

Roadmap

for Intellectual
Property
Protection
in China



Trademark
Protection
in China

Suggested for use by trademark holders,
particularly new entrants to the Chinese marketplace

Prepared Summer 2008 and updated in 2015

It is strongly emphasised that the information provided in this publication by no means constitutes legal advice and should not substitute for counsel. The information is based on the opinion of independent experts and does not claim to be either complete or definitive; but is intended merely as a guide. The relevant Chinese laws and other available legal and technical sources should be properly consulted when seeking protection for IP rights in China.

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Overview

Use the existing system and make sure you meet all legal requirements in China as soon as your company decides to enter the market.

Not knowing or acting in time is not an acceptable excuse in Chinese courts; not more than it would be in Europe!

Chinese government agencies have worked actively over the past years to bring legislation up to international standard. This is particularly true for intellectual property rights, where trademark, patent and copyright laws and implementing regulations have all undergone a radical overhaul in 2000-2001. A further major trademark law reform has been achieved in 2014.

While the legal framework covering IP is largely in place (a number of provisions such as time limits and limits on penalties and fines continue to cause foreign investors consternation), enforcement continues to cause significant problems to right owners, which is accentuated because of the size of the country and the cunning creativity of the infringers. This is particularly true for trademarks, where counterfeit products are manufactured and sold on a large scale. Yet, gathering evidence to support serious commercial or criminal cases continues to be relatively difficult, even for long-time investors and operators.

Successful companies are likely to find their trademark being infringed in China at some point in time, whether they are physically present in China or not. While there is no magic recipe that guarantees full protection, companies should take all legal and practical measures available in China to reduce risks, starting of course by having their rights registered.

USE PEOPLE WHO UNDERSTAND THE LANGUAGE AND KNOW HOW TO OPERATE THE SYSTEM

This means a highly experienced intellectual property lawyer who has operated in China for several years and who may also be able to provide your firm with good government connections and some helpful insight into how to make the system work.

China-based "investigation" consultancies are particularly useful and knowledgeable. Their connections with government agencies, courts, police, and other key enforcement bodies can be invaluable. These people are often the key operators and referrals from China-experienced lawyers are probably necessary for a newcomer on the Chinese market.

At the onset of your business dealings in China, when meeting your lawyers, come up with not only a legal but also a practical strategy for trademark protection. This may involve building provisions for monitoring and protection into a joint-venture agreement.

UNDERSTAND WHO CAN DO WHAT IN CHINA

Most companies which find their trademark infringed in China spend months trying to resolve the infringement through their embassies, Chinese government connections, or through the Ministry of Commerce. While it is not a bad idea to pursue a political approach, embassy staff is not, for the most part, specialised in handling intellectual property cases and is deluged with similar cases, not to mention other responsibilities in China.

The political approach should be undertaken in parallel with a practical strategy which employs IPR-experienced lawyers and consultants, and which uses the system that is in place. Even when using a political approach, the fundamental question remains whether the right holder has fulfilled all legal obligations in China to protect his right. If this is not the case, even a political approach may lose its footing.

The original Trademark law of China dates back to 1982. It has been revised three times, in 1993, 2001 and more recently in 2013. The New law has entered into force on May 1st, 2014.

The Chinese Trademark Law provides for a trademark registration system, which sets out the legal foundation for trademark protection. As a prudent first step, companies should hire a lawyer with extensive experience regarding the Chinese trademark system to determine whether their trademarks can be legally registered in China. Since China has a centralised registration system, the assessment and registration process is fairly easy and straight forward.

It is important to note that China uses the "first-to-file" system, meaning that companies may lose legal protection in China if a similar mark has already been registered in China. China is a member of the Paris Convention and WTO, so make sure you file in China within six months of registration of the same mark at home if you want to keep the original application date!

Part I: Acquisition and Maintenance of Trademark Rights

WHAT IS A TRADEMARK?

A trademark is a sign that serves the specific purpose of identifying the goods or services of a producer or service provider and allowing the consumers to distinguish these goods or services from those of others.

WHAT CAN BE REGISTERED AS A TRADEMARK?

The sign may be composed of words, devices, letters, numerals, three-dimensional signs (shapes), combinations of colours or any combinations of the above. Before May 1st 2014 (date of entry into force of the newly revised Trademark Law) the sign must be visually perceptible. The New law has deleted the word "visual", and gives an example of a non-visual sign: "sound, etc.". It seems that in theory, other kind of trademark, like smell mark, are also acceptable, but in practice, it is not yet stipulated in the implementing rules.

WHO CAN APPLY FOR REGISTRATION OF A TRADEMARK?

Any individual person, legal person or "other organisation" in the course of its production or business operation, can apply for registration of a trademark.

Applications may be made individually or jointly by two or more persons or even collectively. In the latter case, it is registered in the name of an organisation and is used by the members of the said organisation in their business with a view to indicating their membership of such an organisation.

ON WHAT PRODUCTS OR SERVICES CAN A TRADEMARK BE REGISTERED?

The products and services the trademark is designated to can be classified into 45 classifications according to the latest Nice Classification.

WHICH TRADEMARK CAN BE REGISTERED?

In order to be registered, trademarks must comply with two different sets of requirements, commonly designated by the terms "absolute grounds (of refusal)" and "relative grounds (of refusal)".

In China, when examining a trademark application, the CTMO verifies both grounds; the absolute and the relative.

