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China Update

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Legal News

Intellectual Property

The Beijing IP Court Lays Out Guidance for Well-Known Trademark Enforcement

The recent decision of the Beijing IP Court in the Tiffany/Di Fan Ni case supported the decision of the Trademark Review and Adjudication Board ("TRAB") and went on to set down guiding principles for trademark lawyers to keep in mind when arguing similar cases in the TRAB and courts.

Tiffany Trademark Invalidation Administrative Dispute between Shanghai Zhendi Decoration Materials Co. Ltd., v. TRAB

Case Title: Tiffany Trademark Invalidation Administrative Dispute between Shanghai Zhendi Decoration Materials Co. Ltd., v. TRAB
Court: Beijing IP Court
Date of Decision: April 24, 2017
Area of Law: Trademark

Significance of Decision: "TIFFANY" was recognized as well-known mark in China, and was granted cross-class protection in relation to goods of jewelry in class 14 and wallpapers in class 27
Appealed: No.

On 24 April 2017, the Beijing IP Court delivered its judgment concerning an appeal of a decision of the TRAB to invalidate Trademark Registration No. 8009772 for "蒂凡尼" (pronounced "di fan ni"– clearly this sounds similar to "Tiffany") upon receipt of a complaint by Tiffany and Company, on the grounds that the trademark at issue was too similar to its well-known trademark "Tiffany", even though the goods at issue were not jewelry and the like, but were wall paper goods and similar.

The Appellant, Shanghai Zhendi Decoration Materials Co. Ltd., filed an appeal in the Beijing IP Court from the TRAB, due to its dissatisfaction with the TRAB's decision that invalidated its No. 8009772 "蒂凡尼" Trademark, on the grounds that Tiffany and Company ("Tiffany") had submitted insufficient evidence to prove that 1) its Tiffany's China trademark registrations for "TIFFANY" and "TIFFANY&CO." were well-known in relation to jewelry; 2) the disputed trademark "蒂凡尼" was similar to "TIFFANY" mentioned above in terms of pronunciation and the like; and 3) confusion was unlikely in any case so as to lead to misidentification and damage.

At trial, the Beijing IP Court considered that the registration of the trademark at issue has violated Article 13.2 of the PRC Trademark Law of 2001, due to: 1) Tiffany proving through sufficient evidence of sales and promotion that its two TIFFANY trademark registrations had been well acknowledged by the relevant public and constituted well-known trademarks in relation to the goods of "jewelry" in class 14, prior to the application date (20 January 2010) of the trademark at issue; 2) Upon long-term and significant use, the "TIFFANY" trademarks have formed strong corresponding relations with its Chinese transliteration "蒂芙尼", whereas the trademark at issue "蒂凡尼" is not only pronounced similarly to "TIFFANY" but also only one character differs from the Chinese characters used by Tiffany regularly as its Chinese version. Thus, the court concluded that the trademark at issue and the TIFFANY trademarks are similar trademarks; and 3) the Appellant had also registered a "DIFFANY" trademark which is very similar to the well-known "TIFFANY" mark and had been using the "DIFFANY" and "蒂凡尼" trademarks at the same time. Furthermore, it was noted that the trademark at issue, was first applied for registration by the Appellant's associated company and then assigned to the Appellant at a later time.

In conclusion, the court considered that the findings mentioned above reflected that the Appellant had intentionally set out to obtain a free-ride on the back of Tiffany's well-known brand, and the use of the trademark at issue on wallpaper would cause association among the relevant public that there might be a licensing, association of affiliates or other relationship between the Appellant and Tiffany, which would result in misidentification of the source of the goods and possible damages to Tiffany.

It is worth noting that, according to the Beijing IP Court, when it comes to determine whether a disputed mark will mislead the public and result in possible damages to the interests of the owner of a well-known mark or not, the following factors should be taken into consideration: the degree of public familiarity of the well-known trademark, similarity of the two trademarks at issue, relativity of the designated goods thereof, subjective intention and so on. These issues should be kept in mind when arguing similar cases in the TRAB or the Beijing IP Court.

Parallel Imports under Chinese Trademark Law - the Ballantine's Decision

The recently issued court decision involving Ballantine's whiskey has an impact on parallel imports in China.

Background

Parallel imports refer to the unauthorized import of genuine products into a country. In China, parallel imports of patented goods have been legitimized by Article 69 of the Patent Law, but there is no explicit provision covering parallel imports under the Chinese trademark law. Although China does not have a clearly articulated position on the legality of parallel imports involving trademark issues, in practice, the Chinese courts have generally held that selling of such goods in China does not constitute trademark infringement, except in some special cases. China seems to

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follow the "international exhaustion of trademark rights" standard, which means that once trademarked goods have been sold overseas, a brand owner's exclusive rights to those goods in China have been exhausted, and a reseller's use of that trademark in China does not constitute a trademark infringement.

