



Inside China's IP Market: a Guide

2024

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The sixth edition in this series provides invaluable on-the-ground intelligence and analysis on a range of trademark and patent topics, covering every stage of the IP lifecycle and the unique challenges and opportunities facing rights holders in China .

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Summary

INTRODUCTION

INTRODUCTION

Patents are some of the most accessible tools for businesses to protect their innovations. By patenting an innovation, companies can enjoy exclusive monopolies, in exchange for disclosure, over new technology that has been developed and competitive advantages that have been created with the technology. However, as we all know, not all patent applications will be granted, especially applications for inventions, which must pass substantive examination before being granted.

Assessment of inventive step is one of the key elements of the substantive examination of inventions. In China, it is not uncommon for an examiner to issue an office action alleging that the claimed invention lacks an inventive step on the ground that the distinguishing feature of the invention is a common knowledge. 'Customary means in the art' is a significant type of common knowledge. Office actions concerning this type of common knowledge are fairly difficult to overcome because the rejection is not supported with any reference document and involves strong subjectivity.

This article will investigate the concept of common knowledge and introduce an effective strategy for responding to office actions related to customary means in the art. At the end of the article, three successful cases are also presented.

CONCEPT OF COMMON KNOWLEDGE

The concept of 'common knowledge' is not defined by the Chinese Patent Law nor its Implementing Regulations. The Guidelines for Patent Examination, although offering no definition of the concept, do cite two examples it, and state that "the distinguishing feature is a common knowledge, such as a customary means in the art to solve the re-determined technical problem, or a technical means disclosed in a textbook or a reference book to solve the re-determined technical problem" (see Section 3.2.1.1, Chapter 4, Part II). Thus, it can be seen that the Guidelines for Patent Examination divide common knowledge into two categories: the first category covers textbooks and reference books, and the second one is the customary means in the art.

For the first category of common knowledge, the examiner would cite evidence and point out the exact text in the cited textbook or reference book that describes the asserted common knowledge. As the exact text is available, the rejection can be dealt with as an inventive step rejection raised based on other literature, such as patent documents and articles in periodicals.

The second category of common knowledge, that is, customary means in the art, is rather a catch-all term. It is used by the examiner to reject a patent application on the ground of lacking inventive step when he or she fails to find any reference document to support his or her opinions. No evidence will be provided, only logical analysis and reasoning. As a result, the examiner can exercise their discretionary power to raise a rejection in relation to the customary means in the art, which leads to strong subjectivity in the office action. As no reference document is available for one to compare it with the patent application, rejections concerning the customary means in the art are often very difficult to overcome.

RESPONSE STRATEGY

To develop a good strategy to overcome office actions concerning the customary means in the art, it is important to understand how the inventive step of an invention is assessed by examiners and where errors may occur in the process of assessment.

The Guidelines for Patent Examination provide for a “three-step approach” for examiners to follow (see Section 3.2.1.1, Chapter 4, Part II). The three steps are

1. determining the closest prior art;
2. determining the distinguishing features of the invention and the technical problem actually solved by the invention; and
3. determining whether or not the claimed invention is obvious to a person skilled in the art.

Among these steps, step (2) is crucial and directly affects the conclusion of whether a patent application involves an inventive step. When taking this step, the examiner, without finding any reference document related to the distinguishing features of an invention, often uses his or her own discretion to subjectively determine, by means of logical analysis and reasoning, whether the distinguishing features of the invention fall under the customary means in the art, and subsequently denies its inventiveness. As the examiner's knowledge of the customary means in the art is often limited, logical errors may occur in the reasoning process, and the distinguishing technical features of the invention may be incorrectly deemed as customary means in the art.

When responding to an office action concerning the customary means in the art, it is very easy for one to follow the examiner's train of thought and put up an argument surrounding step (3), that is, whether or not the claimed invention is obvious to a person skilled in the art. However, as the negative conclusion reached by the examiner is the result of errors in step (2), it would be the most effective to focus on the examiner's findings in this step and question whether the examiner has correctly identified the distinguishing technical features of the invention and the technical problem actually solved by the invention. Once it is established that the distinguishing technical features and technical problem determined by the examiner are wrong, the conclusion drawn by him or her will be undermined.

To be specific, to respond to an office action, one should first analyse and re-identify the distinguishing technical features of the invention in comparison with the closest prior art cited by the examiner. Based on the technical effect that can be produced by the newly identified distinguishing technical features, the technical problem with the claimed invention, which is the technical task to improve the closest prior art to achieve a better technical effect, should be redefined. Through the aforesaid analyses, it will become obvious that the distinguishing technical features of the invention are not those found by the examiner. Consequently, the technical problem determined by the examiner is incorrect. Then, the applicant should proceed to demonstrate that the invention represents notable progress based on the advantageous technical effects that can be produced by the newly identified distinguishing technical features and draw the conclusion that, compared with the closest prior art cited by the examiner, the invention has prominent substantive features and represents notable progress, so the patent application for invention involves an inventive step.

Besides the above, one may also request the examiner to produce evidence in support of his or her opinions. The Guidelines for Patent Examination provide that, where an examiner finds that the technical features contributing to solve the technical problem are common knowledge, he or she should usually provide evidence (Section 4.10.2.1, Chapter 8, Part II). Although the rule encourages, rather than obliges the examiner to produce evidence, with the aforesaid request being made, the examiner will be pressured to reconsider his or her previous rejection carefully. He or she may admit that the claimed invention involves an inventive step or, at least, he or she will conduct more searches for evidence.

CASE STUDIES

The most important element for the above strategy is to redefine the technical problem actually solved by the claimed invention. Once it is proved that the technical problem determined by the examiner is incorrect, the examiner will have no choice but to reconsider his or her opinion. Three cases are presented here to demonstrate how the technical problem of an invention may be redefined in response to a rejection concerning the customary means in the art. In all three cases, the rejections of the examiners were successfully overcome.

CASE 1

The patent application for the invention under No. 202010092528.1 concerns an online forensic method based on the macOS system, and Reference Document 1 (NSTL National Center for Scientific and Technical Library Documentation, pp. 25-30, 31 December 2014) is the closest prior art cited by the examiner, which discloses the design and implementation of a static forensic system for Apple computers based on the Windows platform. The examiner issued a rejection decision on the basis that the patent application for invention lacked an inventive step. In the decision, the examiner held that based on the distinguishing technical features of the first claim of the patent application and Reference Document 1, the technical problem actually solved by the invention was "how to improve the efficiency of forensics", and the distinguishing technical features of the first claim were the customary means in the art.

A request for re-examination was filed in response to the rejection decision. In the request, analyses were made to re-identify the distinguishing technical features of the claimed invention in comparison with the closest prior art, and then redetermine the technical problem actually solved by the invention based on the technical effect that could be produced by the newly identified distinguishing technical features. The analyses led to the conclusion that the technical problem solved by the invention was:

- (1) how to perform online forensics while the macOS operating system is running;
- (2) how to automatically identify the category of the file system and call the corresponding operation program according to the identified content;
- and (3) how to extract plaintext data from encrypted disks or partitions or volumes to reduce the difficulty of parsing so that to save resources

This was different from the conclusion of the examiner in the rejection decision. Apparently, the technical problem determined by the examiner was incorrect.

CASE 2

The patent application for the invention under No. 202011502493.0 concerns a page generation method, and Reference Document 1 (CN 106095506 A) is the closest prior

art cited by the examiner, which discloses a page-loading method and device. During the substantive examination, the examiner issued the first office action on the basis that the patent application for invention did not involve an inventive step. In the first office action, the examiner considered that based on the distinguishing technical features of the first claim of the patent application and Reference Document 1, it could be found that the technical problem actually solved by the invention was “by what device the page is loaded”, and the distinguishing technical features of the invention were the customary means in the art.

A response was filed against the first office action. By analysing the claimed invention in comparison with the closest prior art cited by the examiner, it was shown that the technical problem solved by the invention was, instead of “by what device the page is loaded” as determined by the examiner in the first office action:

In SSR (Server Side Rendering) mode, to avoid long waiting time between servers due to interface timeout or long return time of the interface, which will make the rendering of the page to slow down, and the user to wait too long.

Therefore, the technical problem determined by the examiner was incorrect.

CASE 3

The patent application for invention under No. 202011040403.0 concerns a priority-based email delivery method, and Reference Document 1 (CN103401764A) cited by the examiner is the closest prior art, which discloses an email delivery method. During the substantive examination, the examiner issued the first office action on the basis that the patent application for invention lacked inventive step. In the first office action, the examiner held that, based on the distinguishing technical features of the first claim of the patent application and Reference Document 1, the technical problem actually solved by the invention was “how to prioritize each type of email”, and the distinguishing technical features were the customary means in the art.

The applicant responded to the first office action and redefined the technical problem of the invention in consideration of the closest prior art cited by the examiner. The new technical problem defined was, instead of “how to prioritize each type of email” as determined by the examiner in the first office action:

how to determine the actual urgency of emails and dynamically adjust the delivery mechanism of emails (to determine the priority of emails according to the successful delivery time and reading acknowledgement time of emails, that is, to effectively determine the actual urgency of emails according to the recipient’s attention to emails, and update the priority level regularly to ensure the accuracy of the final priority level)

Hence, the technical problem determined by the examiner was incorrect.

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Applying Article 15 of China's Trademark Law to tackle malicious registration

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Summary

LEGAL BASIS AND APPLICABLE REQUIREMENTS

WHAT ARE AGENTS AND REPRESENTATIVES?

WHAT IS AN ACT OF UNAUTHORISED REGISTRATION OF THE AGENT OR REPRESENTATIVE?

WHAT EVIDENCE CAN PROVE THE EXISTENCE OF THE AGENCY RELATIONSHIP OR THE REPRESENTATIVE RELATIONSHIP?

WHAT ARE THE TRADEMARKS OF THE PRINCIPAL OR THE REPRESENTED PARTY?

HOW TO JUDGE THAT THE AGENT OR REPRESENTATIVE HAS OBTAINED THE AUTHORISATION FOR TRADEMARK REGISTRATION?

TYPICAL CASES

Trademark squatting has various forms, and one of these is squatting by the trademark owner's distributor or partner. The best way to avoid this is to register your trademark in China before you enter the Chinese market. Another precautionary measure is to clearly stipulate in the contract, before entering into any cooperation, that distributors and partners must fully respect your rights and are prohibited from applying for registration of your trademarks. If your trademark is registered by your distributor or partner due to factors such as a lack of understanding of relevant legal provisions, eagerness to produce your products or operate business in China, or failure to make appropriate arrangements for the trademark, there is still a possibility of getting your trademark back.

There are two ways to accomplish this: one is through amicable negotiation between the parties to reach a trademark transfer agreement, thereby transferring the trademark from the distributor or partner to you. The other is through legal means by filing a trademark opposition if the trademark is published for opposition, or filing for trademark invalidation if the trademark has already been registered by the distributor or partner. Simultaneously, it would be better to file your own trademark application for registration. This article provides a guideline on how to apply the relevant articles of the China Trademark Law to successfully oppose or invalidate the trademark filed by your distributor or partner, so that you can establish your own trademark rights in China.

LEGAL BASIS AND APPLICABLE REQUIREMENTS

Article 15, paragraph 1, of the China Trademark Law provides that, without authorisation, where an agent or representative registers the trademark of the principal or the represented party in their own name, and the principal or the represented party raises an objection, the registration shall not be granted and the use shall be prohibited. Therefore, if your trademark is filed or registered by the distributor or partner, Article 15, paragraph 1, of the China Trademark Law is the law you can rely on to oppose or invalidate the contested trademark.

To establish that an agent or representative has registered the trademark of the principal or the represented party without authorisation, the following requirements must be met:

1. the applicant for registration of the contested trademark is your agent or representative;
2. the designated goods or services of the contested trademark are the same or similar to those of your trademark;
3. the contested trademark is identical or similar to your trademark; and
4. the agent or representative cannot prove that their application for registration has been authorised by you.

Among the above requirements, it is not difficult to fulfil requirements (2), (3) and (4) because the arguments are relatively straightforward. However, for requirement (1), evidence is required to prove facts, such as the relationship between the parties, acts of unauthorised registration and the trademarks of the principal or the represented party. Therefore, it is crucial to have a comprehensive understanding of these terms.