In addition, the New law introduces the concept of good faith: "the application and use of trademarks shall be made in good faith" (article 7)

ABSOLUTE GROUNDS

1. LEGALITY

Illegal signs are those that are identical with or similar to

- the Chinese State name, the national flag, the national emblem, national anthem, the military flag or medals of the People's Republic of China, and those identical with the name or the symbol of the central organisations of the State or Party, as well as the name of specific places where authorities of the Central Government are located or any name or design symbolising such places or buildings;
- the names of other States, their national flags, emblems or military flags;
- the names, flags, emblems of international organisations;
- official symbols or inspection marks indicating control or guarantee of quality (such as ISO, etc.);
- the Red Cross or the red Crescent;
- have a discriminative content against a nationality;
- that are deceptive, that are likely to mislead the public to misidentify the quality or other characteristics or place of origin of the goods; (this is a new provision, which replaces the old reference to "fraud and exaggeration in advertising");
- that are detrimental to socialist morals or customs, or having other unhealthy influences. There is no legal definition of the term "unhealthy influences". However, it could be compared to the concept of "public order", used in Western countries.

The geographical names of administrative divisions at or above the county level and the foreign geographical names well known to the public shall not be used as trademarks, except for geographical terms that have other meanings or are a part of collective marks/or a certification marks.

2. NON-FUNCTIONALITY

This requirement applies, in particular, to three-dimensional shapes that cannot be registered as trademarks if they originate only from the nature of the goods/services or exist necessarily for achieving a certain technical effect or enabling the goods to acquire their substantive value.

3. DISTINCTIVENESS

Distinctive means that the signs must be distinguishable and capable of distinguishing the goods/services of one person from those of another person. The basic principle is that lack of distinctive features prevents the registration of a sign as a trademark.

In particular, this requirement is not fulfilled by signs that are exclusively composed of generic names, designs or models describing the goods or the services, or that contain exclusively a direct reference to the quality, the main raw material, the function, the use, the weight, the quantity or other features of the goods or services, and lack distinctive features. However, the above-mentioned "lack of distinctive features" may be overcome if the trademark can be proved to have become easily distinguishable and acquired distinctiveness through practical use.

RELATIVE GROUNDS

4. NO CONFLICT WITH PRIOR RIGHTS

Such prior rights of another person are: an identical or similar prior trademark (i.e. a trademark already registered or a trademark not yet registered but already preliminarily approved by the China Trademark Office (CTMO) of the State Administration of Industry and Commerce (SAIC), or a trademark already filed at CTMO on the same day but used before, or a well-known trademark (see below) for the same or similar class of goods or services). Prior right may also be a copyright; a design; a personal name; a company name, etc.

TRADEMARKS IN THE CHINESE LANGUAGE

Chinese consumers are likely to find a Chinese name for foreign trademarks either by way of translation or by way of transliteration (sound alike). It is therefore advisable to register a Chinese version of a foreign trademark. Indeed, the registration of a trademark in roman characters does not automatically protect the trademark against the use or registration of the same or similar trademark written in Chinese.

There may be several possible ways to write a "roman" trademark in Chinese, by way of translation or by way of transliteration and, in particular for the transliteration, there may be several available characters that sound alike and could be used.

This is why, unless the foreign word has a direct and only one translation in Chinese, the registration of the foreign word in roman characters is not enough to protect a Chinese equivalent, which is not just a translation!

If such a Chinese version already exists in another Asian country, in order to avoid confusion it is advisable to ensure that the Chinese version is the same.

ORDINARY PROCEDURE TO REGISTER AND MAINTAIN A TRADEMARK

Ordinary procedure means that the registration procedure proceeds smoothly, without obstacles.

A trademark can be applied for either through the national way which means directly applying to the CTMO, in accordance with the Chinese Trademark Law (National Way) or through the international way which means applying to the World Intellectual Property Organisation, pursuant to the Madrid Arrangement and/or Protocol for the International Registration of Trademarks (International Way)

NATIONAL WAY

If companies apply to register a trademark directly at CTMO, they should do in accordance with the following procedure.

Application

The involvement of a trademark agent for the filing of the trademarks at CTMO is advisable for all companies, particularly new entrants to the Chinese marketplace, and mandatory for foreigners without habitual residence or place of business in China.

Since May 1st, 2015, it is possible to file one application for the registration of a trademark in several classes of products or services. This is one of the changes introduced by the new law. This is, nevertheless, not particularly recommended because, once the trademark is registered, it is not possible to divide it into several and distinct registrations, which becomes a problem if the trademark needs to be partially assigned to a third party. There is an exception, however, to this non-division rule when a trademark application is only partially approved for registration (see below).

The trademark can be filed by electronically:
<http://sbj.saic.gov.cn/wssq/>

In any event, it is necessary to carefully list, for each class, the goods or services for which the trademark is to be protected. (The examiners refuse trademark applications that simply refer to all the products of a class as stated in the Nice Classification. It is necessary to actually reproduce the items of such list, and if certain goods or services are not included in the Nice Classification, a description of the same should be added.)

Select a trademark agent from the official list

Pay the fee

The cost of the application depends on the number of goods mentioned in the application. The official fee is RMB 600 per application covering 10 goods/services. If the number of goods/ services exceeds 10 in one application, an additional fee of RMB60 is charged for each item.

Provide the following documents

One copy, printed on smooth and clear paper, or replaced by photographs not larger than 10x5 cm; if colour is claimed, one copy in colour and one copy of the black and white design. For a three-dimensional or a colour-combination trademark, a specific statement indicating that the shape or the colour combination is claimed as a trademark, together with a literal description. For a collective or certification trademark, a statement and a certificate stating the relevant qualifications and/or regulating the use of the trademark. If the trademark is in a foreign language, or contains foreign language, a translation must be provided.

If the same trademark has already been filed in another country of the Paris Convention or WTO (and this is the first application for the trademark concerned), less than six months prior to the application in China, a declaration claiming priority should be made together with the trademark application.

The applicant should provide, within three months of the date of application (failing which it is deemed not to have requested the priority right), a duplicate copy of the relevant trademark certificate, certified by the relevant trademark authority, and indicating the application date and the application number.