Generally, parallel imports do not constitute an infringement in principle, but if importers conduct improper behavior leading to the trademark recognition, function loss and bring damage to the goodwill of trademark owner, then parallel imports will be also deemed to infringement. For example, altering the appearance of a product or packaging, leading to the destruction of trademark recognition function and goodwill of trademark owner, will mean that the actions of importing and selling of the goods could be seen as contravening the Chinese trademark law.

Case Study

Allied Domecq Spirits & Wine Limited and Pernod Ricard (China) Trading Co., Ltd. Vs. Changsha Yuhua Bai Jia De Liquor Firm

Case Title: Allied Domecq Spirits & Wine Limited and Pernod Ricard (China) Trading Co., Ltd. Vs. Changsha Yuhua Bai Jia De Liquor Firm
Court: Changsha Intermediate Court
Date of Decision: 22 January 2017
Area of Law: Trademark Law, Food Safety Law, Anti-Unfair Competition Law
Significance of Decision: The removal for a product identification code by a distributor led to the court concluding that consumer confusion as to the origin of the products at issue was likely, such that trademark infringement was concluded.
Appealed: No

History

The Plaintiff, Allied Domecq Spirits & Wine Limited ("Allied Domecq") is the owner of Trademark Registration No. 7766497 for the BALLANTINE'S trademark and Registration No. 3230516 百龄坛 mark (Ballantine's in Chinese) under Class 33 for various beverages goods. Pernod Ricard (China) Trading Co., Ltd. ("Pernod Ricard"), is the exclusive authorized importer and distributor of Allied Domecq in China. The defendant, Changsha Yuhua Bai Jia De Liquor Firm ("Changsha Yuhua") is a retailer of Allied Domecq which sold parallel imported whisky produced by Allied Domecq without Allied Domecq's permission. Registration No. 3230516 百龄坛 mark was used by the Chinese label on parallel imported whisky sold by Changsha Yuhua, and the production date, production lot, product place of sale and sales information were removed prior to sale.

The Plaintiff Allied Domecq and Pernod Ricard considered that Changsha Yuhua's behavior had infringed their trademark rights and constituted unfair competition, such that they initiated a lawsuit against Changsha Yuhua in the Changsha Intermediate Court on 24 August, 2016.

Decision

After the hearing and due consideration, the court held that Article 97 and Article 67 of the Food Safety Law did not require the operator to translate a foreign trademark of the imported goods into Chinese. Therefore, the use of Chinese label containing the mark "Ballantine's in Chinese" on the same product by Changsha Yuhua without the permission of the trademark holder, went against the will of trademark holder and objectively damaged the rights and interests of the trademark holder. The Defendant's behavior had violated Article 57(7) of the Trademark Law "causing

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prejudice to another party's exclusive rights to use its registered trademark", so the Defendant's behavior was considered to have constituted trademark infringement.

The state of the law in this area is somewhat clearer as the court, in this case, has followed a trend of finding infringement when labeling is tampered with, even though the goods themselves are genuine. It is hoped that in the future, this decision and others is codified in the Trademark Law and/or the Supreme Court Interpretations.

China's Courts Revisit Bad Faith Trademark Applications

Over the years, the large number of trademark squatters and counterfeiters, have led to foreign and local trademark owners complaining that China needed to police bad faith trademark applications more rigorously. In the recent Doosan case, discussed herein, it is seen that the Chinese Trademark Office and courts, are willing to extend the application of provisions of the law to stop bad faith filers in certain cases.

Beijing Jiahe Xingchan Lubricant Co., Ltd. Vs. Trademark Review and Adjudication Board and Doosan Co., Ltd., Doosan Infineon Co., Ltd.

Case Title: Beijing Jiahe Xingchan Lubricant Co., Ltd. ("Jiahe") Vs. Trademark Review and Adjudication Board ("TRAB") and Doosan Co., Ltd., Doosan Infineon Co., Ltd. (collectively, "Doosan")
Court: Supreme Court
Date of Decision: 30 March 2016
Area of Law: Trademark law
Significance of Decision: This case shows an increased willingness of the CTO and courts to apply Item 8 of Paragraph 1 of Article 1 of the Trademark Law in relation to bad faith filings. It is hoped that this practice obtains popularity in China.
Appealed: No

Case History

Beijing Nissan Jiahe Lubricant Co., Ltd. (Nissan Jiahe, which name was changed to Jiahe Xingchan, "Jiahe") filed an application for registration of the trademark "斗山" (DOOSAN in Chinese characters) with the Chinese Trademark Office ("CTO") on 25 July 2005, in relation to "lubricating oil, lubricating grease, technical white oil, motor oil, cutting fluids, industrial oil, industrial grease, heat-conducting oil, and gear oil" in class 4, under Trademark Application No.479739.