WHAT ARE AGENTS AND REPRESENTATIVES?

An agent includes the agent provided for in the Civil Code and a dealer who is familiar with your trademark through commercial dealings.

In practice, there are different types of sales agents, including:

- sales companies within a group, specialising in selling the group's products externally;
- agents who enter into agency contracts with the commissioning company to sell related products in a designated area. The prices are determined uniformly by the commissioning company and commission is extracted based on sales performance, such as exclusive agents and general agents; and
- distributors who purchase products from the manufacturing company and sell them externally at self-determined prices without extracting a commission.

All of these agents fall under the definition of an agent in Article 15, paragraph 1, of the China Trademark Law.

A representative refers to an individual who holds a subordinate position to you and may have knowledge of your trademark due to the performance of his or her duties. This includes individuals such as the legal representative, director, supervisor, manager or executive of partnership affairs.

WHAT IS AN ACT OF UNAUTHORISED REGISTRATION OF THE AGENT OR REPRESENTATIVE?

An act of unauthorised registration of the agent or representative includes the following situations:

- during the negotiation stage for the establishment of the agency or representative relationship, an agent or representative registers your trademark, which may damage your interests;
- after the termination of the agency or representative relationship, an agent or representative applies for registration of your trademark, potentially damaging your interests; and
- although an application is not made in the name of an agent or representative for your trademark, there is evidence proving collusion between the applicant for registration and the agent or the representative. As for the act of colluding in squatting, it may be presumed if the applicant is, among other things, a relative or an investor of the agent or representative, depending on the circumstances.

WHAT EVIDENCE CAN PROVE THE EXISTENCE OF THE AGENCY RELATIONSHIP OR THE REPRESENTATIVE RELATIONSHIP?

Evidence that can prove the existence of an agency relationship includes an agency or distribution contract, and transaction vouchers and procurement documents, etc, that can prove the agency or distribution relationship.

Evidence that can prove the existence of a representative relationship includes: (1) company registration data; (2) the payroll, labour contracts, employment documents, social insurance, medical insurance and other materials of the enterprise; and (3) other evidentiary materials that can prove that a party has a specific identity subordinate to the representative and may know the trademark of the represented party due to the performance of duties.

The chance of success in the opposition or invalidation against the trademark filed or registered by your agency or representative greatly depends on the sufficiency of evidence proving the existence of an agency relationship or representative relationship. Therefore, it is crucial to properly keep the above-mentioned list of evidence. In our practice, we have seen many cases where the real trademark owner failed to provide the necessary evidence to prove the existence of this relationship, resulting in the loss of opposition and invalidation cases and ultimately leading to the loss of their trademarks.

WHAT ARE THE TRADEMARKS OF THE PRINCIPAL OR THE REPRESENTED PARTY?

Trademarks of the principal include the following:

- the principal's trademark specified in the contract or the authorisation document;
- if there is no agreement between the parties and the agency relationship has been established, the trademark previously used by the principal in respect of the goods or services sold by the principal shall be deemed the principal's trademark; and
- if there is no agreement between the parties, the agent's use of the trademark over the goods or services they distribute is sufficient to cause the relevant public to believe that the trademark is a mark indicating the difference between the goods or services of the principal and those of others, due to the agent's own advertising and publicity, and shall be deemed to be the principal's trademark in respect of the principal's goods or services.

The trademarks of the represented party include the trademarks previously used by the represented party and other trademarks belonging to the represented party according to law.

As you can see, to apply Article 15, paragraph 1, of the China Trademark Law, it is not necessary to prove that you have used your trademark in mainland China before your agent or representative files your trademark, but you need to provide solid evidence to prove that the contested trademark is indeed your trademark. This evidence can include the agency and distribution agreement that clearly stipulates that it is your trademark, the registration certificates and the use evidence of the contested trademark in other countries or regions, etc.

HOW TO JUDGE THAT THE AGENT OR REPRESENTATIVE HAS OBTAINED THE AUTHORISATION FOR TRADEMARK REGISTRATION?

The contents of the authorisation given by the principal or the represented party shall include the goods or services and trademarks that the agent or the representative can register, and the expression of the intention of authorisation shall be clear and definite.

The agent or representative must provide the following evidence to prove the existence of the authorisation:

- written authorisation documents given by the principal or the representative party to the agent or the representative; and
- other evidence through which it can be determined that the principal or the represented party has made a clear and explicit expression of the intention to authorise the agent or the representative.

Although an agent or representative has not obtained the express authorisation of the principal or the represented party at the time of applying for registration, if the principal or the represented party subsequently ratifies the application for registration, the agent or the representative shall be considered to have acquired the authorisation of the principal or the represented party. The authorisation of the principal or the represented party is obtained at the time of applying for registration of a trademark, but if the principal or the represented party later reneges, it shall still be deemed that the agent or the representative has obtained the authorisation of the principal or the represented.

TYPICAL CASES

CASE ONE: INVALIDATION OF TRADEMARK 'GREEN DOCTOR IN CHINESE CHARACTERS'

In 2017, a foreign company (the applicant) and a company in Tianjin (the respondent) signed a sales agency agreement on the applicant's 'RIs0LI' brand series products in mainland China, and the respondent is the agent and distributor of the applicant in mainland China. The 'RIs0LI' brand series products of the applicant include 'DR.CREN' series products. As early as 2015, the applicant's agent company has advertised and sold products bearing the 'DR.CREN' mark. The respondent, as the distribution agent of the applicant, should be aware of the trademark 'DR.CREN', which was previously used by the applicant and has strong originality. The disputed trademark 'Green Doctor in Chinese characters' has similar Chinese meaning to the 'DR.CREN' trademark previously used by the applicant, and the products (eg, cutlery, forks and tableware) approved for use in the disputed trademark are related to the products (such as the pots and pans) previously used by the applicant in terms of sales sites, sales channels and consumption objects, and belong to similar goods. To sum up, the registration of the disputed trademark constituted the agent applying for registration of the principal's trademark without the authorisation of the principal referred to in Article 15, paragraph 1, of the Trademark Law and it should be declared invalid. The respondent did not file an appeal against the invalidation decision, and the disputed trademark become invalid.

CASE TWO: INVALIDATION OF TRADEMARK 'GAOYUANWEIJIN AND DEVICE'

In this case, the evidence, including the enterprise business licence, the disputed party's identity information, the labour contract and other materials submitted by the applicant, clearly demonstrate that the disputed party signed an open-term labour contract with the parent company of the applicant, and the disputed party was appointed as the manager of the food and beverage department within the applicant's wholly owned enterprise. Consequently, the disputed party is also the legal representative of the applicant. The aforesaid evidence can prove that the disputed party should have been aware of the disputed trademark owned by the applicant. These goods covered in the disputed trademark, such as beer, water (beverage) and mineral water ingredients, are similar to the beverage commodities associated with the applicant's trademark. Furthermore, the disputed party was not authorised to register the applicant's trademark over these goods. Therefore, the registration of the disputed trademark by the disputed party without authorisation constitutes the act of unauthorised registration of the represented party's trademark, as stated in the first paragraph of Article 15 of the China Trademark Law, and thus the registration of the disputed mark was declared invalid.

In summary, the purpose of the first paragraph of Article 15 of the China Trademark Law is to prohibit the malicious pre-emptive registration of the trademark by an agent and representative, thereby preventing acts of betrayal or breach of trust. If your trademark

was not filed maliciously by your agent or representative, but rather by another individual with whom you have a contractual, business or other relationship, then you can oppose or invalidate the trademark by relying on the second paragraph of Article 15 of the China Trademark Law, which could be the topic of another article.



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What BISHONEN's nine-year journey to registration reveals about China's Trademark Law

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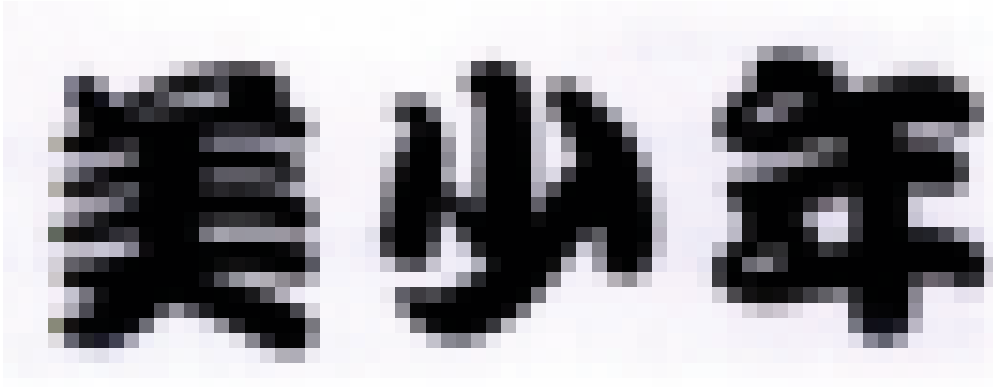
Summary

SUMMARY

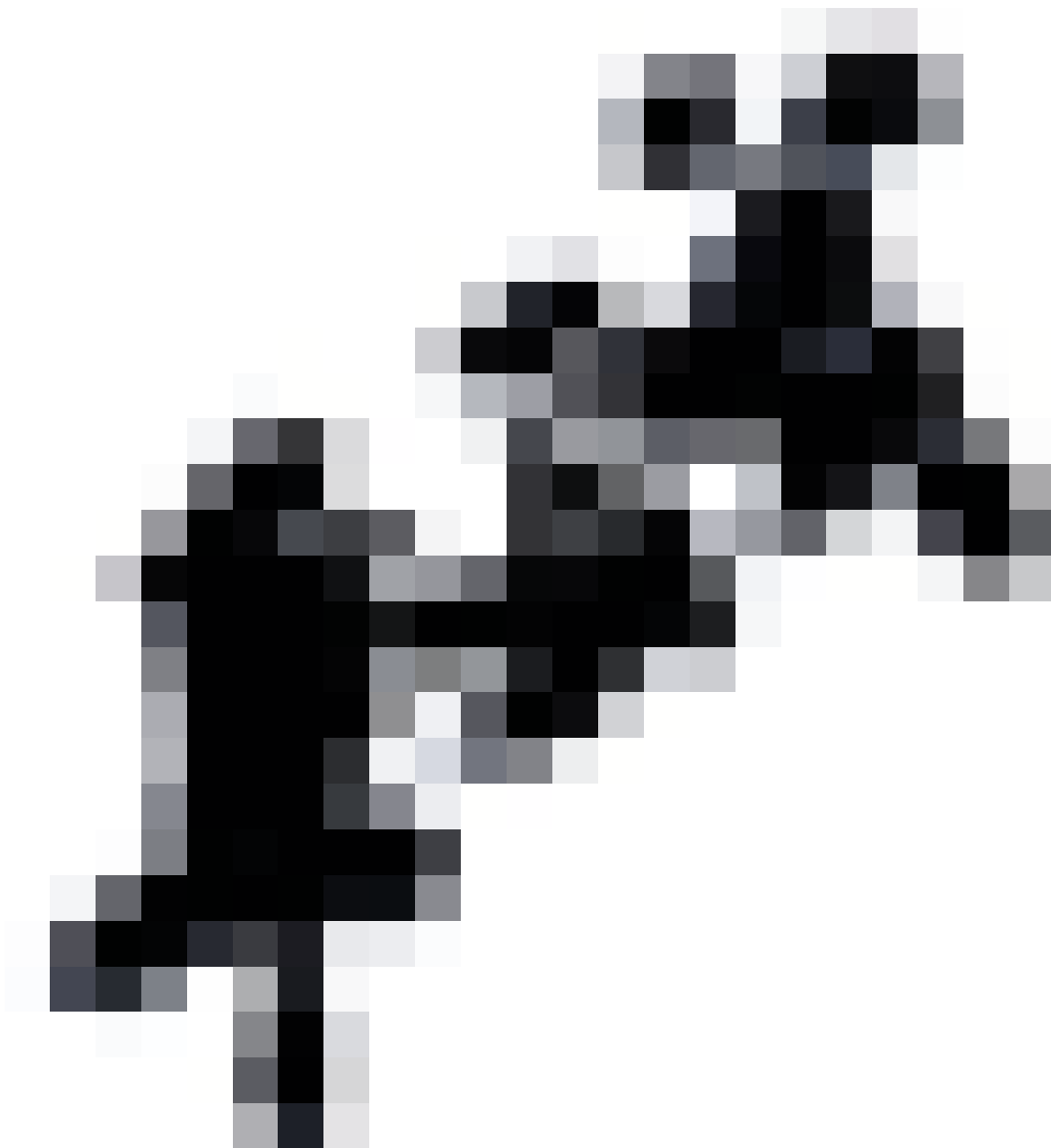
SUMMARY

The sake of the 'BISHONEN' (Chinese characters '真山年') and was born in Japan and has been produced and sold in Kyushu, Japan, since the 1920s. The brand name was chosen by the president of Nanju Sake Brewery Co, Ltd (later renamed Bishounen Brewery Co, Ltd), at the time, and was taken from the verse "without restraint, Zongzhi is a gallant young guy" (original in Chinese '—~~一~~狂歌') from Songs of Eight Immortal Drinkers by the Chinese Tang dynasty poet Du Fu. After the approval of its trademark registration in Japan, owing to the change of business, the trademark and its sake manufacturing business were transferred to NLA Co, Ltd (NLA (later renamed Bishounen Co, Ltd)).