If the same trademark has been used or displayed on the same goods in an international exhibition sponsored or recognised by the Chinese government that took place less than six months before the application, it is also possible to claim priority and make a specific declaration to that effect.

Formal examination

Where the formal requirements of the application are fulfilled and the application form filled out according to the relevant rules, the CTMO will accept the application and notify the applicant in writing.

Where the formal requirements are not fulfilled or the application form not filled out according to the relevant rules, the CTMO will not accept it, and it shall notify the

applicant in writing and explain the reason.

Where the formal requirements are basically fulfilled or the application form filled out basically according to the relevant rules, but amendments are required, the CTMO shall notify the applicant to make the amendments and require him to do so according to the contents prescribed and re-submit it within fifteen days from the date on which he receives the notification.

Where the application is amended and re-submitted to the CTMO within the time limit, the date of filing shall be retained. Where the application is not amended within the time limit, the application shall be deemed to have been abandoned, and the CTMO shall notify the applicant in writing.

Substantial examination

CTMO next verifies whether the trademark application is in conformity with the Trademark Law, which includes verification of legality, distinctiveness and non-functionality (absolute grounds of refusal); whether the trademark application is identical or similar to other trademarks that have already been registered, or preliminarily approved (but not yet registered), or that have been applied for (but not yet preliminarily approved). During the examination process, the CTMO may require the applicant to provide a description (for example, of the designated goods) or to make amendments (some goods may pose a problem with regards to previous trademarks).

Preliminary approval and Publication

If the examination reveals that the trademark application is in conformity with the Law and that there is no other prior trademark, the CTMO examiner will preliminarily approve the trademark application and the trademark will be published in the Official Gazette. The examiner may consider that the trademark should be partially approved, i.e. for some of the designated goods only. In this case, partial refusal is notified to the applicant and the trademark is published as partially approved. It is, then, possible to divide the trademark application in order to continue the procedure, if necessary, by filing an application for review for the non-approved goods.

Registration

If no opposition (see below) has been filed after the expiration of the three months from the date of the publication, the registration is approved, a certificate of trademark registration is issued and the trademark is published. The period of validity of a registered trademark is ten years, counted from the date of approval of the registration.

Renewal

Where the registrant intends to continue to use the registered trademark beyond the expiration of the period of validity, an application for renewal of the registration needs to be made within twelve months before the said expiration. Where no application therefor has been filed within the said period, a grace period of six months may be allowed. If no application has been filed at the expiration of the grace period, the registered trademark is cancelled. The expiration of period of validity of each renewal of registration is ten years. Any renewal of registration is published after it has been approved.

License and Assignment

A registered trademark may be licensed to a third party. There are three kinds of license agreements: "exclusive license", where the licensor himself is prevented from using the trademark in the agreed territory, "sole license", where the licensor retains the right to use the trademark in the territory, and "ordinary license", where the licensor may grant other licenses to others in the territory.

Attention should also be paid to the necessity to stipulate in the agreement that the licensor has the right to control the quality of the goods produced under the trademark. This distinction between the various types of licenses is used in particular when determining who has the right to act against infringers. The trademark license agreement (but not necessarily a duplicate copy of the entire agreement) should be filed for the record with the CTMO. This is not a substantive requirement for the validity of the agreement: the recordal is mainly for the information of third parties. Recordal is also recommended in order to arrange for the transfer of funds relating to royalties.

A trademark, whether at the application stage or already registered, may be assigned and the assignment must be recorded at the CTMO. They should also be published by CTMO.

Renunciation

The trademark registrant has the right to renounce its trademark. They may choose not to renew the trademark when it comes to its expiration date. Furthermore, the trademark registrant may also apply for the removal of their registered trademark or the registration of the trademark in respect of a part of the designated goods when they think it necessary, even if the trademark has not reached the expiration date. The registrant shall send an Application for Trademark Renunciation and return the original Certificate of Trademark Registration to the CTMO.

INTERNATIONAL WAY

This possibility is only available to nationals of a state that is a party to the Madrid Arrangement or the Madrid Protocol. China is a member of the Madrid Arrangement (from 1989) and of the Madrid Protocol (from 1995).

Requirements

For those who are members of the Madrid Arrangement, but not members of the Madrid Protocol, the application must be based on a trademark already registered in the state of origin, whereas for those which are members of the Madrid Protocol, the application may be based on a simple trademark application.

Procedure

Upon receipt of the application for extension of protection, the World Intellectual Property Organisation (WIPO) issues a certificate, publishes the trademark in the International Trademark Gazette and notifies the Trademark Authority of the state concerned. During a period of three months, starting on the 1st day of the next month of reception of this Gazette, oppositions against the trademark can be made in China.

If no objection is made by the CTMO, within a period of one year to 18 months (one year for Madrid Arrangement, 18 months for the Madrid Protocol) from the trademark record in the International Register, the trademark is considered registered in China, as from the date of the certificate issued by the WIPO.

The subsequent procedures, such as renewal, modification, license or assignment can also be done through the international way.

COMPARISON BETWEEN NATIONAL AND INTERNATIONAL WAY

Need for a trademark agent

The use of a local trademark agent is compulsory for a Chinese national application from foreigners without habitual residence or place of business in China, but not compulsory for an international application.

Language

An international application can be made in English or French while national applications can only be made in Chinese.

Cost

The international application may cover more than one country at the same time and at the same cost, and the basic fee covers up to three classes of goods or services. As mentioned above, the new law provides that trademarks filed directly in China may also cover several classes.

Speed

The duration of the national registration procedure (9 months + 3 months for the oppositions) is, now, equal to the Madrid arrangement procedure (12 months) and shorter than the Madrid Protocol procedure (18 months).