Doosan filed an opposition in relation to this application, after it was preliminarily approved by the CTO, based on its trademark registrations for "斗山 DOOSAN" under Trademark Registration No.'s 1910283 and 1910286 registered from 4 July 2001, in relation to "aeroplane engines, boat engines, drilling bits [parts of machines], road rollers, feed mixing machines, milking machines, mixing machines for industrial purpose, winders, washing machines, printing machines, bulldozers, tarring machines, excavators, and road making machines" in class 7.

The CTO made a decision in relation to this opposition matter on 13 July 2011. It concluded that the opposed trademark application was similar to the prior registrations owned by Doosan, and that the registration of the trademark would mislead the public and lead to negative social influence, when it was used for lubricating oil.

Jiahe appealed to the TRAB on 6 September 2011 on the grounds that 1) there was not any evidence showing the good reputation of the "斗山 DOOSAN" in Trademark Registration No.1910283 that was already obtained before filing of the trademark application at issue, 2) the goods covered by the trademark application at issue and Doosan's trademark registrations were not similar, in terms of function and usage, and co-existence of the two trademarks would not cause consumer confusion, and 3) the opposed trademark application did not violate Item 8 of Paragraph 1 of Article 10 of the Trademark Law 2001, which states that The following words or devices shall not be used as trademarks: " … (8) those detrimental to socialist morals or customs, or having other unhealthy influences." The same provision is stipulated in Item 8 of Paragraph 1 of Article 10 of the Trademark Law 2013 which is currently effective.

The TRAB made a decision on 9 October 2013, considering 1) although the goods covered by the opposed trademark application, such as lubricating oil, were not similar to those covered by Doosan's trademark registrations, such as excavators and bulldozers, but "斗山 DOOSAN" was a trademark registered by Doosan in relation to excavators and bulldozers, and before filing of the opposed trademark application, Doosan carried out an acquisition and established Doosan Engineering Machinery (China) Co., Ltd. in China, which was widely reported by the media. Doosan also promoted its "斗山 DOOSAN" brand before filing of the opposed trademark; 2) The opposed trademark "斗山" was similar to "斗山 DOOSAN" that was registered by Doosan earlier; 3) Jiahe filed the applications to register other well-known car brands, such as "Honda", "Toyota", "Dongfeng Citroen", "Mondeo", "Elysee", "Regal", "Camry", "Skoda" (all is in Chinese characters), in addition to the opposed trademark application, which was not a coincidence but showed Jiahe's intentional copying and imitation of other's trademarks having great reputation; 4) Jiahe's filing of the opposed trademark would not only cause relevant public's confusion as to the sources of the goods, but also disturb the normal trademark registration and management order, undermine fair competition, violate the principles of good faith, and lead to negative social influences, which constituted the situation referred to in Item 8, Paragraph 1, Article 10 of the Trademark Law 2001. The TRAB accordingly determined that the opposed trademark application should not be registered.

Jiahe appealed to the Beijing No.1 Intermediate People's Court, whichfound that 1) The old Trademark Law 2001 which was effective when the TRAB reviewed the appeal and issued the decision should be applied to this case; 2) the evidence filed by Doosan with the TRAB, especially including annual reports, sales contracts, invoices, industry association certification, designing report, relevant media reports could show that its trademark registrations had obtained great reputation, in relation to excavators and bulldozers, before filing of the opposed trademark; 3) the Chinese characters included in the opposed trademark and Doosan's trademark registrations were completely the same, and considering that Jiahe registered a number of famous car brands in relation to lubricating oil in class 4, its acts above were not coincidental but had seriously disrupted the order of trademark registration and accordingly led to unhealthy influences of social and public interests. Therefore, the TRAB's decision stating that the registration of opposed trademark constituted the circumstances referred to in Item 8 of Paragraph 1 of Article 10 of Trademark Law 2001, was proper and was supported by the Intermediate Court.

Jiahe appealed to Beijing Municipal Higher People's Court on the grounds that 1) whether Item 8 of Paragraph 1 of Article 10 of Trademark Law 2001 should be applied was not related to the reputation of Doosan's trademark registrations; 2) there was no causal relationship between its filing of car brands and the application of Item 8 of Paragraph 1 of Article 10 of Trademark Law 2001; 3) Doosan's rights and interests are specific civil rights, rather than the public interest, and the Chinese characters "斗山" itself did not have unhealthy influence, so the Intermediate Court's

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decision on disruption of trademark registration order and production of unhealthy influences lacked factual and legal basis. However, on 20 July 2015, the Higher Court issued its decision, maintaining most of the original decision issued by the Intermediate Court and rejecting all of Jiahe's claims.

Jiahe filed an application for retrial of this case with the Supreme People's Court on the grounds listed above. It claimed that its filing of car brands only damaged specific civil rights and interests but should not be identified as a situation involving unhealthy influence. It requested the Supreme Court to overturn the decision issued by the Higher Court.