Since 2004, a Chinese individual, Feng, has repeatedly applied in China for the registration of a number of trademarks originating in Japan, including '



''



;', '%CI', and 'B' prominently used them in connection with sake and other products, claiming that the products were from Japan. Up to now, Feng has filed five 'BISHONEN' trademark applications, among which were the following.

Application/r- egistration number	Class	Application date	Registration date	Mark
8848113	33	16 November 2010	14 January 2012	
	4067769	33	17 May 2004	7 June 2006

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In 2014, NLA applied for international registration G1192609 under the Madrid Agreement and designated China (the NLA Application). After examination, the Chinese Trademark Office then rejected the application by citing the above trademarks No. 4067769 (Reference Mark 1) and No. 8848113 (Reference Mark 2). On 5 January 2015, NLA petitioned for re-examination of the rejection with the Trademark Review and Adjudication Board (TRAB) and sought to clear the way for its trademark application in China.

The non-use cancellation action against Reference Mark 2 and the appeal against the rejection of the NLA Application ran almost simultaneously, during which NLA exhausted the two-instance procedures in court to keep its application alive and, by a rehearing, it finally got its trademark successfully registered in China. It took nine years from the date of international registration of the NLA Application to the final approval of registration in China, the details of which can be seen from the timelines below.

DIFFICULTIES AND REFLECTIONS THEREIN

OPTIONS AGAINST MALICIOUS APPLICATIONS

Articles 32 and 45 of the current Trademark Law stipulate that if an applicant preemptively registers by improper means a trademark that has been used by others and has a certain influence, the prior right holder or interested party may, within five years from the registration date of the trademark, petition to the TRAB to declare the registered trademark invalid; in the case of malicious registration, the owner of a well-known trademark shall not be subject to the five-year time limit.

However, it is difficult in practice for some foreign companies to prove that a registered trademark should be declared invalid, as it is difficult for them to collect evidence of their prior use and influence in China as well as evidence to show the other party's bad faith; for example, when their marks first gained popularity before the application date of the registered trademark, their reputation in the market may have already been known to the relevant public and competitors in China, which may lead to trademark squatting, but at the time they did not enter the Chinese market on a large scale. Not to mention the five-year statute time limitation that requires the one who wants to overcome it to prove its mark to be well-known in China, which means a requirement of more evidence to prove its wide influence on the relevant public in the relevant Chinese market before the application date of the registered trademark.

Therefore, to fight against trademark squatting, we may need to look elsewhere to bypass the above difficulties. Article 49 of the Trademark Law provides a three-year non-use cancellation procedure. Based on this provision, requesting the cancellation of a registered trademark on the grounds of non-use for a continuous term of three years without justified reasons, and then getting one's own trademark registered, may be a more convenient choice, especially against those who make a living by trademark squatting without intention to use, also known as 'trademark trolls'. According to Article 66 of the Regulations for the Implementation of the Trademark Law, in cases where a registered trademark is challenged on the ground that it

has not been used continuously for three years without justified reasons, it is the trademark owner who bears the burden of proof to submit evidence of use of the trademark three years before date of filing of the cancellation petition or provide justified reasons for the non-use. The petitioner, on the other hand, only needs to provide a brief petition with a lower burden of proof, which usually leads to lower costs as well.

REGARDING THE EVIDENCE IN NON-USE CANCELLATION ACTIONS

In the administrative lawsuit against the Reference Mark 2, the plaintiff, NLA, challenged the evidence of use provided by the third party, Feng, including because the photocopies provided were blurry, the evidence was self-made without any support of actual performance and no specific time was shown in the photos provided. In response to NLA's challenge, the Beijing Intellectual Property Court specifically pointed out that the China National Intellectual Property Administration (CNIPA) should check the originals of the evidence submitted by the parties when hearing of such a cancellation. In practice, many commercial entities still lack awareness of using their trademarks registered in a regulated manner, which leads to little evidence of use of trademarks being retained in their commercial operations, and some trademark holders may even forge evidence to circumvent the provisions of non-use cancellation. Therefore, it is particularly important for the CNIPA to check the original pages or objects when examining evidence of trademark use. If a trademark holder is unable to submit the original copies of the evidence of use he or she submitted, making it difficult for the defendant and the court to determine or judge, based on the photocopies of the evidences alone, whether the disputed trademark has been used publicly, truthfully and legally within the specified time period, he or she shall bear the legal consequences of failing to provide evidence.

THE DISCRETION ON SUSPENSION AND THE PREVENTION OF CIRCULATION OF PROCEEDINGS

JUDGES' DISCRETION ON SUSPENSION

Under Article 51 of the Interpretation on Several Issues concerning the Implementation of the Administrative Procedure Law of the People's Republic of China, which was in force during the period of the administrative lawsuits against Reference Mark 2, in the course of litigation, where the trial of a case must be based on the outcome of the trial of a relevant civil, criminal or other administrative case, and the relevant case has not been concluded yet, the litigation shall be suspended or stayed.

However, in practice, although one may petition the court to stay, the judge has his or her own discretion as to whether the previous case will have an impact on the current case and whether the proceeding should be stayed or not. When a court has a large number of pending cases with complex case schedules, the judge may, so as to improve efficiency and reduce the backlog of cases, not allow this suspension. In this case, the lawsuit against Reference Mark 2 and the lawsuit against the re-examination decision of the NLA Application proceeded almost simultaneously, and the result of the cancellation of Reference Mark 2 would have a substantial impact on the outcome of the lawsuit regarding the re-examination of the NLA Application, but the judge still did not rule to stay the hearing.

THE CHOICE OF APPEAL AND CIRCULATION OF PROCEEDINGS

Article 31 of the current Trademark Law stipulates that if two or more applicants for trademark registration apply for registration with identical or similar trademarks on the

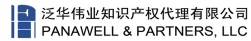
same or similar goods, the trademark applied for earlier shall be preliminarily examined and announced.

When facing an unfavourable first instance ruling on the re-examination decision of a trademark application, it is a difficult choice to decide whether to proceed with the appeal or not, as the appeal may not be successful. However, the obvious advantage of filing an appeal is that it can keep the trademark application alive, preserving its filing date and therefore having the effect of blocking others from applying for the same or similar mark in a later application. In other words, if the NLA Application remains alive, once the Reference Mark 2 is finally cancelled, it can then be approved for registration. Conversely, if the appeal is abandoned and thus the re-examination decision rejecting the request for the extended protection of NLA's trademark takes effect, the NLA Application will lose its effect of blocking others. If, at this time, someone (sometimes it is the applicant of the trademark to be cancelled) files another application for registration of the same or similar trademark on the same or similar goods, even if later on Reference Mark 2 is finally cancelled and NLA immediately files a new application, this new application of NLA will face a new registration hurdle – the CNIPA will give priority to that earlier application filed during the time period between abandoning the appeal and the cancellation of Reference Mark 2.

Therefore, although there will be time and money costs, by continuing to appeal, keeping the original application alive, the applicant can at least reduce the risk of new obstacles to its trademark registration.

CROSS-BORDER COOPERATION OF ATTORNEYS

The action of applying for a trademark in a foreign country and facing cancellation and administrative litigation procedures involves professional legal issues that require extraordinary research, team discussions, devotion of time and patience of experienced attorneys. The Chinese and Japanese attorneys in the NLA Application demonstrate these strengths, having worked closely with each other as a team for years, established good mutual trust with full and close communication channels and methods between them, highlighting the importance of effective teamwork in this and similar cases.



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Trade secret litigation and arriving at a definition of 'commensurate' security measures

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Summary

LEGISLATIVE HISTORY OF SECURITY MEASURES

THE KEY FACTORS OF COMMENSURATE SECURITY MEASURES

THE UNDERLYING THEORY BEHIND THE FACTORS

OTHER TIPS

It is well known that the basic elements of trade secrets include:

- they must not be known to the public;
- they must have commercial value; and
- commensurate security measures must have been taken by the right holder.

The first two elements are relatively easy to understand and prove in trade secrets litigation, while the last element often becomes focus of the lawsuit on which each party spends lots of resources to compete. Some recent cases reveal that the right holders of trade secrets might not have sufficient understanding of the word of 'commensurate', which leads to unsatisfying outcomes in trade secrets litigation.

What kinds of security measures taken by the rights holders are accepted by courts as 'commensurate' in China? What are the underlying theories behind the word 'commensurate'? And what aspects should the rights holders pay attention to when adopting security measures? This article tries to provide answers to these questions based on some recent judgements of the Supreme People's Court (SPC) of China.

LEGISLATIVE HISTORY OF SECURITY MEASURES

According to an earlier version of the Unfair Competition Law of China, the rights holders of trade secrets must take security measures to defend their trade secrets. However, at that time, there was no adjective preceding 'security measures'. This means that courts did not pay too much attention to the facts if the measure were reasonable and sufficient to protect the trade secrets. Few courts noticed this issue but did not elaborate on the relationship between the measures and the trade secrets in the practice.

After observing the legal practice for about 15 years, the SPC officially indicated in 2007 that the security measure must be "reasonable and commensurate with the trade secret". It is not hard to find out the reason why the SPC set up the new standard as, in practice, many measures taken by the rights holders were not reasonable and could not protect the trade secrets.

In 2020, the SPC again revised the wording from "reasonable and commensurate measures" to "reasonable measures before infringement" in its law interpretation to match the revised wording "commensurate measures" of the Unfair Competition Law. Therefore, the holders of trade secrets must prove that reasonable measures have been taken before the secret information is infringed so that the elements of trade secrets can be fulfilled. The court will review whether the plaintiff has taken "reasonable measures" in the trial.

THE KEY FACTORS OF COMMENSURATE SECURITY MEASURES

Five factors have been taken into consideration when determining whether the security measures are commensurate, including:

- the nature of the trade secret and its carrier;
- the commercial value of the trade secret;
- the identifiability of the confidentiality measures;
- whether the confidentiality measures are commensurate with the trade secret; and
- the right holder's will to keep the secret.

Each of the factors will be explained as follows.

THE NATURE OF THE TRADE SECRET AND ITS CARRIER

A trade secret is a type of information, including technical information, business information or other commercial information, that is recorded or reflected by a certain carrier. The carrier is not the secret but is the object of security measures. The purpose of setting up the measures is to protect the carrier from exposing secrets to the public. Therefore, the nature of trade secrets (typically, the type of trade secrets) and their carrier should be considered in the trial first, well before reviewing other factors.