Duration of protection

According to the Madrid Arrangement, international trademarks are protected for a (renewable) period of 20 years, whereas national registrations are protected for 10 years (renewable). However, since the duration of protection provided for in the Protocol is 10 years, fees must be paid in two installments. Hence, for practical reasons, an international trademark should be regarded as due for renewal every 10 years.

Trademark Certificate

Theoretically, there is no difference between an international and a national trademark registration. However, a Chinese language registration certificate is only issued for a national registration. Given the fact that most enforcement actions are taken via the Chinese Administration of Industry and Commerce, throughout the Chinese territory, it is in fact much easier to prove the existence and scope of a trademark and to "motivate" a local bureau of the Administration of Industry and Commerce by producing a Chinese registration certificate. Therefore, it is necessary to request the CTMO to certify an international registration, which may take up to three months, and this may affect the speed of an enforcement action.

SPECIAL PROCEDURE TO REGISTER, MAINTAIN OR CHALLENGE A TRADEMARK

Special procedure refers to situation where there is an obstacle to the registration of a trademark.

REFUSAL

Whether the trademark has been applied for through the WIPO or directly at the CTMO, it may be refused. In the case of refusal, the CTMO notifies its decision to the

applicant or (in the case of a foreign applicant) to its agent.

Within 15 days, the applicant may file an application (through its agent) with the Trademark Review and Adjudication Board (TRAB), under the State Administration for Industry and Commerce, which operates as a "court of appeal" for all decisions of the CTMO. The TRAB is located at the same address as the CTMO.

Although the 15-day period is extremely short, no extension is possible. It is therefore particularly important to maintain close contact with the agent in charge of conducting the procedure. The new law imposes a time limit for the TRAB to make its decision: 9 months, with a possible extension of 3 months.

OPPOSITION

The right to oppose a trademark is open to:

- Any person, if the opposition is based on an "absolute ground";
- Only a prior right owner, if the opposition is based on a "relative ground" (owners of a prior right). Since the new law, other persons without any of the above rights, are no longer allowed to file an opposition.

Prior rights include the owner of a registered trademark; the holder of a preliminarily approved trademark; the owner of an unregistered well-known trademark (if the goods are identical or similar); the owner of a well-known trademark registered for non-identical or non-similar goods; the owner of a trademark, already used although not registered, which has acquired a certain influence when the other trademark applicant is using unfair means (the term "a certain influence" relates to trademarks that would not qualify for the status of "well-known", but never the less are considered to deserve special protection in their field, provided bad faith is proven); the holder of another property right, such as right of name, copyright, portrait. It is possible to file a partial opposition against some of the designated goods only.

The procedure is handled by a registered trademark agent.

Chinese trademark agents usually provide a watch service for their clients. It is highly recommended that this service be subscribed to, if only because some trademarks that should be opposed are in Chinese and the assessment and advice as to the opportunity of an opposition should be entrusted to Chinese-speaking professionals. Furthermore, it should be noted that "pirate" trademark applicants are becoming increasingly

sophisticated in their attempts to escape the attention of trademark examiners and trademark owners. They might file applications for “half” designs, and then use them together, or file designs that do not appear to constitute a risk of confusion, but that, when transformed in actual use, become obvious infringements.

Oppositions to the application may be filed at the CTMO within three months of the date of publication of the trademark application in the official Trademark Gazette. In this case, it is necessary to prepare a defence. Alternatively, the trademark registrant may find out, by checking the Trademark Gazette, that others are attempting to register trademarks that are similar to its own registration (or application), and that it has to file an opposition against such attempt.

The opposition is filed in two copies and should be based on clear facts, sound grounds and supported by relevant material evidence. If the opponent wishes to produce additional evidence to support its opposition with additional evidence, it should make a statement to that effect in the opposition and should provide such evidence within three months of the date of the opposition.

The CTMO notifies the applicant about the opposition in a “timely manner”, which in practice amounts to 3 months, and in some instances may be longer. The applicant should file a response within 30 days of notification of the opposition. If necessary, the applicant may file additional arguments and/ or evidence within three months of the date of the response.

The new law imposes a deadline for the CTMO to issue its decision: 12 months with a possible extension of 6 months.

Decisions made by the CTMO are, in principle, subject to appeal before the TRAB (whose decisions are, themselves, subject to appeal before the Intellectual Property Court set up in Beijing, since August 2014). However, the new law introduces a major change: the opposed trademark becomes immediately registered. The opponent needs to file, with the TRAB, an action requesting the invalidation of the trademark.

INVALIDATION

Even after it has been registered, a trademark may still be invalidated, and deemed never to have existed.

Invalidation may be decided by:

the CTMO on its own initiative (ex officio) when the

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trademark is found to fall under one of the absolute grounds of refusal, or when the trademark registration has been obtained by “improper means” (there is no clear definition of “improper means”; basically, this expression corresponds to “bad faith” or “fraud”; it is a case-by-case situation), invalidation is more commonly decided by the TRAB, upon request of or a third party.

Those entitled to file a request before the TRAB are:

- If the request is based on absolute grounds or on the “registration by fraud or other improper means”, any person may file a request, and there is no time limit for filing a request based on such grounds. Here, the terms “fraud” or “improper means” refer to the general concept of public order, not to private issues relative grounds).
- If the request is filed on the ground of a prior right, only the prior right owner may file the request. The time limit for taking such action is five years, from the date of registration of the trademark. However, if the party requesting the invalidation is acting on the ground of a well-known trademark, and can prove that the trademark to be invalidated has been registered in bad faith, the five-year limitation does not apply.

When a trademark is invalidated,

It is deemed not to have existed from the very beginning. However, when the invalidation is declared by the TRAB in any of the above-mentioned situations, any judicial or administrative decision implementing the trademark in question that have been rendered in the past remains valid. In the case of bad faith where the rights of third parties have been prejudiced, a claim may be made for compensation.

