it has been interpreted to mean only a Chinese arbitration institution can be designated if an arbitration agreement is to be valid.

This is specifically provided for under Article 16, which provides that an arbitration agreement shall contain a designated arbitration commission, and Article 10, which also provides that arbitration commissions may be established in municipalities directly under the Chinese Central Government, and the establishment of an arbitration commission shall be registered with the administrative department of justice of the relevant municipality, directly under the Chinese Central Government. Therefore, due to non-registrations of non-Chinese arbitral institutions with the Chinese Arbitration Law or the Chinese department of justice, such arbitration agreements may be invalid under the Chinese Arbitration Law.

There has been no judicial pronouncement on the mandate of international arbitration institutions operating in China, although the Supreme People's Court (SPC) have before ruled invalid an arbitration clause that provided for an ICC-administered proceedings in Shanghai based on Article 16, therefore illustrating the significant danger of providing for China-seated arbitration in an agreement. However, recently such an arbitration clause was found valid in accordance with the requirements of Article 16 at the Anhui Higher People's Court, therefore indicating a positive development which reverses predominant Chinese judicial position, although not binding upon Chinese Courts. Therefore, it is of utmost important the SPC issue a binding judicial interpretation on this issue.

Business News

The Stabilization of China's Economy

A gauge of Chinese manufacturing indicated the industry may be stabilizing after policy makers eased monetary settings and bolstered provincial finances, such as pumping liquidity to boost the economy by cutting interest rates three times and reducing banks' reserve requirement ratios twice since November, with official data showing stabilization in industrial production, credit growth and property sales in May. The preliminary Purchasing Managers' Index from HSBC Holding Plx and Markit Economics was at 49.6 for June, therefore beating the median estimate of 49.4 in a Bloomberg survey and an increase from May's 49.2. However, manufactures have continued to cut staff numbers, therefore suggesting companies have relatively muted growth expectations as demand conditions both domestically and internationally remain relatively subdued.

Pilot Expansion of Service Industry in Beijing

In a response to the recent economic slowdown, China has recently announced a new program focusing on the service industry in the capital Beijing. The State Council issued its Official Reply to the *Beijing Municipality Comprehensive Pilot Programme for Expanding Opening Up in the Service Industry*, approving the plan in principle. The program entails the opening of Beijing's service industry to foreign investment, therefore contributing to the exploration of a new and open economic system, lasting for three years and is part of China's broader strategy for developing and integrating the Beijing, Tianjin and Hebei provinces.

Alongside its Offical Reply, the State Council issued an Overall Plan for the program, detailing the six key service areas that will take the lead, including:

(1) Science and technology services;
(2) Internet and information services;
(3) Culture and education services;
(4) Business and tourism services;
(5) Financial services; and
(6) Health and medical services.

Furthermore, the pilot program will include plans to optimise the supporting systems such as customs clearance, social credit and market supervision. The service industry is a significant area as it accounts for approximately 48% of China's overall GDP and in the last few years have overtaken secondary industries such as manufacturing and construction in terms of its contribution to China's output, therefore it is vital to provide and accommodate to the service industry to create further opportunities for foreign investors in all sectors.

China Streamlines Business Registrations to Encourage Startups

Currently in China, startups have to go to three locations to receive essential business certificates, including the Administration for Industry and Commerce AIC, the quality supervision departments, and the taxation bureaus. However, in a move to cut red tape and encourage startups, business licenses, tax registration certificates, and organisation code certificates may be all issued by the AIC, therefore the streamlined registration system is an improvement to the current system in order to bolster economic growth.

Chinese Watchdog Makes Sweeping Auto Recalls

The General Administration of Quality Supervision, Inspection and Quarantine recently announced a massive auto recall of 500,000 vehicles, which encompassed the Sunny, Sylphy, Tilda and Venucia e30 models by Dongfeng Motor Co; Toyota's Vios, Yaris, Corolla and Corolla EX models; Nissan's Teana, Palandi and X-Trall; and Mitsubishi's Lancer Evolution and Zinger, due to a multitude of quality problems with the models. Furthermore, the watchdog will launch a campaign running between the period July 1 to Dec 31, 2015 to improve the after-sales services of auto companies, accompanied by the Administration who will be publicizing its strict standards on after-sales services and will offer to mediate disputes between auto companies and car owners.