Some recent SPC cases reveal the Court's attitude toward this. In one case, the plaintiff sued the defendant for infringing the technical secrets contained in the product. The confidentiality measures adopted by the plaintiff, however, were directed to the technical drawings of the product, instead of the product. Although the SPC confirmed the measures for the drawings may guard the secrets contained in the drawing, the claims of the plaintiff were denied because those measures were not related to the products that had been commercially available for a long time before the alleged infringement. The SPC indicated that in this case the carrier bearing the secret was the product; thus, the confidentiality measures adopted for the drawings, such as non-disclosure agreements with former employees and the technical drawing management policy, did not apply to the product (the carrier of the trade secret in this case). Thus, the measures provided by the plaintiff did not constitute trade secrets according to the law because the right holder did not apply security measures to guard the secrets. In another SPC case, the Court clearly stated in the sentence that the carrier of the secrets must be examined, while the connection between the measures and the carrier must be considered in the meantime. If the security measures are not aimed at the carrier, the claims in connection with the carrier cannot be supported because the measures are not commensurate.

THE COMMERCIAL VALUE OF TRADE SECRETS

The commercial value of the trade secrets is another factor that needs to be scrutinised in trade secret litigation. However, this factor typically is considered in combination with other factors. For example, the higher value the secrets have, the stricter and more identifiable the measures are that should be taken. This factor also reflects the will of the right holder to take measures for their secret information.

THE IDENTIFIABILITY OF THE SECURITY MEASURES

This factor means that the security measures adopted must be identifiable so that people can clearly understand that the information protected by the identifiable measures is secret and confidential. As mentioned above, the more important and valuable the information is, the more identifiable and stricter the security measures are that need to be adopted.

In a recent case, the plaintiff signed a non-disclosure agreement with only some of its employees and claimed this formed confidentiality measures to protect its secret information. However, the court found that the carriers, some manufactured devices, were placed in an open place without any identifiable restriction measures to show the devices were confidential. In this instance, other employees, without signing the non-disclosure agreement, and even visitors could readily access those devices. Thus, the court ruled that the measures were not sufficient to protect the secret information from exposure to the public because the coverage of the measures was inadequate and the measures were

not identifiable enough to make everyone understand that the devices contained secret information.

WHETHER THE CONFIDENTIALITY MEASURES ARE COMMENSURATE WITH THE TRADE SECRET

Needless to say, important secrets deserve stronger restriction measures for protection. Typically, comprehensive measures include statements in the employee manual, non-disclosure agreements, competitive restriction and confidential clauses in commercial contracts to protect all aspects of the confidential information.

The strength and comprehensiveness of the measures will be reviewed by the court in a trial to see if the measures are reasonable and commensurate with the secret. In an SPC guide case, the Court fully reviewed the measures taken by the plaintiff, including the file access control policy, the rules for accessing confidential files, internal training on confidential policy and the employee manual. The Court held that those measures showed that security measures commensurate with the importance of the confidential information had been taken and actually enforced. Thus, the plaintiff finally received the damages of 159 million yuan thanks to the comprehensive security measures.

THE HOLDER'S WILL TO KEEP THE SECRET

As for the holder's will to keep the secret, this article argues the will is the reason for the measures, while the measures are the consequence and the reflection of the intent. If the holder has no desire to protect the secret, naturally no measures are taken.

The SPC released a classic discussion about the nature and importance of the will to protect:

trade secrets are intangible assets that exist through the protection of confidentiality measures taken by the right holder. The secrets have characteristics such as easy to spread, easy to transfer, and permanent to lose upon disclosure. Confidentiality measures are means for keeping and maintaining the confidentiality of trade secrets. As the information protected by trade secrets, the right holder must have a subjective awareness of protecting the information as a secret while he should also carry out objective confidentiality measures. This is because trade secret is a right generated through the right holder own confidentiality. If the right holder has not taken confidentiality measures in himself, there is no need to protect the information (by law). This is also the value and role of confidentiality measures in the composition of trade secrets.

THE UNDERLYING THEORY BEHIND THE FACTORS

Although the laws and regulations talk a lot about what 'commensurate security measures' mean, the underlying theory is clear. In the litigation filed by the right holder, the court hopes to see the plaintiff shows their will to protect and awareness of their trade secret through enforceable measures taken to protect it. The factors listed by the SPC are used to evaluate the protection level of the trade secret in each individual case so that will, awareness and measures can be reviewed in combination.

In addition, commensurate security measures do not mean the secret information is perfectly safe so that the information can 100% be guarded against any theft or misuse. The standard is that under normal circumstances, the measures are enough to prevent the disclosure of trade secrets. In conformation with this standard, one feasible way to evaluate

the measures is to see what kinds of measures have been taken by other companies in a same industry. If the measures are regular and have been adopted by most companies in the industry, the same measures being set up by a party could be considered sufficient to protect the secret under normal circumstances.

OTHER TIPS

Here are some tips in addition to the factors discussed above.

The first tip regards the time to set up the confidentiality measures, which is critical. In normal conditions, the measures should be set up before the secret information is generated in the day-to-day running of an enterprise. In fact, with a comprehensive confidentiality policy, the trade secret will be under protection at the same time it is created. That is the reason why the words “reasonable measures before infringement” are used by the SPC in the law interpretation.

In practice, if the measures are adopted after the secret information is formed, the time period between the formation of the trade secret and the time at which the measures are adopted will be strictly examined by the court to see if there is any chance that the information was leaked during that time period. The proof burden must be borne by the plaintiff that failed to adopt the confidentiality measures before infringement.

Another aspect we should pay attention to is that the relationship between non-competitive restriction and confidentiality measures. According to the SPC, the non-competitive restriction could be a kind of security measure to protect a trade secret if the non-competition agreement clearly delineates the edge of the trade secret. A general statement, however, such as generally saying that this employee cannot work for our competitor, cannot constitute a confidentiality measure according to the law because it cannot prove the will, awareness and measures of the right holder, and it is not commensurate with the secret by failing to indicate what information is being protected.

Furthermore, if the trade secrets were once shared among multiple parties, then the court requires confidentiality measures to be taken by each of the parties, not only by the party that brings the lawsuit. In one case, the plaintiff sued the defendant for revealing his trade secrets contained in some technical drawings. However, the court found that the drawings were developed by a third party under a commissioned development contract. The plaintiff did not set up a non-disclosure agreement with the developer and the developer did not take any security measures for those drawings. Thus, the court rejected the plaintiff’s claims because the information was not under protection by commensurate measures.

Finally, please keep it mind that reverse engineering is legal in China. Therefore, if the trade secret is contained in a product that has been publicly marketed, the confidentiality of the trade secret will be carefully reviewed by the court. For example, if the secret information is the structure, connections or functions of a product that is available on the market, anyone may detect and know the information contained in the product after buying and studying it through reverse engineering. Therefore, if the right holder claims trade secrets in a sold product or certain technical information in the product available on the market, the right holder needs to prove that commensurate confidentiality measures have been taken for the product and they are able to defend against the reverse engineering on the product. Two methods could be considered to prove that the trade secrets contained in the product are still under protection even after being sold:

- The right holder may prove that even if someone disassembles the product containing the technical secret, they still cannot sense the technical secret because of the nature of the trade secret (eg, the information is intangible and not detectable).
- The right holder may show the court that some special confidentiality measures have been set within the product to hinder the reverse engineering carried out by an unauthorised party (eg, a certain mechanism that can destroy or change the secret contained in the product when the product is dissembled).



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Managing infringement threats across the supply chain

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Summary

JUDICIAL PRACTICE IN CHINA IN OEM-RELATED TRADEMARK DISPUTES

JUDGING CRITERIA FOR FOREIGN-RELATED OEM TRADEMARK INFRINGEMENT DISPUTES

SUGGESTIONS FOR FOREIGN-RELATED OEM PROCESSING ENTERPRISES

As an important form of trade in China, foreign-related original equipment manufacturers (OEMs) contributed to the formation of China's status as the world's factory. With the development of the global economy, China's economic role as the world's factory is changing, and the judiciary's understanding of foreign-related OEM trademark infringement issues is also changing and deepening. Typical foreign-related OEMs feature that the domestic manufacturer is entrusted by the foreign trademark owner or authorised trademark user to produce products according to their requirements, affix the foreign client's trademark to the manufactured products and make sure all the processed products are delivered to the destination designated by the overseas consignors (the products are not sold in China). Regarding whether trademark use in foreign-related OEM manufacturing constitutes trademark infringement, there is no direct and clear regulation in international treaties and Chinese domestic laws. In practice, people should refer to the judicial precedents of higher courts, and judgments will be based on individual cases.

JUDICIAL PRACTICE IN CHINA IN OEM-RELATED TRADEMARK DISPUTES

HONDA CASE

In 2019, the Supreme Court made a judgment in the Honda case, affirming that a foreign-related OEM committed trademark infringement and clearly pointing out that foreign-related OEM are not exempt from trademark infringement. As intellectual property rights, trademark rights are territorial. Even if trademark registration is obtained in a foreign country, the company does not enjoy the exclusive right to use the registered trademark in China. Correspondingly, the 'trademark use authorisation' obtained by entities in China does not belong to the legal rights of trademarks protected by China's trademark law and cannot be used as a defence of non-infringement of trademark rights. In terms of the application of the law, it is necessary to maintain the unity of the legal system and not simply deem a certain trade form as an exception that does not infringe on trademark rights. Otherwise, it will violate the basic rule for determining trademark infringement. After the Honda case, the Court mostly followed the judgment of the case, holding that foreign-related OEMs affixed trademarks to products and exported them without the permission of the Chinese trademark owner, constituting trademark infringement.

THE COURTS' PREVIOUS DECISIONS

In fact, in the past two decades, Chinese courts have undergone a period of evolution in determining whether foreign-related OEMs constituted trademark infringement. From the Nike case in 2000, which determined that foreign-related OEMs constituted trademark infringement, to the Supreme Court's determination in the Petrul and Dongfeng cases in 2015 and 2017 that foreign-related OEMs did not constitute trademark infringement, and then to the Honda case in 2019, in which the Supreme Court determined that foreign-related OEMs constituted trademark infringement, it seems like the Court has different attitudes and policies towards foreign-related OEMs; however, each case has its own characteristics, especially the aforementioned three judgments made by the Supreme Court. There is little change in the Court's attitude towards foreign-related OEMs as it is more likely that the specific circumstances of the case will have affected the judge's final determination of infringement. For instance, in the Honda case, the court considered that the trademark HONDA of the domestic trademark owner was relatively well known, and the HONDAKIT trademark actually used by the manufacturer was not exactly the same as the overseas

registered trademark, as the 'HONDA' part was highlighted. So, the trademark actually used was not identical with the trademark registered outside of China but more closely similar to the trademark registered in China. Meanwhile, the Court also considered the changes in global trade and the possibility that products exported overseas may also flow back to China, causing confusion among consumers, and finally determined that the domestic manufacturing party constituted trademark infringement.

It is undeniable that the judgment of the Supreme Court has established the basic rule for whether foreign-related OEM behaviour constitutes infringement to a certain extent. Local courts often refer to the judgment of the Supreme Court when making judgments in subsequent cases. For example, during the period from 2015 to 2019, due to the attitude of the Supreme Court in the Petrul and the Dongfeng cases, for typical foreign-related OEM behaviours, if the domestic manufacturing party has performed its due diligence and checked the trademark registration certificate of the overseas entrusting party, the court normally holds that the OEM will not circulate in the domestic market, will not cause confusion among consumers and will not cause losses to domestic trademark owners, thus not constituting trademark infringement.

RECENT CASES AFTER THE HONDA CASE

After the Honda case in 2019, local courts strictly applied the criteria for determining trademark infringement by following the attitude of the Supreme Court, and mostly determined that foreign-related OEMs constituted trademark infringement.

However, the Honda case does not mean it rings the death knell for foreign-related OEMs, and it does not necessarily mean all the OEMs constitute trademark infringement. The specific facts of the case should still be considered. In recent years, there have also been some cases involving OEMs, where the courts have comprehensively considered factors such as the legitimacy of the trademark registration involved and whether the way of enforcing rights are legitimate, and eventually determined that the cases do not constitute trademark infringement. For example, in the Stahlwerk case, the court held that as the affiliated company of the trademark registrant in China had a former agency relationship with the overseas OEM client, it obviously had known the trademark of the overseas party but it still registered the identical trademark in China and used the trademark as the basis for filing a trademark infringement lawsuit against the Chinese OEM authorised by the overseas entrusting party. The way of exercising the trademark rights was improper and violated the principle of good faith, and the court determined that the OEM did not constitute trademark infringement.