REVOCATION

Once registered, a trademark registrant should use his trademark. Use is defined as “use on the goods, packages or containers, or on trading documents, in advertising, an exhibition or any other business activities, in order to distinguish the origin of the commodities”. It does not matter whether the goods are to be sold in China or are for export only.

If the trademark is not used for three consecutive years, any person may apply to the CTMO for revocation of the trademark. When a request for revocation based on non-use is made, CTMO notifies the trademark registrant and requests him to produce, within two months, evidence of the use of the trademark prior to the date of filing of the application for revocation, or otherwise a fair

reason for such non-use. For the purpose of such evidence, the use of the trademark by an authorised third party is admitted as evidence of use.

In addition to the non-use, the new law introduced another cause of revocation: where the trademark becomes "generic".

Further, the trademark must be used exactly in the form in which it has been registered (in terms of style, words, etc.). If a trademark is modified in its use, the local department of the AIC may send a warning to the registrant ordering him to rectify within a certain time limit. If no rectification is made, the case may be referred to the CTMO for revocation.

Any change in the name of the registrant, its address or other registered matters must be recorded with the CTMO. The local department of the AIC may issue a warning setting a time limit for making the rectification. If such rectification is not made the case may be referred to the CTMO for revocation.

When the trademark owner or applicant of revocation is not satisfied with the CTMO decision, he can appeal to the TRAB within 15 days.

When a registered trademark is revoked, the exclusive right is terminated from the date on which the CTMO's decision on revocation is published.

JUDICIAL REVIEW

If one of the parties to the litigation is not satisfied with the decision of TRAB concerning refusal, opposition, invalidation or revocation, it may within thirty days from receipt of the notice, institute legal proceedings in the Beijing Intellectual Property Court, whose decision is subject to appeal before the Beijing High Court.

PART II: Enforcement of Trademark Rights

WHAT ACTS CONSTITUTE TRADEMARK COUNTERFEITING OR INFRINGEMENT?

Counterfeiting usually designates a product, identical to those protected by the registered trademark, bearing a trademark that is exactly identical or almost identical to the registered trademark.

Infringement designates a product, identical to those protected by a registered trademark, bearing a trademark that is similar to such registered trademark, or, a product similar to those protected by a registered trademark, bearing a trademark identical or similar to such registered trademark. The new law further defines the infringement by specifying that "such use is likely to cause confusion".

This distinction has direct implications for the criminal aspect of judicial actions, where criminal prosecution can only be implemented in cases of counterfeiting.

The new law also introduces the concept of "contributory infringement", as "to intentionally provide a person with conveniences for such person's infringement" (such as storage, transportation, post service of concealment).

WHAT USE IS PERMITTED?

Where a registered trademark contains any generic name, device, model of the designated goods, or any word having direct reference to the quality, main raw materials, function, use, weight, quantity, and other features of the designated goods, or any geographical name, the owner of the exclusive right to use this registered trademark has no right to forbid other people from using the same (which is called "fair use"). Likewise, if a registered trademark contains a shape that is considered as functional, such shape may be used fairly by others.

Furthermore, the new law has introduced a specific protection in favor of the first user of a trademark, who might be sued by the subsequent registrant of the same or similar trademark. If the first user can prove that it has been using the mark before the application date of the subsequently registered trademark, and has acquired a certain reputation, it may continue using such trademark within the same use range.

PROTECT TRADEMARK IN ADMINISTRATIVE PROCEDURE

ADMINISTRATION FOR INDUSTRY AND COMMERCE (AIC)

If the trademark owner is not a resident of China, it should put matters in the hands of a Chinese trademark agent approved by the State.

What action should be taken?

In principle, cases should be resolved at the beginning through "consultation between the parties". However, this is not an obligation and "if one of the parties refuses to consult..." the trademark owner may take action, by lodging a complaint with the local trademark bureau of the AIC (above the county level) where the infringement is committed (manufacture, sale, storage, etc.). The complaint should specify the trademark rights of the owner (supply a copy of the trademark registration certificate) and include any evidence of the infringement (sample of the infringing product, for example).

Since the action is mainly of a "practical" nature, and is aimed at investigating and seizing, it is always the place where the goods are made, or sold, that indicates the jurisdiction. The actual domicile or registered office, if different, of the infringing party (which, in fact, most of the time is unknown at the time of the complaint) is irrelevant. It is advisable to accompany the AIC team during the "raid", in order to watch out for any useful evidence and make sure that all goods are seized.

What the AIC can do

Upon arrival at the premises, the AIC may exercise the following powers:

Interrogate the parties concerned, review and take copies of the documentary evidence (invoices, contracts, accounting books): this investigation, unfortunately, is often disappointing because infringers rarely keep accurate records of their illegal activities; investigate the premises where the infringement is committed; the AIC can force the opening of industrial or commercial premises, but cannot force the opening of private locations. If necessary the AIC will call the police (Public Security Bureau). AIC and the police usually have a good working relationship.

Examine and seal up or detain any goods considered to be counterfeit or infringements; sealing is used when the AIC does not wish to take the goods away immediately. These are preservation measures. In fact, they should be followed immediately by confiscation.

The AIC is the largest of all IPR enforcement agencies. It deals with not only the trademark issue, but also registration of businesses (individual and legal persons), regulation of the market (unfair competition). It is present at all administrative levels of the territory: national, provincial, county, municipality and employs over 500 000 people.

Who can take action?

Any person, and in particular the trademark owner or an interested party, may take action. The "interested party" is the licensee or the lawful successor of the trademark right.

At the end of the raid, if the AIC is satisfied that an infringement has been committed:

it may order the infringer to stop the infringing acts immediately and may confiscate and destroy the infringing goods and the tools specially used for manufacturing the infringing goods or labels. In practice, however, the trademark owner should be aware that it is not always easy to destroy stock, or to distinguish and destroy "specially used" equipment and tools. It seems that the old practice of destroying the goods only if it is not possible to separate them from the trademark representations is still being implemented.