In the decision issued by the Supreme Court on 30 March 2016, it summarized the key point of the dispute as whether the opposed trademark application contained a trademark that has unhealthy influence and should not be used as a trademark, and it confirmed the following: 1) Doosan's trademark registrations had obtained great reputation, before filing of the opposed trademark; 2) the Chinese characters of the two trademarks were completely the same; and 3) Jiahe filed a number of famous car brands for registration in relation to lubricating oil in class. Based on these facts, the Supreme Court confirmed that the decision issued by the Higher Court applied the correct law so it was supported, and Jiahe's claim regarding the opposed trademark application did not violate the provision of Item 8 of Paragraph 1 of Article 1 of the Trademark Law could not be established and was not supported.

Implications

In this case, Jiahe's bad faith filing of famous car brands was identified by various courts (and originally, the CTO) as violating the principle of good faith and disturbance of trademark registration order, which would cause unhealthy influence. They all went on to then find that Item 8 of Paragraph 1 of Article 1 of the Trademark Law was properly applied to this case. This case clearly demonstrates a progressive step taken by Chinese courts in relation to their willingness to identify bad faith filings and apply Item 8 of Paragraph 1 of Article 1 of the Trademark Law (and presumably, the 2013 amended law equivalent) to such cases. We are looking forward to seeing whether this example is being followed in future cases by the CTO and the courts, especially involving foreign trademark owners.

China's TMO simplifies procedures for Madrid filings based on Chinese parent trademark applications/registrations

CTO announced that they will simplify the Madrid international trademark registration procedures from 23 August 2017. The changes of the procedure include:

● Less documents need to be filed, such as the copy of Notice of Acceptance for Trademark Application/Trademark Registration Certificate, as well as the copy of Modification, Assignment and Renewal Certification will not be required anymore when the Applicant applies the Madrid international trademark registration;

● The Applicant may file modification application for their trademark application even though the CTO hasn't preliminarily approved the registration for the trademark application.

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China's Little Yellow Bike Company Sued for Trademark Infringement

The bicycle sharing business has boomed in China since the beginning of 2017. The Beijing Bikelock Technology Co., Ltd ("OFO"), being one of the most successful companies in the market of China, has received high returns whilst having encountered a lot of challenges.

On 31 July 2017, the Haidian District People's Court of Beijing confirmed that it had accepted a case filed by ShuRen (Shanghai) Intelligent Technology Co., Ltd ("ShuRen") against OFO, claiming that OFO had engaged in trademark infringement.

"小黄车" is the Chinese version of "little yellow bicycle". On 29 July 2015, ShuRen filed applications for the registration of "小黄车" as a trademark for various goods and services in classes 9, 12, 37 and 38 respectively in the China Trademark Office ("CTO"). Apart from all the goods including bicycles in class 12, the trademark applications in relation to other goods passed substantive examination and registered in the CTO in 2016. Based on the ownership of these trademark registrations for goods and services in classes 9 and 38, ShuRen has claimed that the use of "OFO 小黄车" by OFO in relation to bicycle share services, infringes its exclusive rights to use of the registered trademark "小黄车" under Trademark Registration No. 17541750 and 17541835 due to the following:

● The use of "OFO 小黄车" by OFO constitutes use of a trademark under Article 48 of the PRC Trademark Law;
● The "OFO 小黄车" trademark used by OFO, is deceptively similar to the registered "小黄车" trademark owned by ShuRen;
● The goods/services that the "OFO 小黄车" trademark is used in relation to, by OFO, are similar to the goods/services covered by ShuRen's registered trademarks; and
● The use of the "OFO 小黄车" trademark by OFO will cause confusion.

There is no doubt that the use of the "OFO 小黄车" trademark by OFO for its smartphone App's name, services introduction and various service interfaces, official advertising and related activities, constitutes "use" as per Article 48 of the PRC Trademark Law. The rule provides that "the use of trademarks as stipulated in this Law refers to the affixation of trademarks to commodities, commodity packaging or containers, as well as commodity exchange documents or the use of trademarks in advertisements, exhibitions, and for other commercial activities, in order to identify the source of the goods". However, such "use" is not for providing smartphone App services, which might be covered by the goods/services designated for ShuRen's registered trademarks in class 9 or 38, but for promoting OFO's bicycle-sharing business and/or bicycle products. In other words, OFO is using the "OFO 小黄车" trademark in relation to the goods/services that are not the same as or similar to those covered by ShuRen's registered trademarks. ShuRen's trademark registrations cited in this case cover the goods and services such as cameras [photography]; batteries, electric, for vehicles; theft prevention installations, electric; computer software applications, downloadable ; computer software, recorded; cabinets for loudspeakers; automatic indicators of low pressure in vehicle tires; chips [integrated circuits]; navigation apparatus for vehicles [on-board computers]; traffic-light apparatus [signaling devices] in class 9, and wireless broadcasting; providing telecommunication channels for teleshopping; electronic bulletin board services [telecommunications]; communications by computer terminals; providing online forums; computer aided transmission of messages and images, message sending, providing access to databases, communications by cellular phones, providing user access to global computer networks in class 38.