In the Juratek case, although there was no direct evidence to prove that the trademark registrant in China knew the trademark JURATEK of the overseas entrusting company and applied for the registration of the same trademark in China, the Zhejiang Higher People's Court considered that the foreign OEM's entrusting party used and registered a series of JURATEK trademarks in other jurisdictions outside of China and conducted business cooperation with Chinese OEM companies, and the Chinese trademark registrant's awareness of the series of JURATEK logos and its subjective intentions, including the fact that it simultaneously registered several trademarks identical or similar to other well-known auto parts brands. The Court held that the trademark registrant's way of exercising the trademark rights violated the principle of good faith, and at the same time, the OEM manufacturer performed its due diligence by checking and reviewing the relevant trademark

registration certificates, and then determined that the OEM manufacturer did not constitute trademark infringement, and revoked the first instance judgment.

Generally, after the Honda case, the courts no longer simply believe that foreign-related OEMs are an exemption from trademark infringement. In some cases, the facts and evidence of the case will be comprehensively considered, especially the legitimacy of the registered trademark and the exercise of rights of the trademark registrant in China, to determine whether the OEM constituted trademark infringement. Therefore, the judgment of the Supreme Court and the subsequent Stahlwerk and Juratek cases all show that foreign-related OEMs, as a form of trade, cannot be used as a defence against trademark infringement. Whether it constitutes trademark infringement or not is still judged in the frame of the general principles of determination of trademark infringement, combined with the specific circumstances of individual cases.

JUDGING CRITERIA FOR FOREIGN-RELATED OEM TRADEMARK INFRINGEMENT DISPUTES

Similar to the standards of other trademark infringement cases, the trials of trademark infringement disputes involving foreign-related OEM cases are also heard from the following aspects:

- whether the use of the trademark belongs to trademark use, namely to identify the source of goods;
- whether it constitutes the same or similar trademark;
- whether it causes consumer confusion or misunderstanding; and
- the grounds for defence of infringement.

Regarding whether it is trademark use, or whether the trademark is used to identify the source of goods, previously, there have been different views in judicial precedents. For example, in the Petrul case, the Court held that affixing a trademark on the goods by the manufacturer is not trademark use as it does not function to identify the source of goods. Currently, the criteria are almost the same that the OEM behaviour affixing a trademark on the goods manufactured, even without entering into China's domestic market, constitutes trademark use, which is also consistent with the criteria for the cases concerning cancellation of a trademark based on non-use for three consecutive years. In cases of cancellation of a trademark on the basis of non-use for three consecutive years, the China National Intellectual Property Administration and courts tend to accept the use evidence for foreign-related OEMs, as they view the use of the trademarks in foreign-related OEM trade as trademark use. Thus, if the trademark owner submitted trademark use evidence in foreign-related OEM trade, trademark registration can be maintained. Regarding the second point, whether they constitute the same or similar trademarks is not a controversial issue in foreign-related OEM trademark infringement cases, as the trademarks involved are normally the same or highly similar.

Whether it causes consumer confusion is another key factor in determining whether foreign-related OEMs constitute trademark infringement. In some previous cases, such as the Dongfeng case where no trademark infringement was established, the Court held that it would not cause confusion as the OEM products would not enter into domestic markets and would not cause damage to the domestic trademark owner. However, at present, the courts generally believe that the words "likely to cause confusion" stipulated in the Trademark

Law refer to the possibility of confusion. If the relevant public has access to the accused infringing goods, then it meets this requirement, and it does not require the relevant public actually access the infringing goods, nor does it require that the confusion occurred. In the aforementioned Honda case, the Court pointed out that:

in a foreign-related OEM trademark infringement dispute, the relevant public should include not only consumers of the accused infringing goods but also operators closely related to the marketing of the accused infringing goods. Even if the accused infringing goods are exported abroad, there is a possibility that they may return to the domestic market. At the same time, with the continuous development of China's economy, there are a large number of Chinese consumers traveling and purchasing abroad, and there is also the possibility of encountering and confusing OEM products.

Finally, the court will examine whether there is a defense of non-infringement. For example, in the aforementioned Stahlwerk and Juratek cases, the Court held that the right holder's trademark registration and exercise of rights were improper, and finally determined that no trademark infringement was established. In these two cases, the Court did not discuss the trademark use and confusion issues but determined that the domestic trademark right owner registered the trademark and enforced its rights in an improper way, which is similar to the 'unclean hands' defence.

SUGGESTIONS FOR FOREIGN-RELATED OEM PROCESSING ENTERPRISES

From the current cases involving foreign-related OEM trademark infringement disputes, we can see that the courts generally believe that affixing a trademark in foreign-related OEM cases should be deemed trademark use, and there is also a possibility of confusion. Although there are some cases successfully defending infringement, especially when defending the plaintiff's trademark registration and that their actions for trademark right protection are improper, the cost is often too high.

Therefore, based on the current judgments of the Supreme Court on foreign-related OEM cases and local judgments normally following the attitude of the Supreme Court, it is recommended that overseas entrusting parties conduct necessary trademark clearance searches before entrusting Chinese companies to engage in OEM business in China. Applying for registration of a trademark or obtaining permission from a prior trademark owner in China is still very important to avoid possible infringement risks. Meanwhile, it is better to keep relevant communication records and documents for business dealings in a timely manner in order to deal with future possible legal disputes. When you are unfortunate enough to encounter a trademark dispute, consult a professional lawyer in time to seek a proper solution.



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Protecting brands online in the wake of covid-19 and the surge in tech developments

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With the impact of the covid-19 pandemic over the past few years, people's travel and activities have been somewhat restricted. As a result, people have become more reliant on the Internet in various ways. For instance, students have opted more for remote online courses, and people have increasingly turned to e-commerce for their shopping needs. However, it is important to acknowledge that intellectual property infringement on the Internet remains widespread, particularly in the realm of e-commerce operations. This is primarily because e-commerce transactions are conducted through online platforms. Apart from the information provided by sellers on these platforms, buyers are unable to assess the authenticity and quality of the goods they purchase until they receive them. They can only rely on trust in the brand. In exploiting this situation, many infringers tend to use the influence of others' well-known trademarks or brands to confuse consumers.

Furthermore, in recent years, the e-commerce industry has witnessed new developments, with the widespread adoption of technologies such as artificial intelligence, big data and 5G communications. In addition to traditional e-commerce platforms such as Taobao and JD, people have become accustomed to purchasing goods and services through various channels such as social networking platforms, webcasts and short videos. These new e-commerce models have made intellectual property right (IPR) infringement even more insidious, presenting challenges in brand protection, evidence collection, enforcement models and legal applications.

However, before delving into brand protection, it is essential to establish that brands are entitled to protection. When foreign brands seek to enter the Chinese market through e-commerce, the first consideration is the layout of the trademark in China and mitigating potential infringement risks. A trademark only gains registered status and protection under the law of the country where it is registered. Trademark rights are territorial in nature. Although a foreign brand owner may hold registered trademark rights in their home country, those rights are not recognised under Chinese law unless registered in China. Without valid prior rights, protecting rights in China becomes challenging. Therefore, enhancing intellectual property rights is a fundamental approach to addressing the risk of intellectual property infringement in e-commerce. Brands should proactively strategise their intellectual property rights, based on market demand and business development, and seek early registration and protection.

During the trademark registration process, companies should also consider the influence of internet development to avoid gaps in their IP coverage. For instance, while the Oxford English Dictionary is traditionally published and sold as a book, if someone develops and uploads an Oxford Dictionary mobile application to the Apple Store, the business of the Oxford Dictionary expands beyond books. Therefore, during the trademark application process, the brand owner of the Oxford English Dictionary would need to cover goods such as mobile phone applications and computer programs in addition to books.

The decentralisation of the Internet enables business operators to easily operate across borders at a lower cost, especially in goods and services with similar characteristics. The platform-like character of the Internet also provides a market base for operators to cross borders. Therefore, enterprises involved in Internet business also need to consider the use of trademarks in traditional fields of classes of goods not previously registered by the trademark owner.

Simultaneously, while completing the layout of intellectual property rights, rights holders should make diligent efforts to identify and warn of intellectual property risks, minimising infringement in the production, procurement and marketing of products. Given the increasingly stringent measures being taken in China against malicious trademark applications, early detection of fraudulent trademark cases should prompt the initiation of appropriate procedures to protect rights.

In practice, various forms of trademark infringement exist in e-commerce, including registering shop names or website domain names with logos identical or similar to the trademarks of the right owners, using the same or similar mark to describe products, selling products labelled with another's registered trademark and selling counterfeit products. When faced with these infringement scenarios, rights holders typically resort to traditional IPR enforcement methods such as civil litigation, administrative complaints or legal letters, seeking the cessation of infringement. However, traditional enforcement methods have their limitations. Civil litigation, for instance, is time-consuming, often taking one to two years to yield results. Moreover, legal enforcement requires stringent evidence and entails relatively high costs. While cease-and-desist letters may be cheaper, their effectiveness is unpredictable and uncertain. Consequently, most brands currently opt to file complaints through the IPR protection platforms established by e-commerce platforms.

Under China's E-Commerce Law, an intellectual property right holder asserting that their intellectual property is being infringed upon shall have the right to notify the e-commerce platform operator to adopt measures such as deleting, shielding or removing the hyperlink, or terminating the transaction and services. The notice must include the preliminary evidence for the infringement. Upon being notified, the e-commerce platform operator must promptly adopt the requisite measures and must forward the notification to the business operators using the platform; where the e-commerce platform operator fails to adopt the requisite measures promptly, it shall bear joint and several liability with the business operator using the platform for the escalated portion of the damages. Therefore, for e-commerce platforms, it is their obligation to take the necessary measures upon receiving an infringement notice.

This rights protection approach offers notable advantages. First, the process is relatively shorter. For instance, on Alibaba Group's IPR protection platform, the average processing time for infringement complaints ranges from seven to 15 working days, and even in complex cases, the review period does not exceed one month. Moreover, once a complaint is substantiated, the e-commerce platform promptly removes the suspected infringing goods, thereby effectively safeguarding the legitimate rights of the rights holder. Second, the preparation of materials for rights protection is relatively straightforward. The rights holder needs to provide proof of ownership, reasons for the complaint, links to the complaint and evidence of infringement. Last, during the complaint processing, the e-commerce platform does not impose additional requirements regarding evidence format or content.

However, it is advisable to use this method for small-scale infringement cases. In instances of larger-scale infringements, complaints can be combined with other rights protection methods through the e-commerce platform to effectively safeguard the rights and interests of the rights holder while promptly curbing the expansion of the infringing party's activities. Alibaba, as one of China's earliest e-commerce platforms, has developed a relatively mature governance experience, including leveraging big data retrieval and collaborating with multiple parties. Several other e-commerce platforms have also adopted a collaborative approach between the platform and brands to protect rights, providing strong big data clues to

assist administrative law enforcement departments and public security authorities, thereby enhancing the accuracy of law enforcement crackdowns.

Before a rights holder can file a complaint against an infringing product or a link to the sale of an infringing product on an e-commerce platform, they must register an account on the IPR protection platform built by each e-commerce company, which is used exclusively for the purpose of defending rights on that platform. After completing the uploading of identification documents and filling in information, the platform will review the identity information. If the identity verification is successful, the right holder can upload the appropriate ownership materials to prove that they are the right holder or the agent of the right holder. Once the rights certification is approved, complaints can be initiated by clicking on "Product Complaints", "Shop Complaints" or "E-commerce Content Complaints". It is also important to note that, for example, if the success rate of a complaint is up to the standard for several months, the complaining account will be listed on the platform's Integrity Complaint List, which will help expedite the review process and enable the right holder to better protect their rights.