AIC may also impose fines...

The amount of the fine depends on the size of the "illegal turnover". The calculation of the "illegal turnover" is not an easy matter since in most cases the infringer does not produce any accounting material, and reference to the price of authentic goods is still not as a rule accepted by the Chinese authorities. If the amount of illegal turnover is below 50,000 RMB, the fine cannot be more than 250,000 RMB. If the amount of the illegal turnover is higher than 50,000 RMB, the fine may be up to five times such illegal turnover (compared to the previous law, these amounts have been increased significantly). In addition, if the offender is caught again within five years of a first penalty decision, the fine may be higher.

Except if...the infringer is only a seller, who does not know that the goods are infringing and who is able to provide information on the supplier. Then, the AIC may only order the seller to stop selling such goods, but cannot confiscate them (nor impose a penalty). This new provision is introduced in the new law.

What AIC can't do

It cannot grant compensation, it can only act as a mediator; assessing and granting compensation is within the exclusive jurisdiction of the People's Courts.

ADMINISTRATION OF QUALITY SUPERVISION, INSPECTION AND QUARANTINE (AQSIQ)

This administration is in charge of managing the quality of the products: setting out national standards, certifying the quality of products and taking anti-fake and shoddy goods actions. Their main purpose is to protect the consumer against the spread in the market of "fake and shoddy" goods, which includes goods bearing a counterfeited trademark and/or sold in a package bearing the name and address of another person.

Who can take action?

Since the main issue is a quality issue, and not the protection of an intellectual property right, any person may go to the AQSIQ and complain without having to justify a personal interest. The advantage here is that it is not necessary to use the services and pay the fees of a trademark agent.

On what grounds?

It is necessary to base the claim on one of the two following grounds: the goods are of sub-standard quality and/or the goods are sold in a package bearing the name and address of another person. Most of the time, the goods are marked with a counterfeited trademark. In such a case, the trademark owner may complain to the AQSIQ.

What the AQSIQ can do

Basically, the AQSIQ has the same powers as the AIC during the raid. The fine for fake and shoddy goods is, in most cases, between half and three times the value of the goods (Article 50 of the Law on Product Quality). When the packaging falsifies the place of origin of products, falsifies or passes off the name and/or address of another party's factory or forges or passes off quality marks such as certification marks or bears a counterfeited trademark, the "illegal profits" are confiscated and a fine is imposed (no specific amount). The AQSIQ is not in any way involved with compensation, even as a mediator. It would appear therefore that there is a certain degree of overlapping between the attributions and powers of the AIC and those of the AQSIQ. Where the goods are of bad quality and bear a counterfeited trademark, it would be possible to submit the case either to the AIC or to the AQSIQ. However, if the goods are such that no "quality claim" would be justified, and the only issue is of a trademark nature, the claim should not be filed with the AQSIQ but with the AIC.

Whichever way is chosen should be decided on a case-by-case basis: the AQSIQ is focused on fighting fake products, whereas the AIC has other activities, which gives an advantage to the AQSIQ, which in addition has the power to impose higher fines. On the other hand, the AIC is better represented in the territory at all administrative levels and has more manpower at its disposal than the AQSIQ.

CUSTOMS

(Please see Roadmap for Intellectual Property Protection in China - Customs Enforcement in China)

ADMINISTRATIVE LITIGATION

Review of the decision taken by AIC, AQSIQ or Customs is possible by instituting legal proceedings before the People's Court within 15 days of notification of their decisions. Applications for review occur more and more frequently and are usually initiated by the defendant, who challenges the qualification of infringement or the amount of the fine. These cases are handled by the administrative division of the People's Courts.

PROTECT TRADEMARK IN CIVIL PROCEDURE

A civil action may always be brought before the People's Courts. The choice of civil litigation is recommended in all cases where an administrative enforcement action is not easily available, such as, when the infringement is arguable, or when the infringer is a seller who could argue his "innocence" and get away with a simple order "not to sell". When damages are claimed, a civil action is the only way.

HOW TO DISCOVER AND COLLECT EVIDENCE

Prior to taking action, the trademark owner should conduct some preliminary investigation in order to ascertain, if possible, the whereabouts of the manufacturer of the infringing goods.

When the goods covered by the trademark are sold in retail stores, it is advisable to conduct periodical market surveys in various parts of China, in department stores and boutiques and wholesale markets and outdoor markets, etc.

If the infringer is not simply a seller (boutique or outdoor market) but a factory, it is essential to obtain as much information as possible on the factory (location, time of production of the infringing goods, etc.). There are, in China, a number of investigating agencies operating as consultancy firms, and some trademark agents maintain permanent investigating squads and networks.

HOW TO INITIATE A CIVIL ACTION?

The civil procedure is operated according to the following steps:

- A complaint needs to be filed with the civil division of the People's Court. When the plaintiff is a foreigner, the complaint needs to be filed by a Chinese attorney who needs to produce a power of attorney duly signed, notarized and legalized by the plaintiff. In the three cities where IP Courts have been established (Beijing, Shanghai and Guangzhou), all trademark cases are to be submitted to the basic level, regardless of their importance.