Meanwhile, the trademarks of "OFO 小黄车" varies from "小黄车". The meaning of the latter is

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"little yellow bike". It is hard to get it registered as a trademark due to lack of distinctiveness as it is exactly a description of the goods in relation to the bike-sharing business. That is presumably why ShuRen failed to get it registered for using on the goods including bicycles in class 12 in 2015. As a result, it cannot be the significant part of "OFO 小黄车".

On the contrary, "OFO" is likely to be seen as the dominant part of the "OFO 小黄车" trademark in relation to the goods/services in bike-sharing market because "OFO" itself is inherently adapted to distinguish the source of goods/services in the market, and it has enjoyed a strong reputation in the market due to wide use and promotion.

In addition, it is likely that the court will not find any malicious intention regarding the use of the "OFO 小黄车" trademark by OFO. Further, it is likely that the court will have difficulty in finding that the use of this trademark will cause confusion as consumers tend to consider the goods/services marked with "OFO 小黄车" as originating from OFO only.

We await the court's decision with anticipation.

Fendi Wins Trademark Infringement Case in China

On July 28, 2017, the Shanghai IP Court delivered its final judgment concerning a trademark infringement and unfair competition dispute involving the luxury brand "FENDI".

Fendi Adele S.R.L. v. Shanghai Yi Lang International Trade Co., Ltd, Capital Outlets (Kunshan) Business Development Co., Ltd.

Case Title: Fendi Adele S.R.L. v. Shanghai Yi Lang International Trade Co., Ltd, Capital Outlets (Kunshan) Business Development Co., Ltd
Court: Shanghai IP Court
Date of Decision: July 28, 2017
Area of Law: Trademark, Unfair Competition
Significance of Decision: 1) The two defendants were ordered to immediately cease their infringement of the trademark right No. G1130243 "FENDI" as well as the unfair competitive behavior of unauthorized use of Fendi Adele S.R.L. ("Fendi")'s trade name "Fendi"; 2) the two defendants were also ordered to compensate Fendi economical loss and reasonable expense amount to RMB 350,000
Appealed: No

The said judgment partially withdrew the first instance judgment made by the Shanghai Pudong New District People's Court, and ordered the two defendants, Shanghai Yi Lang International Trade Co., Ltd ("Yi Lang") and Capital Outlets ("Kunshan") Business Development Co., Ltd (Capital Outlets) to immediately cease their infringement of the trademark right No. G1130243 "FENDI" as well as the unfair competitive behavior of unauthorized use of Fendi Adele S.R.L. ("Fendi")'s trade name"Fendi". Furthermore, the two defendants were also ordered to compensate Fendis economical loss and reasonable expense amount to RMB 350,000.

Fendi filed a lawsuit to the Shanghai Pudong New District People's Court in 2016 against the two defendants, on the ground that it considered that they infringed its trademark rights and trade name by using them on shop sign, outside wall instruction board, discounting information instruction

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board, shop decoration, sales receipt, shopping bag as well as the brochures and the like thereof. Nevertheless, the said first instance court determined that such use fell into the category of reasonable use of trademark in order to state their products or services provided, since the FENDI products sold in the defendant's shop were authenticTherefore the court, rejected Fendi's requests. Due to dissatisfaction of the first instance judgment, Fendi appealed to the Shanghai IP Court.

Upon trial, the Shanghai IP Court considered that it shall fulfill conditions as follows to determine whether it constitutes reasonable use of a trademark: 1) such use is in good faith and reasonable, and does not use other's trademark as its own trademark of goods or service; 2) such use is necessary, which is merely stating or describing within the scope of its operated goods; 3) such use will not cause any confusion nor misidentification among the relevant public. However, in the current case, the use of "FENDI" logo on the shop sign along was sufficient to result in a conclusion by the relevant public with normal attention that the involved shop was operated by Fendi or operated upon authorization by Fendi. Not to mention it was supported by the new evidence provided by Fendi during the second instance trial, which was a notarized questionnaire showing that 29 out of 42 interviewees considered that the involved shop was a directly operating shop or an authorized shop of Fendi. Thus, the Shanghai IP Court determined that the use of "FENDI" logo on the involved shop sign was not reasonable use in good faith. In addition, the Shanghai IP Court determined that such use on the shop sign by Yi Lang, also infringed the trademark right of No. G1130243 "FENDI" in class 35, as well as the trade name "FENDI", and therefore, Yi Lang should be liable for the relevant civil liability. The Capital Outlets who was the operator and manager of the outlets where the involved shop is located, shall also bear joint liability with Yi Lang, on the ground that it did not specify the identity of the involved shop operated by Yi Lang to consumers. This led to confusion and misidentification among relevant consumers that the involved shop was operated or authorized to be operated by Fendi. In other words, the Capital Outlets provided assistance and convenience to the Yi Lang's trademark infringement, created unfair competition and shall therefore bear the joint liability with Yi Lang.