Also, the preservation of evidence against infringement is important. If the evidence is not fully completed, it will also lead to difficulties in the subsequent protection of rights. In the process of evidence collection against the infringer on the electronic platform, apart from paying attention to the shop homepage, the business entity and the pictures of the products sold, it is also necessary to notarise the manufacturer marked on the product itself, the product packaging, the product manual or the product description on the webpage. In the absence of evidence to the contrary, the manufacturer marked on the above carrier is presumed to be the actual manufacturer of the product. At the same time, the monthly sales, cumulative sales and user reviews of the infringing product can be notarised during the notarisation process, where the monthly sales and cumulative sales have some positive reference significance in determining the amount of compensation. Meanwhile, if the infringing company has an official website, the website can also be notarised to reflect the scale of operation, brand influence and profitability of the company.

Despite the various measures e-commerce platforms have adopted to protect brands, IPR infringement and counterfeit products are still prevalent on e-commerce platforms, and rights holders may consider holding e-platforms liable when shop operators commit infringement and then evade liability for the infringement. However, as mentioned earlier, the Chinese Civil Code and the E-commerce Law have already made provisions for e-commerce platforms to avoid liability when they have fulfilled their obligations to remove infringing links after being notified of the infringement unless the e-commerce platform has been negligent in fulfilling that obligation. There is, however, an exception to this rule. If the e-commerce platform operator knows or should know that the goods sold or services provided by the platform operator do not meet the requirements for the safety of persons or property or otherwise infringe the legitimate rights and interests of consumers and fails to take the necessary measures, it shall be jointly and severally liable with the platform operator in accordance with the law. If an e-commerce platform operator fails to fulfil its obligation to examine the qualifications of the operators on the platform or fails to fulfil its obligation to ensure the safety of consumers, causing damage to consumers, it shall bear the corresponding responsibility in accordance with the law.

However, it is important to mention algorithmic recommendations when discussing this issue. Based on data information, such as consumers' browsing records and purchase history, e-commerce platforms calculate users' preferences through specific

programs and proactively recommend corresponding products to them. While algorithmic recommendations achieve an accurate match between online services and user needs, providing users with a better online experience, they also have hidden risks. If platforms do not properly control the legitimacy of infringing products, algorithmic recommendations can easily contribute to or reinforce the influence of infringement. Although e-commerce platforms do not directly sell goods, the consideration and design of the weighting of various goods are reflected in the algorithms. Users could see either the shopping search keywords or the product pages under the comprehensive ranking as the platform's algorithmic recommendations. If the recommended product happens to be an infringing product, this recommendation may also be considered as providing assistance or facilitating the infringement.

In addition to the aforementioned challenges, brand protection in e-commerce requires a comprehensive strategy that encompasses not only proactive registration and enforcement but also the establishment of robust monitoring and surveillance mechanisms. With the rise of social media platforms and the increasing popularity of AI, it has become crucial for brands to stay vigilant and proactive in identifying potential infringements and unauthorised use of their intellectual property.

One effective method of monitoring and surveillance is the use of advanced technologies such as artificial intelligence and machine learning algorithms. These technologies can scan vast amounts of online content and detect instances of brand infringement or counterfeiting. By analysing product descriptions, images, reviews and user-generated content, these algorithms can quickly identify potential trademark violations and alert brand owners. This proactive approach enables brands to take swift action and protect their rights before significant damage occurs.

With the development of digital technology, new models and businesses based on big data and algorithms are bound to emerge, posing challenges not only to legislators, law administrators and e-commerce platforms but also to brand rights holders. Brands need to adopt new strategies to meet these challenges and become more proactive in their brand protection efforts. By strategically registering trademarks, leveraging advanced technologies for monitoring, fostering collaboration between stakeholders and promoting awareness among consumers, brands can effectively combat intellectual property infringement in the e-commerce space. Through these efforts, they can secure their market position, preserve consumer trust and foster a healthier and more sustainable digital economy.

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The Beijing Measure: whether data should be a registered and protected form of intellectual property in China

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Summary

CORE CONTENT OF BEIJING MEASURES

**EXPLORING THE CONTROVERSIAL ISSUES OF THE DATA INTELLECTUAL PROPERTY
REGISTRATION SYSTEM OF CURRENT CONCERN THROUGH THE BEIJING MEASURES**

On 12 May 2023, the Beijing Municipal Intellectual Property Office issued the ‘Beijing Municipality Measures for the Registration and Administration of Data Intellectual Property (Trial) (Draft for Comments)’ (the Beijing Measures), which aim to regulate data intellectual property registration behaviour within the administrative jurisdiction of Beijing. Following Shenzhen, the Zhejiang province and the Jiangsu province, Beijing is another region to have enacted data intellectual property registration-related legal documents. The Beijing Measures not only respond to the requirements in the ‘Opinions on Constructing a Basic System of Data and Better Utilising Data Factors’ (the Twenty Data Policies) issued by the State Council in December 2022, which called for the establishment of a data property rights system and the exploration of new methods for data property rights registration, but also represent Beijing’s efforts as a pilot area for national data intellectual property work in exploring the implementation of the data intellectual property registration system.

This article starts with the Beijing Measures, while taking into account local documents such as the ‘Shenzhen Interim Measures for the Registration and Administration of Data Intellectual Property’ (the Shenzhen Measures), the ‘Zhejiang Province Measures for the Registration of Data Intellectual Property (Trial)’ (the Zhejiang Measures) and the ‘Jiangsu Province Rules for the Registration and Administration of Data Intellectual Property (Trial)’ (the Jiangsu Rules). The aim is to further sort out and explore controversial issues in the data intellectual property registration system within the industry that have attracted attention.

CORE CONTENT OF BEIJING MEASURES

The Beijing Measures consist of five chapters, including general provisions, registration content, registration procedures, management and supervision, and supplementary provisions. After sorting out and comparing the data intellectual property registration management measures and rules of Shenzhen, the Zhejiang province and the Jiangsu province, we believe that companies should pay attention to the following points.

COORDINATION AND ADMINISTRATION OF DATA INTELLECTUAL PROPERTY REGISTRATION IN BEIJING

According to Article 4 of the Beijing Measures, the Beijing Intellectual Property Office is the authority responsible for the management of data intellectual property registration, which is essentially the same as in the Zhejiang and Jiangsu provinces. The fact that the management of data intellectual property in Beijing is led by the Intellectual Property Office indicates that Beijing relies on the intellectual property protection system for the management and protection of data property rights. Beijing views data processors as the main applicants for registration, and data products are included in the scope of intellectual property protection as the objects of protection. This is what Hu Wenhui, the Deputy Commissioner of the China National Intellectual Property Administration (CNIPA), introduced at a press conference of the Chinese State Council Information Office: “CNIPA currently regards data processors as the main subjects of protection and regards datasets that have undergone processing according to certain rules and are in an undisclosed state as the objects of protection. Through registration, data processors are granted certain rights.” This reflects the data property rights management and protection model promoted by the CNIPA. This model of management and protection is different from the one used in Shenzhen, where the Development and Reform Commission is the main coordinating department and established a registration system for the circulation value of data elements and dividing data property rights into three categories via the classification and confirmation of data rights.

DATA INTELLECTUAL PROPERTY REGISTRATION BELONGS TO REGISTRATION IN TERMS OF OWNERSHIP

The mechanism for protecting data rights and interests by confirming data intellectual property rights through the intellectual property protection system is registration in terms of their ownership.

THE SUBJECT FOR REGISTRATION IS THE DATA HOLDER AND PROCESSOR

Article 2 of the Beijing Measures expand the registration subject to include data holders and processors. Based on the characteristics of data intellectual property protection, the expansion of the registration subject directly leads to the expansion of the scope of data objects included in the registration protection. As a result, more data can be registered and traded, increasing the possibility of registration for confirming rights, as well as circulation and trade.

EMPHASIZING THE COMMERCIAL VALUE OF DATA AND ITS UNDISCLOSED STATUS IN TERMS OF OBJECTS OF REGISTRATION

The data intellectual property registration system is established to encourage data circulation, guide data transactions and maximise and safeguard data assets. Therefore, it is of practical significance to emphasise the commercial value of registered data to guide companies in considering whether to register data with a purpose-oriented approach. In addition, many companies view their undisclosed data as their core competitive resources and invest heavily in collecting, processing and presenting this data, making it an essential data asset with high significance for rights confirmation and registration protection. This point is often confirmed by courts in judicial cases, such as the Weibo v Today's Headlines case. In judicial practice, the courts also tend to grant companies the right to disclose data. Therefore, registering and confirming important data assets in an undisclosed state is beneficial for companies to obtain protection and relief when facing infringement, and also for companies to benefit from data resource circulation.

REQUIREMENTS FOR DATA INTELLECTUAL PROPERTY REGISTRATION

According to Article 9 of the Beijing Measures, data intellectual property registration requires that the data has been certified or notarised and that there is no dispute over ownership. The data registration authority does not provide substantive examination of data ownership confirmation.

DOWNPLAY DATA OWNERSHIP AND EMPHASISE DATA USAGE RIGHTS

The Beijing Measures specify that data holders and processors are the registered objects. Any data holder or user who obtains data usage rights through legal regulations or contract agreements in various links of data circulation has the right to register data intellectual property rights. Based on Article 13, the holder of the data intellectual property registration certificate has the right to process and use the data and gain profits. In addition, Article 15 specifies that data intellectual property rights can be traded, pledged and licensed, and provides a registration and filing system for changes. Moreover, when the applicant unit undergoes mergers, divisions, dissolution or bankruptcy, or when the natural person applicant dies, changes to registration can also be made. This series of measures promotes and safeguards the circulation and use of data as a property right in the market.

EXPLORING THE CONTROVERSIAL ISSUES OF THE DATA INTELLECTUAL PROPERTY REGISTRATION SYSTEM OF CURRENT CONCERN THROUGH THE BEIJING MEASURES

ISSUES RELATED TO THE NATURE OF DATA RIGHTS

There have long been disputes in both theory and judicial practice over the nature of data rights, which related to what kind of legal rights can be utilised to protect data resources. In practice, when data assets are infringed upon, companies usually seek judicial relief by claiming unfair competition (such as in the Weibo Vision Technology v Chuangrui Technology unfair competition case and the Hantao v Baidu unfair competition case), or by treating databases as copyrighted works or trade secrets, and filing lawsuits for copyright infringement (such as in the Hantao v Sohu copyright dispute case and the Quzhou Wanlian v Zhou Huimin trade secret infringement case) or for trade secret infringement (such as in the Quzhou Wanlian v Jinan White Rabbit trade secret infringement case). Precedents have been established where companies have successfully obtained court confirmation using the claim of unfair competition, which has been more widely applied and received greater attention from regulatory authorities. The Anti-unfair Competition Law of the People's Republic of China (Draft Amendment for Comments) released by the State Administration for Market Regulation in November 2022 establishes in Article 18 that the market regulatory department has the power to impose administrative penalties on enterprises that disclose, transfer or use other operators' business data obtained by unfair means, resulting in substantive substitution of related products and services, as a response to this issue.

Judicial relief for data rights focuses on behaviour regulation, and the establishment of data rights is often completed through effective judgments. When exploring pre-emptive defence mechanisms against infringement of data rights outside of the judicial process, the Twenty Data Policies proposed a new approach to data rights identification and property registration. However, the construction of data rights identification and storage registration mechanisms involves issues related to the nature of data rights and the choice of protection models, which has led to ongoing theoretical disputes. These theoretical disputes have resulted in different legislative choices for data rights protection systems, with the main approaches being ownership (property rights) protection, intellectual property protection, creditor protection and new rights protection. This has given rise to two different approaches and directions for constructing data property rights: after the Twenty Data Policies, the National Development and Reform Commission (NDRC) has focused on the new property rights approach, emphasising the rights of all participants in the entire process of data collection, acquisition, processing, use, transaction and application, and classified rights to establish registration systems suitable for each stage of circulation. This approach has led to the establishment of the 'three rights separation' of data resource ownership, data processing and use rights, and data product operation rights, which will be implemented through the January 2023 policy document 'Accelerating the Construction of China's Unique Basic Data System to Promote the Development Dividend of Digital Economy Shared by All People'. The Shenzhen Measures are the initial results of exploring this approach, which focused on two registration objects: data resources and data results. It confirms three types of rights, namely data resource ownership, data processing and use rights, and data product operation rights, and carries out registration for initial registrations, as well as permits, transfers, changes, cancellations, objections, etc, ultimately resulting in the issuance of data resource registration certificates, data resource licensing certificates and data product registration certificates.