The Court should "accept" (docket) the case within seven days (this is where the verification of the power of attorney takes place). Within five days of

- such acceptance, the court sends the complaint to the defendant. The defendant must file a written defence within 15 days after receipt (30 days for foreign defendants), which is served in the five following days by the court to the plaintiff. Parties should exchange their evidence. The court may organise a pre-trial hearing during which evidence is examined and discussed by the parties. Permissible evidence includes: documentary evidence, material evidence, statements by litigants, conclusions of experts, records of inspection. Most evidence, including expert evidence, is written. Evidence in a language other than Chinese must be translated, notarised and legalised to be admissible before the People's Courts. As for the evidence materials which authenticity can be proved directly and primarily, such as publications from overseas etc., no notarisation and certification need to be done, unless the opposite party brings out effective questioning and the inducing party cannot effectively refute.
- In theory, the court may act as fact finder and order inspection, but usually, evidence is produced by the parties themselves. However, if the plaintiff has fulfilled its duty to produce evidence to the best of its ability, the court may order the defendant to disclose evidence (such as accounting books) that is in its possession. If the defendant refuses to comply, the court may "draw the consequence" accordingly when making its decision.
- At the trial, the hearing starts with opening statements read by both parties, followed by oral debate on issues selected by the court.
- At the end of the hearing, the court asks the parties if they wish to settle the dispute. If they do, a settlement may be negotiated out of court, followed by a mere withdrawal of the case or signed in the presence of the court. In such case, the court endorses the agreement, which shall then have an

enforceable strength equivalent to that of a judgment.

- The judgment is delivered within a few months, depending on the complexity of the case. There is no time limit for the trial of the cases involving foreign element. In some complicated, or sensitive, cases, the decision may be reviewed by a judicial committee composed of senior judges and other persons, but the parties do not get to be heard at such committee.

WHAT REMEDIES CAN THE TRADEMARK HOLDER GET FROM CIVIL PROCEDURE?

The court may apply the following measures: (1) order to cease the infringements (injunction); (2) confiscate infringing goods, materials as well as the tools and equipment used in the production of the infringing goods; (3) order the payment of damages.

Obtaining damages, however, implies that the trademark holder uses its trademark. If the plaintiff argues, as a defence, that the trademark is not used, the court may order the plaintiff to prove such use during the last three years. Failing to do so deprives the plaintiff from the right to obtain damages.

The amount of damages for infringing a trademark right is calculated according to: (1) the losses suffered by the right holder; (2) if this is difficult to determine, the profits gained by the infringer out of the infringement; (3) again, if this is difficult to determine, a reasonable multiple of the royalty that the right holder might have earned (if the use had been authorized). The new law specifies that if the circumstances are "serious" the amount resulting from the application of the above methods of calculation may be multiplied by (maximum) three. When no calculation is possible, the court may decide to award "statutory" damages for an amount up to three million RMB (a significant increase introduced by the new law). The amount of damages includes the appropriate expenses of the right holder for stopping the infringement, such as attorney fees.

PROTECT TRADEMARK IN CRIMINAL PROCEDURE

WHAT ACTS CONSTITUTE A TRADEMARK CRIME?

The activities concerned are manufacturing or knowingly selling counterfeits and forging or selling unauthorised representations of a trademark.

WHAT IS THE THRESHOLD OF THE CRIME?

In principle, the threshold is 50,000 RMB for one trademark and 30,000 RMB if more than one trademarks are involved. In practice, however, the decision to accept a case a

criminal is not automatic and the actual threshold is often higher. Furthermore, the method of calculation is complex.

WHAT ARE THE PENALTIES FOR TRADEMARK CRIMES?

The penalties are: fixed-term imprisonment of up to 3 years or detention and/or fine where conditions are "serious" or the sales are "large", three to seven years fixed-term imprisonment where the conditions are deemed "extremely serious" or the sales are "huge".

HOW TO INITIATE A CRIMINAL PROCEDURE?

Public prosecution

Generally, the criminal cases are brought before the court by a bill of indictment of the People's Procuratorate.

However, in order to reach this stage, the right holder needs to file a complaint with the local Public Security Bureau (PSB: the police). The PSB have the power to detain suspects and interrogate them. They may also summon witnesses (such as employees) to come to their office and declare what they know about the infringing activity. They, of course, can search and inspect premises without restraint (in some difficult cases, it is useful to try and set up a raid jointly by the PSB and the AIC or the AQISQ).

If the PSB wishes to proceed with keeping a suspect under custody, it submits a request for approval of arrest to the People's Procuratorate in order to transform the "detention" into "arrest". If it is approved, the arrest will be executed immediately by the PSB. If not, the People's Procuratorate will explain the reasons and call for a supplementary investigation as necessary (see Article 66-68 of the Criminal Procedure Law of the P.R. China).

Within three days from the date of receiving the file of a case, the People's Procuratorate notifies the victim that he has the right to entrust an agent ad litem, for example a lawyer.

If the victim has suffered material losses as a result of the defendant's criminal act, he has the right to file an incidental civil action during the course of the criminal proceeding.

Private prosecution

IPR holders can also directly initiate criminal proceedings before a court without involvement of the public security organs (police) or the People's Procuratorate (except if the case represents "serious danger to public order and state interests").

In fact, such direct action is practically never used, although it is encouraged by the court. It is, indeed, extremely difficult for an IP owner to gather and produce full evidence that the IPR violations constitutes a crime, i.e., that the threshold requirements are met.

SPECIAL PROTECTION FOR WELL-KNOWN TRADEMARKS

WHAT IS A WELL-KNOWN TRADEMARK?

Not every trademarks is well-known, a well-known trademark is a trademark that is “widely recognised” by the “relevant public”, i.e. the current or potential consumers of a certain kind of goods or services designated by the trademark, the people who manufacture the aforementioned goods and who render the aforementioned services, and the relevant people involved in the distribution channels.

BY WHAT WAY CAN A TRADEMARK BE RECOGNISED AS A WELL-KNOWN TRADEMARK?

When to apply for recognition as a well-known trademark?

It is only possible to apply in one of the following circumstances:

The trademark is not registered in China, but is nevertheless well-known in China. If another trademark, identical or similar to such unregistered well-known trademark, is applied for, or used on identical or similar goods, the holder of such unregistered trademark may request that such identical or similar trademark be refused or stopped from being used.