In conclusion, the two defendants, both the Yi Lang and the Capital Outlets shall not only immediately cease their infringement of Fendi's No. G1130243 mark and unfair competing behavior to the trade name thereof, but also compensate the economical loss of RMB 350,000 (including reasonable expense) to Fendi.

State Council Discusses IPR Financing Models such as Patent Pledge

On July, the State Council held an executive meeting to discuss the *Opinions on Strengthening the Implementation of Innovation-driven Development Strategy to Further Promote a Deep Development of Mass Entrepreneurship and Innovation* (Opinions).

According to the meeting, the Opinions introduce the following five steps that may affect future IP practices:

● to explore to build a system for the transformation of scientific and technological results in a given period;
● to simplify the filing procedure for intangible assets such as patents;
● to set the pricing of agreement, listing and auction;
● to promote the pilot application of the first set of major technological equipment;
to improve the IPR utilization and coordinated protection system;

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● to push forward patent-pledge financing, welcome insurance companies to provide related insurance services, encourage local government to provide risk compensation or premium subsidies;
● to advance nationally financed fund to set up VC fund for middle and early- stage or start-up innovative enterprises; and to explore to give political support to VC incubators as per technical and scientific incubators.

New Balance Won USD 1.5 Million in Landmark China Trademark Case

The Suzhou Intermediate People's Court has ruled that three domestic shoemakers must pay New Balance USD 1.5 million in damages and legal costs for infringing the American sportswear company's signature slanting "N" logo, in what lawyers said was the largest trademark infringement award ever granted to a foreign business in China.

It is a victory not just for New Balance, but also for many other foreign companies that have long complained that Beijing has not done enough to protect their brands. And while the size of the ruling — issued three days after President Trump ordered an investigation into China's alleged theft of intellectual property — was relatively small by international standards, it was nevertheless a substantial increase compared with previous penalties.

In the decision, the Suzhou Intermediate People's Court, near Shanghai, ruled that three defendants that made shoes under the brand New Boom "seized market share from New Balance" and "drastically damaged the business reputation of New Balance," according to a copy of the decision, which was sent to The New York Times by the American company.

<u>Arbitration and Dispute Resolution</u>

The New Rules for Handling Arbitration Cases about Employment and Personnel Disputes Became Effective

On 1 July, 2017, the latest *Rules for Handling Arbitration Cases about Employment and Personnel Disputes* ("Rules") issued by the Ministry of Human Resources and Social Security ("MOHRSS") formally became effective.

According to an online interview with a MOHRSS official concerning the Rules held on 13 July 2017, the most important parts of the latest amendments that should be noted are as follows:

● Specifying the scope of final arbitral award

As mentioned above, Article 47 of the Labor Dispute Mediation and Arbitration Law stipulates several situations that apply to? the final award which aims to lessen the burden of parties concerned and save judicial resources. However, the regulation in the said Article was not specific enough - for instance, the definition of economic compensation or damages needs to be specified for the purpose of clarity. Thus, in accordance with Article 50 of the Rules, the said economic compensation is now known to include compensation given during the non-compete period provided in the Labor Contract Law, compensation for dismissal or termination of the labor contract and so on; whereas the said damages includes the extra one-month salary for not signing a written labor contract in accordance with the Labor Contract Law, damages for illegal probation period, illegal dismissal or termination of the labor contract. Furthermore, it also sets up the amount of single arbitration that applies to the final award, which is no more than the amount of 12 months local minimum salary.

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● Adding simple handling procedures

The Rules add a whole new chapter titled as Simple Handling to deal with cases that fulfill one of the following circumstances: 1) facts and rights/obligations are clear, without much controversy; 2) the amount of money involved does not exceed the last year average salary of the local province/automatic administrative area/municipality directly governed by the central government; 3) both parties agree to apply the simple handling procedure. In case of the simple handling procedure, there will only be one arbitrator for the case. Upon agreement from the applied-for party, the arbitral tribunal may shorten or eliminate replying period. In addition, the arbitral tribunal may also deliver relevant arbitration documents by telephone, SMS message, fax, email and so on; it may also determine matters, such as evidence deadline, arbitration procedure, document making etc., more flexible depending on the circumstances of the case.

● Adding collective labor dispute handling procedures

According to the Rules, they can apply to the collective labor dispute handling procedure, in case of a dispute with more than ten employees having the same request or dispute that arise from the performance of collective labor. It also provides that such case will be filed and tried in priority. In addition, such cases may also apply to the simple handling procedure, provided that it fulfills one of the circumstances mentioned above.