The Beijing Measures, Zhejiang Measures and Jiangsu Measures rely on the intellectual property protection approach and apply the intellectual property protection model, which focuses on data processors and registers their rights, bringing data into the scope of intellectual property protection.

ISSUES RELATED TO THE MECHANISM OF EXAMINATION AND REGISTRATION

When registering data property rights, there has been a long-standing controversy over whether the registering agency should conduct substantive examination or examination of forms. Currently, the registration rules in four regions all require the registering agency to conduct formal examination and have an obligation to review the completeness and legality of the application materials. In particular, the Beijing Method refers to the Copyright Law and protects data as a kind of intellectual property. In the field of copyright, voluntary registration is adopted and substantive examination is not conducted. Similarly, data intellectual property registration is also based on formal examination.

However, the choice of registration system depends on the legislative orientation and the purpose of protecting registration rights. Data property registration aims to improve the data disclosure system and promote the flow of data and ensure the security of data transactions. Therefore, when selecting examination standards, both transaction security and efficiency should be considered. At the same time, considering that data products have high technical requirements, whether it is necessary to examine the authenticity of the data, the legality of the source and the compliance of the data content and processing, and whether the examining boundaries of the registering agency will change, still needs to be addressed by relevant laws and regulations. The Shenzhen Method entrusts the obligation of substantive examination to a third-party agency, referring to the 'Provisions of the Supreme People's Court on Several Issues concerning the Trial of Cases by Internet Courts', which requires evidence to be authenticated through designated technical means or evidence preservation platforms. This may indicate a similar trend in the future development of substantive examination of data property rights. In terms of the legality of data sources and the compliance of data content and processing, a legal team may be used to provide examination opinions in conjunction with technical personnel.

ISSUES RELATED TO THE EFFECTIVENESS AND FUNCTION OF DATA PROPERTY RIGHTS REGISTRATION

As mentioned earlier, the Beijing Measures emphasise granting data holders and processors intellectual property certificates similar to those given for traditional forms of intellectual property, while downplaying data ownership and emphasising data usage rights, to protect the interests of data holders and processors in terms of using and profiting from data processing (Article 13). Through data property registration and other measures such as extension and alteration registration, the Beijing Measures also protect the security of transactions and promote the flow and exchange of data. In many articles, the Beijing Measures encourage the development and use of data, promote the flow of data and realise the commercial value of data.

Furthermore, according to the Beijing Measures, data property registration certificates will also be actively used in administrative law enforcement and judicial trials in the future, fully demonstrating their evidentiary value. This is in line with the goal and purpose of the structural separation of data property rights led by the NDRC.

In the article 'Accelerating the Construction of China's Characteristic Data Basic System and Promoting the Sharing of Digital Economic Development Dividends', the NDRC emphasises the importance of building a data property rights registration system to strengthen data usage rights, activate data product operation rights and encourage the development and use of data, promote the orderly circulation of data, guide data transactions and unleash the value of data elements. This is consistent with the goal of the Twenty Data Policies to promote the structural separation and orderly circulation of data property rights as a new type of rights and production factor, and may become the development direction of the future data property rights system.

Currently, the Shenzhen Measures aim to promote the opening and flow of data and the development and utilisation of data. Data property rights registration certificates and licences obtained can be used in data transactions, accounting and other businesses, and in the future, data can also be used as a production factor for enterprise asset accounting and financing mortgages, as well as an important basis for dispute arbitration (Article 6 and Article 8, Clause 6).

In December 2022, Shenzhen city issued intellectual property data registration certificates to the first batch of enterprises that applied for data property rights registration, including Shenzhen Qianhai Data Services Co, Ltd, and Guangdong Kunyu Shuju Technology Co, Ltd. This marks an important step forward in the pilot work of data intellectual property registration, which solves the problem of unclear ownership of data and improves the current situation where enterprise data resources 'cannot be traded' or 'dare not be traded'. Currently, Shenzhen city and Zhejiang province have established data intellectual property registration systems, and more regions will establish similar systems in the future. Through more detailed legislation, they will actively promote the application of intellectual property registration certificates and their use in judicial evidence recognition, allowing data intellectual property certificates to be used in enterprise operations and data market transactions.



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High-compensation patent litigation highlights courts' growing willingness to award significant damages

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Summary

INTRODUCTION

CASE INTRODUCTION

ANALYSIS AND RECOMMENDATIONS

SUMMARY AND OUTLOOK

INTRODUCTION

On 1 January 2019, the Intellectual Property Tribunal of the Supreme People's Court of China was officially established to handle nationwide appeals of patent and other technology-related intellectual property and antitrust cases. With the further unification of court judgment standards and the increased judicial protection of intellectual property rights, high compensation cases constantly emerge in judicial practice. According to the recently published Typical Cases of the Intellectual Property Tribunal of the Supreme People's Court (2022), in the patent and trade secret infringement disputes involving melamine the infringer was ordered to pay a compensation of 218 million yuan ((2020) Zui Gao Fa Zhi Min Zhong No. 1559, (2022) Zui Gao Fa Zhi Min Zhong No. 541).

Pursuant to the provisions of the Patent Law, the determination of the compensation amount for patent infringement includes: calculating based on the actual losses suffered by the right holder due to the infringement or the profits obtained by the infringer from the infringement; where it is difficult to determine the losses suffered by the right holder or the profits obtained by the infringer, a reasonable multiple of the patent licensing fee can be used as a reference for determination; where it is difficult to determine the losses suffered by the right holder, the profits obtained by the infringer, and the patent licensing fee, statutory compensation can be applied, ie, the court, based on factors such as the type of the patent, the nature and circumstances of the infringement, may determine the amount of compensation ranging from 30,000 yuan to 5 million yuan.

How to determine compensation amount and thus effectively protect the rights holder's interests has always been a focal point of concern for all parties involved. In this regard, we will analyse, based on some typical cases of high compensation in Chinese patent infringement litigation, which kind of claims and evidence put forward by rights holders received support from the courts.

CASE INTRODUCTION

CASE 1: SHENZHEN DUNJUN TECHNOLOGY CO, LTD V SHENZHEN JIXIANG TENGDA TECHNOLOGY CO, LTD

The first instance court fully supported the right holder's claim for compensation of 5 million yuan, and the second instance court upheld the judgment of the first instance.

Shenzhen Dunjun Technology Co, Ltd (Dunjun Company), the patentee, claimed compensation based on the profits obtained by Shenzhen Jixiang Tengda Technology Co, Ltd (Tengda Company) ((2019) Zui Gao Fa Zhi Min Zhong No. 147) from the infringement, and submitted the following evidence:

- evidence of offline sales of the accused infringing products;
- evidence of online sales of the accused infringing products from multiple platforms, including: Dunjun Company's purchases of the accused infringing products from Tengda Company's official flagship stores on different dates on JD.com and Tmall.com, with images, prices, cumulative review counts and other information about the accused infringing products;
- information from Tengda Company's official website;
-

printed copies of Tengda Company's official flagship store on JD.com, showing an increase of several thousand in cumulative review counts compared to previous records; and

- other evidence showing information about the sales, offer for sales and reviews of the accused infringing products on different online platforms.

In addition, Dunjun Company requested that the first instance court order Tengda Company to submit financial records and documents related to the accused infringing products. The first instance court, based on the trial proceedings, legally ordered Tengda Company to provide complete information and complete financial records regarding the production and sales of the accused infringing products. However, Tengda Company refused to provide them without justifiable reasons. Pursuant to the provisions of relevant judicial interpretations, the first instance court, considering the evidence provided by Dunjun Company and Tengda Company's refusal to provide relevant financial records, supported Dunjun Company's claim for compensation.

In the second instance proceedings, the Supreme People's Court upheld the judgment of the first instance and affirmed that the compensation amount determined in the first instance judgment was appropriate.

CASE 2: SYNTHES CO, LTD V DABO MEDICAL TECHNOLOGY CO, LTD, ET AL

The Supreme People's Court fully supported the right holder's claim for compensation of over 20 million yuan ((2021) Zui Gao Fa Zhi Min Zhong No. 148).

Synthes Co, Ltd (Synthes Company), the patentee, claimed that the compensation amount should be determined based on the infringer's profits and submitted the following evidence:

- Dabo Medical Technology Co, Ltd's (Dabo Company) 'Prospectus for Initial Public Offering of Shares (Draft)', which includes information on the company's main products, sales situation, main sources of operating income and gross profit margins of the main products;
- Dabo Company's 'Prospectus for Initial Public Offering of Shares', which records information about operating profit and the composition of main operating income, discloses the receipt of the lawsuit materials from Synthes Company in this case, and also provides explanations regarding the quantity, specifications, sales amount, and proportion and gross profit of the accused infringing products;
- 'Dabo Medical: 2017 Annual Report', which states the annual revenue and gross profit of trauma-related products;
- 'Dabo Medical: 2018 Semi-Annual Report', which indicates that intramedullary nails for trauma-related implantable consumables are the company's main products and provides information on the annual revenue and gross profit margins of trauma-related products; and
- evidence of Dabo Company's sales through other companies on the Derong Medical Equipment Mall website, showing the sales quantity and selling price of the accused infringing products.

The Supreme People's Court held that, as Synthes Company claimed to calculate the compensation amount based on the infringer's profits and had adduced preliminary evidence

regarding the infringement scale, and Dabo Company had no justifiable reason for refusing to provide corresponding evidence or materials regarding the infringement scale, which resulted in the inability to accurately determine the factual basis for calculating the infringer's profits, the Court may give no consideration to Dabo Company's arguments, such as that the contribution rate of the involved patent to its infringing profits should be taken into account. The Court also held that, although the calculation process based on the evidence and arguments presented by Synthes Company, considering factors such as sales amount and profit margin, may not be entirely precise, it can still demonstrate that Dabo Company's profits also include profits generated through other sales channels and the sale of other infringing products; thus, Dabo Company's actual profits from the infringement had a high likelihood of exceeding 20 million yuan, even if the contribution rate of the patent was taken into consideration. Dabo Company objected to the amount claimed by Synthes Company but refused to provide the evidence it held. Therefore, it can be inferred that the amount claimed by Synthes Company was reasonable.

ANALYSIS AND RECOMMENDATIONS

Based on the evidence presented by the rights holder and the Court's determination in the aforementioned cases, we recommend that rights holders consider the following points in patent infringement litigation.

ACTIVELY APPLYING DISCRETIONARY COMPENSATION METHOD

During the press conference on the intensified judicial protection of intellectual property rights held in October 2013 at the Supreme People's Court, Jin Kesheng, then the deputy chief judge of Civil Adjudication Tribunal No. 3, defined discretionary compensation methods as follows: on the basis that there is evidence supporting some of the data required for calculating compensation, the Court may exercise discretionary power according to the particulars of the case to determine the additional data required for calculating compensation, thereby determining a fair and reasonable amount of compensation. In July 2016, during the National Symposium on Intellectual Property Trial Work and the Promotion Meeting on the Three-in-One Intellectual Property Trial held by courts nationwide, Vice President Tao Kaiyuan of the Supreme People's Court further emphasised the importance of skilfully applying discretionary compensation methods based on specific evidence to determine actual losses or infringement profits, thereby further enhancing the rationality of calculating damages.

On the one hand, owing to the fact that compensation based on actual losses or infringement profits is not subject to the statutory compensation limit, the discretionary compensation method that determines actual losses or infringement profits based on specific evidence can result in higher compensation amounts than the upper limit of statutory compensation. On the other hand, discretionary compensation relies on the evidence submitted by the parties, and therefore, even if the compensation determined based on actual losses or infringement profits falls within the range of statutory compensation, if the rights holder applies for discretionary compensation and provides evidence, it can provide a more sufficient basis for the court to determine a reasonable compensation amount, which helps to avoid relying solely on the judge's subjective judgment for determining the amount of compensation.

Therefore, to increase the final amount of compensation and provide a basis for the court to determine the compensation amount, it is recommended that the rights holder prioritises

the application of discretionary compensation and provides evidence on the losses suffered by the rights holder or the profits obtained by the infringer.