China Poised for its UN Pledge

China seeks a fair, global system to tackle climate change and will deliver its pledge to the United Nations in the foreseeable future on the amount of emissions it will be cutting. Therefore, once China, who is the world's biggest emitter, has submitted its Intended Nationally Determined Contribution (INDC) ahead of the UN climate talk in Paris later in 2015, overall pledges submitted will cover more than half the world's emissions. It is therefore recognised that China has accepted its responsibility by responding to the public and is making an effort to curb emissions and attempt to develop sustainably. However, the INDC is seen as a floor and not a ceiling, therefore there are expectations for China to over-deliver from its pledge.

Alibaba to Invest in Domestic Media Company

China's e-commerce giant Alibaba Group Holding Ltd has recently announced its plans to invest approximately $200 million for a 30% stake in China Business News, a financial TV and newspaper company that is part of the Shanghai Media Group, in which both companies may jointly develop a financial data service that can make use of Alibaba's database of e-commerce statistics, such as sales trends, and from which Alibaba may turn its shoppers to investors by providing financial news and information as well as stock quotes and charts on its online payment system service. The company's finance arm has stated its plan to partner with the country's largest microblogging platform Sina Weibo and Taobao.com to help local government's efforts to improve administration efficiency and transparency. Furthermore, Aliyun – the cloud computing arm of Alibaba – will be assisting the local government in its efforts to build unified cloud systems to tap the value of massive data.

New Stocks Board to Assist China's Tech Startups

A new strategic board will be established to complement Shenzhen's existing ChiNext board at the Shanghai Stock Exchange to list technology companies as part of China's capital market reform to tend to the financing needs of innovative startups. Although investing in technology start-ups may be risky for investors, they hold the potential of driving the Chinese economy towards a technology-intensive and innovation-driven growth model, especially because a flexible and effective capital market is a critical indicator of an economy's ability to innovate in addition to various other gauges including the number of patents and the emergence of new business models. Therefore, China seems to be working towards a multi-layered system to cater to the financing needs of different types of firms, and is promoting the development of angel funds, venture capital and private equities to address the funding difficulties facing startups.

Removal of regulation on loan-to-deposit ratio

The State Council of China recently passed a draft amendment to China's Banking Law giving banks more freedom to lend by removing the 75% loan-to-deposit ratio stipulation. Instead, the ratio will be seen as a liquidity-monitoring indicator, therefore enabling financial institutions to increase lending to agriculture, small and micro-businesses. Weighted by unsteady global demand, stuttering domestic investment and a weak property sector, China's economic growth fell in the first quarter to 7%, therefore this is an attempt to release more capital and channel credit to the real economy to support growth. Therefore, while the removal of the ratio may not necessarily lead to a substantial growth in credit due to the fact that the ceiling is not a major constraint on growth, the capital adequacy ratio is among the factors hampering credit growth.

Free Trade Agreement Between Australia and China

After a decade of negotiations, China and Australia have signed a free trade agreement, therefore giving each nation an unprecedented access to each other's markets. It has been indicated that over 80% of Australian goods exports will be tariff free under the agreement, and may rise up to 95% upon full implementation, with dairy, beef and seafood tariffs to be eliminated within the oncoming years. Furthermore, the agreement will eliminate China's tariffs on Australian's resources and energy products, therefore there is great importance attached to the agreement due to the potential opportunities it may bring.

China and Australia Infrastructure Facilitation Agreement

China and Australia have reached an agreement on a memorandum of understanding (MOU) signaling the establishment of an infrastructure facilitation agreement (IFA) framework designed to allow Chinese workers to work in Australia on infrastructure projects worth over AUD $150 million. The establishment of an IFA for a project will be governed by the Australian Department of Immigration and Border Protection (DIBP) and a project company, which will be guided by the China International Contractors Association (CHINCA) and the Australian Development of Foreign Affairs and Trade (DFAT), who will recommend projects to DIPB.

In addition to the monetary threshold, the MOU sets out criteria for the project and the company which must be met before an IFA can be established, including for the project company to be registered in Australia, for the project to be related to infrastructure development within the food and agribusiness, resources and energy, transport, telecommunications, power supply and generation, environment, or tourism sectors, and for the project company to agree to comply with all Australian laws and regulations, including applicable Australian workplace laws, work health and safety laws, and relevant Australian licensing, regulation and certification standards.