Comment

In China, a party must go through the arbitration for a labor dispute first before it can bring the dispute to the court in case of dissatisfaction with the arbitral award. The aim of such system design is to solve most disputes in the arbitration phase so that it saves time and costs for the concerning parties. However, in practice, many parties of labor dispute who dissatisfy with the arbitral award choose to go through both the arbitration and the two instance court trials, which could become very time-consuming and grueling for both the employee and the employer. Nevertheless, it is a positive progress that the Rules incorporate these new changes (e.g. adding the simply handling procedure) in order to enhance the efficiency of labor dispute procedure and to balance the rights and interests between both the employee and the employer.

Data Protection/Privacy

China Inspects Privacy Policies of Popular Mobile Apps

On 24 August 2017, China's top internet regulators finished the first round of their checks on the privacy policies of ten popular mobile apps.

The Cyberspace Administration of China, Ministry of Industry and Information Technology, Ministry of Public Security and the Standardization Administration have examined the privacy policies of several well-known internet products and services, such as JD, Alibaba's Taobao, Sina Weibo, Tencent's WeChat and Baidu Map.

The campaign aims to regulate the commercial behavior of internet companies, such as the collection, storage, use and transfer of personal information. It will urge internet companies to rectify any illegal terms and clauses. Privacy terms must be explained explicitly to users and their privacy respected, according to the regulators.

The inspection results will be published late September.

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Anti-Trust

China's MOFCOM approves Broadcom's purchase of Brocade with conditions imposed based on antitrust principles

On 23 August 2017, the Ministry of Commerce of the People's Republic of China announced to approve Broadcom Limited's ("Broadcom") stock right acquisition of Brocade Communications Systems, Inc. ("Brocade") with conditions.

MOFCOM received the operators' centralized declaration of Broadcom's stock right acquisition of Brocade on 17 January 2017 and launched an investigation on 6 March 2017. Further review will be ended by 28 August 2017. Both Broadcom and Brocade are American companies and both take a lead in fiber channel storage. The investigation showed that Broadcom's Fiber Channel SAN ("storage area network") switches are the neighbor products of its Fiber Channel Host Bus Adapters (HBA). After this acquisition, Broadcom may utilize Brocade's dominance in SAN switch of fiber channel market (with its global market share over 70%-80%) to weaken the technological interoperability of the fiber storage HBA with the third parties producing HBA, the inappropriate use the confidential business information of those third parties and the bundling sale of their own HBA, and eliminate and restrict the competition in the fiber storage HBA market. Also, Broadcom can get access to their main competitor's confidential business information in SAN switch of fiber channel market, and use the information to further expand market share and eliminate and restrict the competition in the SAN switch market. Considering that, MOFCOM decided to approve this case with conditions.

Along with the investigation, the Chinese Ministry of Commerce and the anti-monopoly institutions in US and EU have exchanged ideas on review progress and competition concerns.

Business News

China's State-owned Enterprises Reported Steady Profit Growth in the First Seven Months

China's State-owned enterprises ("SOEs") reported steady profit growth in the first seven months of 2017 as the country's supply-side structural reforms took effect.

The combined profits of China's SOEs gained 23.1 percent year-on-year to RMB 1.66 trillion (USD 249.6 billion) during January-July. Centrally-administered SOEs made about RMB 1.09 trillion in profit, up 17.3 percent year-on-year, while locally-administered SOEs made over RMB 575 billion, up 35.8 percent year-on-year. Total business revenue for state firms rose 16.5 percent to RMB 28.9 trillion, while operating costs rose 15.8 percent to RMB 28 trillion. By the end of last month, total SOE assets stood at RMB 144.9 trillion, while liabilities grew 11.3 percent year-on-year to RMB 95.3 trillion.

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China Saw 59 IPOs in First Half of 2017

China's technology, media and telecommunications ("TMT") sectors saw 59 IPOs in the first half of 2017, the figure was almost the same as the second half of 2016.

The IPOs raised a total of RMB 25.8 billion (USD 3.9 billion) in H1. A total of 27 were listed on the Growth Enterprises Market ("GEM") Board in Shenzhen, raising RMB 9 billion, while 19 went public on the Main Board, collecting RMB 10.8 billion. Another 12 TMT IPOs were listed on the Small and Medium Enterprises ("SME") Board and one on an overseas market.

State Council Published the Development Plan for the New Generation of Artificial Intelligence

The State Council published the Development Plan for the New Generation of Artificial Intelligence ("Plan") on 20 July 2017, which sets out the strategic targets for the development of artificial intelligence ("AI") in China.

The Plan provides that the technologies and applications of AI in China should generally be in line with the most advanced levels in the world. AI industries will become a new and important economic growth point. The application of AI technologies will have become a new method to improve people's livelihoods. By 2025, the fundamental AI theories should have achieved significant breakthroughs and some technologies and applications should have reached a world-leading level. In addition, AI should become a major power driving the industrial upgrade and economic transition. The establishment of an AI society should mean that positive developments are achievable. By 2030, AI theories, technologies and applications should generally reach a world-leading level. China should become one of the major AI innovation centers in the world.