The trademark is already *registered* in China and is well-known in China. If another identical or similar trademark is applied for, or is used on, *non identical or similar* goods, the owner of the prior registered trademark may request that such identical or similar trademark be refused or stopped from being used. In order to achieve this, it needs to prove, not only, sufficient reputation, but also that such use is likely to mislead consumers or to damage its interests.

On what basis is the recognition decided?

“Well-known” status is recognised by the administrative or judicial authority on a case-by-case basis, based on the following factors: extent of awareness of the trademark in the relevant public sector, duration of use of the trademark, duration, extent and geographical scope of promotion of the trademark, any record (judicial or

administrative decision) indicating that the trademark has been protected as a well-known trademark (including in other countries) and other factors concerning the reputation of the trademark (such as sales volume, sales area, etc. of the main commodities bearing the trademark), it being understood that it is not a precondition that the trademark conform to all the above criteria.

Where to apply?

It depends on the circumstances: when filing an application for opposition against another trademark, the application for recognition is filed at the same time with the CTMO; when filing an application for cancellation of another trademark, the application for recognition is filed at the same time with the TRAB.

When organising a raid against the use of the trademark by another person, the application for recognition and protection is filed with the AIC at the municipal (prefecture) or at the provincial level. After proceeding with some verification on the case, the AIC transfers the file to the CTMO for a decision on the “well-known” status. The application may also be lodged in the course of a civil law suit before a People’s Court.

How long does it take to obtain recognition?

If the application is filed in the course of an opposition or cancellation procedure, the decision is dependent on the duration of such procedure, the first stage of which is strictly contained in a maximum duration of 18 months, but judicial appeal is possible. If the application is made directly before a people’s court, the decision depends on the duration of the procedure, which can take several years. If the application is made in the course of a raid by the AIC, the decision is with the CTMO, who is not bound by a time limit.

What is the validity period of a “well-known” status?

There is no time limit for the period of validity of a well-known trademark. However, when the party concerned requests protection for a well-known trademark where the scope of protection requested in the current case is different from that of another case, in which the trademark has been recognised as a well-known trademark, or if the other party objects to the said trademark being well known and at the same time produces evidence proving that the said trademark is not well known, the CTMO or the TRAB should re-examine the material relating to the recognition of the well-known status of the trademark and make a decision. In the case of People’s Court proceedings, this obligation to re-examine the case arises each time the defendant

objects to the well-known status, even if he does not produce any evidence that the trademark is not well-known.

WHAT SPECIAL PROTECTION CAN A WELL-KNOWN TRADEMARK ACQUIRE?

Once a trademark is recognised as well-known, its protection may be strengthened in the following respects:

1. prevent malicious registration and use of the trademark by others, even on non-similar goods or services;
2. extend the scope of protection against similar trademarks;
- 3 . obtain higher damages;
4. easier to initiate criminal action;
5. prevent the registration of the trademark as an enterprise name (whereas if the trademark is not recognised as "well-known", it is necessary to prove that the mark is used prominently in the enterprise name);
6. prevent the registration of the mark as a domain name (whereas for a "normal" mark it is necessary to prove that actual transactions under the disputed domain name have been conducted).
7. It is possible to sue in court a registered trademark (this possibility is only opened to the owner of well-known trademarks).

Over the years, the recognition of the well-known status had given rise to abuses. Applications were made for the sole purpose of promoting sales and confusing consumers. Such "commercial use" of the recognition of the well-known status is, now, expressly prohibited by the new law.

China contact information

STATE INTELLECTUAL PROPERTY OFFICE (SIPO)

www.sipo.gov.cn (Chinese & English)

STATE ADMINISTRATION FOR INDUSTRY AND COMMERCE (SAIC)

www.saic.gov.cn (Chinese & English)

China Trademark Office (CTMO)

www.ctmo.gov.cn or <http://sbj.saic.gov.cn/>
(Chinese & English)

NATIONAL COPYRIGHT ADMINISTRATION OF CHINA (NCAC)

www.ncac.gov.cn (Chinese only)

GENERAL ADMINISTRATION OF CUSTOMS OF CHINA (GACC)

www.customs.gov.cn (Chinese & English)

Shanghai Customs

www.shcus.gov.cn (Chinese & English)

Guangzhou Customs

<http://guangzhou.customs.gov.cn> (Chinese & English)

Tianjin Customs

<http://tianjin.customs.gov.cn> (Chinese only)

GENERAL ADMINISTRATION OF QUALITY SUPERVISION INSPECTION AND QUARANTINE (AQSIQ)

www.aqsiq.gov.cn (Chinese & English)

MINISTRY OF PUBLIC SECURITY (MPS)

www.mps.gov.cn (Chinese only)

SUPREME PEOPLE'S COURT (SPC)

www.court.gov.cn (Chinese)

China IP Judicial Protection, IPR tribunal

www.chinaiprlaw.cn (Chinese & English)

SUPREME PEOPLE'S PROCURATORATE (SPP)

www.spp.gov.cn (Chinese only)

MINISTRY OF COMMERCE (MOFCOM)

<http://www.mofcom.gov.cn> (Chinese & English)

IP Protection in China

www.ipr.gov.cn (Chinese & English)

Service Centres for IPR Protection,

Reporting and Complaints

<http://jbts.ipr.gov.cn/tousu/eHome.html> (English)

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The IP Key project is the European Commission's financial vehicle for the EU-China New Intellectual Property Cooperation, an agreement between the EU and China. Concluding in 2016, this three-year project is building on the long and productive history of EU-China cooperation on IP issues. IP Key focuses on facilitating the development of an IPR framework in China that is increasingly effective, fair, transparent and otherwise based upon international best practices. It is a platform for cooperation and acts as bridge between EU and Chinese agencies in order to create an IP landscape that benefits both Chinese and EU Industry operating in China .

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