The Plan also sets out, at a high level, the guiding principles, key development areas, resource allocation and policy support for the development of AI in China.

China Citic Bank and Baidu Set up Joint Venture

China Citic Bank and Baidu have received regulatory approval for their joint venture lender to begin business operations, marking the latest foray into the banking sector by the nation's tech giants.

The joint venture Citic aiBank has a registered capital of RMB 2 billion (USD 300 million). It is 70 percent owned by Citic Bank while Baidu holds the remaining 30 percent. The new bank's scope of operations includes deposits and loans – mainly from individuals and small and micro enterprises, bank card business, bancassurances and interbank business. Besides, the new bank will mainly offer its services via online banking without physical branches.

China Plans to Create the World's Largest Power Company

The government on 28 August 2017 approved the merger of Shenhua Group Corp., the country's top coal miner, with China Guodian Corp., among its largest power generators. With assets of RMB 1.8 trillion (USD 271 billion).

The new company will have installed capacity of more than 225 gigawatts, topping Electricité de France SA and Enel SpAand will account for 13 percent of both China's power-generating and coal-mining capacity.

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Baidu is Selling Takeout Delivery Business to Alibaba-Backed Ele.me

Baidu Inc. is selling its takeout delivery business to Ele.me, a rival backed by Alibaba Group Holding Ltd. The cash-and-stock deal will help the Chinese search-engine giant stop sinking money into a costly business that hasn't paid off.

The sale is part of a larger refocus for Baidu, which is prioritizing artificial intelligence as its growth driver. In recent months, the search firm has consolidated business units and focused on two AI products, a voice-interaction system called DuerOS and an autonomous-driving open source platform called Apollo. It also signals a defeat in Baidu's attempt to compete in China's fierce online-to-offline (O2O) market.

Chinese Carmaker Great Wall Interested in Buying Fiat Chrysler

Chinese carmaker Great Wall has expressed interest in buying Fiat Chrysler Automobiles ("FCA"). FCA, which also owns the Jeep, Ram, Alfa Romeo and Maserati brands, has been searching for a buyer in order to cut development costs of electric and self-driving cars.

FCA already produces Jeep models in China itself, under its partnership with the local producer Guangzhou Automobile. Under China's rules, international carmakers are required to form joint ventures with domestic producers.

Alibaba Opens up New Ways for Australian Food Producers to Access Chinese Customers

Alibaba has been an important avenue for Australia baby formula and vitamin producers to access the Chinese market through its Alibaba.com wholesale website and its direct-to-consumer site Tmall. However, Alibaba recently said that fresh produce now presented the greatest opportunity for growth.

Alibaba/The company already sells some fresh products online and is pushing further into the category/subsector with its own supermarkets in China by opening 13 since 2015. It says it has tried to reinvent the supermarket experience at its Hema stores by removing the distinction between online and offline shopping, with shoppers using a smartphone app to make purchases and learn about products. Each supermarket also serves as a fulfillment center for online orders that can be delivered within 30 minutes.

There are about 1300 Australian brands already being sold on its platforms, and Alibaba said it did not necessarily need more Australian products, and it was focusing on growing the existing brands' profile through campaigns and marketing.

Ofo Lands in Austria

Chinese bike-sharing titan Ofo Inc. announced on 21 August 2017 it has landed in Austria, rampingup its efforts to expand the booming cycle empire into the overseas market. The company states the firm's latest move is, to fulfill its ambitious goal to pedal to 200 cities in 20 countries by the end of this year, as to compete with its top rival, Mobike Technology Co., Ltd..

Ofo said they saw great potential for Ofo's environmentally-friendly and affordable dockless bicycle services in Austria. Ofo said after reaching an agreement with the city of Vienna, capital of Austria, it would begin a one-month pilot phase in the city to allow all users to ride the yellow shared bikes free of charge. After the pilot phase, the company will deploy a full fleet of 2,000 bikes across Vienna. Users will be able to ride the shared bikes by simply scanning a QR code

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printed on the bike via the downloaded app and paying EUR 1 (USD 1.2) per hour online on their smartphones.

JD.com and Thai Retailer Central in Talks for USD 500 Million E-commerce Joint Venture in Thailand

China's JD.com Inc. is in advanced talks with Thailand's Central Group to launch an e-commerce joint venture in Thailand with a planned total investment of USD 500 million. The venture will help JD.com expand its overseas business beyond Indonesia and boost its presence in Southeast Asia where rivals Alibaba Group Holding and Amazon are ramping up competition with new services, such as a quick delivery service in Singapore.

JD.com plans to enter the Thai market later this year and use Thailand as a hub to service other countries in the region such as Vietnam and Malaysia. The joint venture with Central Group will focus on the e-commerce and finance sectors.

The deal has yet to be finalized as the companies are unable to agree on ownership terms.

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.

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