In both of the aforementioned cases, the rights holders argued for calculating the compensation amount based on the profits obtained by the infringers and provided evidence to support their claims. For example, in the above Case 1, the rights holder not only submitted evidence demonstrating the sale of the infringing products on various online and offline platforms but also gathered data on the cumulative increase in the count of reviews of the infringing products by accessing the same sales platform during different periods, thereby proving that the actual scale of infringement by the infringer exceeded the compensation range claimed by the rights holder.

THE COMPREHENSIVENESS AND DIVERSITY OF EVIDENCE SUPPORTING THE CLAIMED COMPENSATION AMOUNT

The rights holder should provide evidence as comprehensively and with as much detail as possible based on the available evidence they can obtain.

In Article 31 of the Several Provisions of the Supreme People's Court on Evidence in Civil Intellectual Property Lawsuits, it is stated that:

Financial books, accounting vouchers, sales contracts, purchase lists, bills of sales, annual reports of listed companies, prospectuses, website or promotional materials provided by the party; transaction data stored in equipments and systems; commodity circulation data statistics from third-party platforms; evaluation reports; intellectual property licensing contracts; and records from market supervision, tax, and financial departments, etc., can be used as evidence to prove the claimed amount of compensation for intellectual property infringement.

In many cases, the accused infringers often promote their revenue, market share and sales information on their websites or in their promotional materials. Furthermore, if the accused infringers are listed companies or companies preparing for initial public offering, the records in their annual reports, prospectuses, quarterly or annual financial reports and other relevant documents can serve as evidence to support the claimed amount of compensation.

For example, in the above Case 2, the rights holder submitted various pieces of evidence, such as sales data obtained from third-party websites, the infringer's self-disclosed prospectus, annual reports and website promotional content to support the rights holder's claim for the compensation amount.

USE OF THE BARRIER TO EVIDENCE SYSTEM

Pursuant to Article 27 of the Interpretation (II) of the Supreme People's Court on Several Issues concerning the Application of Laws in the Trial of Patent Infringement Dispute Cases:

if the rights holder finds it is difficult to determine the actual losses suffered as a result of the infringement, the Court shall, in accordance with Article 65(1) of the Patent Law, require the rights holder to provide evidence of the benefits obtained by the infringer from the infringement; if the rights holder has already provided preliminary evidence of the benefits obtained by the infringer, while the account books and relevant documents related to the patent infringement are primarily in the possession of the infringer, the People's Court may order the infringer to provide such account books and documents; if the infringer, without justifiable reasons, refuses to provide or provides false account books

or documents, the People's Court may determine the benefits obtained by the infringer from the infringement based on the claims of and the evidence provided the rights holder.

Where rights holders have already provided preliminary evidence of the benefits obtained by the infringers, they can apply to the Court for the retrieval of account books and relevant evidence that are controlled by the infringers and are related to the patent infringement. In practice, it is rare for the accused infringers to submit account books and data that meet the Court's requirements. Once the Court orders the accused infringers to submit the relevant account books and data possessed by them, but they refuse to do so without justifiable reasons, it will be considered as hindering the burden of proof. In these cases, the Court may support the compensation amount claimed by the rights holders based on the rights holder's assertions.

SUMMARY AND OUTLOOK

This article provides examples and analysis of how rights holders in patent infringement litigation in China can provide evidence on the compensation amount and also offers recommendations.

In high compensation cases, while it is necessary for the rights holders to provide sufficient evidence to prove the infringement facts and the extent of the damages, the courts' increased intensity in awarding damages is also a crucial factor. In a report on the implementation of the Decision of the Standing Committee of the National People's Congress on Several Issues concerning the Litigation Procedures for Intellectual Property Cases including Patent Cases released by the Supreme People's Court on 27 February 2022, the following is mentioned.

The amount in dispute is increasing, with more cases involving claims for compensation of over 100 million yuan. Courts have effectively increased the intensity of damage compensation. In the 'Vanillin' technology secret infringement case, compensation of 159 million yuan was awarded ((2020) Zui Gao Fa Zhi Min Zhong No. 1667). In the 'Kabo' technology secret infringement case, maximum punitive damages (ie, five times the compensatory damages) were imposed, amounting to over 30 million yuan ((2019) Zui Gao Fa Zhi Min Zhong No. 562). The average amount of compensation awarded in first instance judgments of technology-related intellectual property infringement cases nationwide has increased by 147.1% compared to the amount before the establishment of the intellectual property tribunals of the Supreme People's Court.

Intellectual property cases involving foreign parties are handled fairly and justly. In the 'NX' computer software infringement case, the court supported the foreign rights holder's claim for compensation based on the price of genuine software ((2020) Zui Gao Fa Zhi Min Zhong No. 155). In the 'Intramedullary Nail with Locking Screw' invention patent infringement case, owing to the infringer's refusal to submit account books, the court revised the judgment to fully support the foreign rights holder's claim for compensation of over 20 million yuan (ie, the aforementioned Case 2), which helped create an open, fair and just environment for technological development in China.

It is believed that with further strengthening of judicial protection for intellectual property rights in China, the interests of rights holders will receive more comprehensive and effective protection in the future.



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How the latest monetisation methods can be used to grow a brand's value in China

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[Hylands Law firm](#)

Summary

[WHAT IS A BRAND?](#)

[CONCLUSION](#)

With economic development and intensified market competition, brands, as part of a company's soft power, play an important role in the development of company. They not only serve the basic function of identification but also generate significant economic benefits through monetisation. Brand monetisation is an inevitable trend for companies to enhance their core competitiveness and achieve innovative management.

This article introduces the types of brand-related intellectual property rights in China's current laws and explores the main ways to monetise a brand under China's current legal environment. The aim of this article is to help companies monetise their brands with less legal risks, thereby enhancing companies' competitiveness and brand value.

WHAT IS A BRAND?

Defined in the Encyclopedia Britannica, 'brand' means "a set of words, images, and associations that represent and distinguish a product or service in the marketplace". In modern businesses, a brand is not only a means of identification but also tells consumers about the brand's culture, the quality of related goods and services, and more.

In China's current laws and regulations, there is no specific definition of 'brand'. Based on judicial practices, a brand generally refers to various marks used by business entities in commercial activities for identification purposes, including trademarks, trade names, geographical indications, influential product names, packaging, decoration and domain names.

MAIN TYPES OF INTELLECTUAL PROPERTY RIGHTS RELATED TO BRANDS

Type	Brand - related protection content
Trademarks	Corporate brands appear in the form of trademarks and to identify the source of goods. Trademarks can be in the form of words, graphics, letters, numbers, three - dimensional signs, colour combinations and sounds, and a combination of these elements. Trademarks are usually used on packaging, containers, trade documents, advertisements, exhibitions and other commercial activities. If a company wants its trademark to be legally protected, according to Chinese Trademark Law, it needs to undergo trademark registration (unregistered well - known trademarks can also receive legal protection within a certain scope, but they need to meet specific conditions to be recognised as well - known trademarks) to obtain exclusive rights to the registered trademark.
Design patents for appearance	Corporate brands can also be protected by applying for design patents for appearance. This refers to new designs with aesthetic appeal and that are suitable for industrial application on the overall or partial shape or pattern, or a combination thereof, as well as the combination of

	<p>colour and shape or pattern. Once granted authorisation by the patent office through an application, companies can enjoy exclusive rights to the design that meets the conditions for patent granting.</p>
Copyright	<p>Chinese copyright law protects original works of literature, art, natural science, social science, engineering technology, etc. The most common works protected by copyright related to corporate brands are artistic works, such as graphic logos, unique patterns on packaging and virtual characters. It also involves other types of works, such as literary works (original promotional slogans, product descriptions, etc), graphic works such as product design drawings, and architectural works (iconic buildings). Copyright exists from the moment the work is created and does not require authorisation from relevant parties to obtain it. However, companies can register important works for copyright to provide preliminary evidence of ownership.</p>
Trade names	<p>Trade name is one of the core rights of brands. A trade name generally refers to the prominent part of a company's business name used for registration or market use during enterprise registration. According to relevant Chinese laws and regulations, the enterprise name can only be used after it is approved and registered, granting exclusive rights within the designated scope. Engaging in production or business activities using an unregistered enterprise name will result in corresponding penalties.</p>
Influential product names, packaging and decoration	<p>Influential product names, packaging and decoration usually include elements such as words, graphics, letters, numbers, three - dimensional signs and colours, or a combination thereof, that have been used and gained a certain level of recognition. Influential product names, packaging and decoration do not need to be recognised or authorised; they are entirely the market achievements of business operation.</p>
Domain names	<p>In modern businesses, domain names have become important components of brands. However, domain names for brand protection are often neglected, such as when companies only register the domain name for the main brand and neglect to register the domain names for sub - brands, fail to find other registered brand domain names in time and miss the deadline for</p>

filing domain name disputes. The cost of registering a domain name is much less than the cost of resolving domain name disputes. Therefore, it is advisable to register domain names early and comprehensively, and to take preventive measures to avoid unnecessary losses.

MONETISING METHODS

INTELLECTUAL PROPERTY LICENSING AND TRANSFER OF RIGHTS

In conjunction with business plans, enterprises can license or transfer brand-related intellectual property (such as trademarks, copyrights, design patents and domain names) to third parties. Through this approach, companies can obtain licensing fees or transfer fees while achieving business goals, such as sub-brand independence, transferring brands to third parties and expanding business.

The licensor and the licensee should enter into a licensing agreement. The scope of permitted use, the type of licence, whether it can be sublicensed, the duration of the licence, licensing fees, any indemnity and liability issues should be outlined in detail under the licensing agreement. In the transfer agreement between the transferor and the transferee, the scope of transferred rights, transfer fees, the exclusivity and liability issues are essential aspects.

Additionally, the transfer and licensing of intellectual property rights must also comply with the procedural requirements of Chinese law. For example, according to Chinese trademark law, the transferee is required to submit a transfer application to the Trademark Office. It's not a mandatory requirement for companies to register trademark licences, but registration can provide preliminary evidence in combating third-party claims and facilitate rights protection and cooperation with relevant administrative departments.

COMMERCIAL FRANCHISE

The operational resources that can create a competitive advantage in the market, such as registered trademarks, trade names, design patents and distinctive overall business images, can be maximised through commercial franchising to achieve the economic benefits of a company's intellectual property. Commercial franchising refers to a situation where a company licenses its operational resources (eg, registered trademarks, corporate logos, patents and proprietary technologies) to other entities through contractual agreements, allowing the licensee to operate based on a unified business model as stipulated in the contract. Enterprises can earn economic benefits through franchise fees. According to Chinese current laws and regulations, the key difference between franchising and brand authorisation lies in whether the goods or services provided are standardised, whether business activities are carried out under a unified business model and whether corresponding fees are charged. Franchisors also need to meet the qualifications stipulated by law.

COMMERCIALISATION OF THE BRAND

The commercial development of a brand is more common in developed countries, but is still in the developmental stage in China. However, its enormous economic value should not be overlooked. 'Commercialisation of the brand' refers to enterprises developing and utilising

all or part of the intellectual property (including trademarks, copyright and design patents) related to their brand by the enterprise itself or by licensing to third parties. Examples include the commercial development of branded animation characters and the creation of branded metaverse avatars. By commercialising the brand, consumer identification with the brand is enhanced, and the reputation of both the brand and the company is improved, thereby increasing economic benefits.

CONTRIBUTIONS BY VALUATED BRANDS

Contributions by valuated brands are a common method of brand monetisation, where the brand is invested into another company or project to obtain corresponding equity interests or benefits, thus achieving brand monetisation. Brand capital contribution is a legal capital contribution method stipulated in the Chinese Company Law, and 100% of intellectual property rights (including brands) can be injected as registered capital. In comparison to the common capital contribution process, it should be noted that the investor owns the rights to the brand. Each of shareholders must approve the brand's valuation report, and the brand's rights should be transferred from the shareholder to the company. Finally, the business registration must be applied for. Contributions by valuated brand must consider factors such as brand value, partners, risks and benefits, while avoiding hidden brand investment. When selecting partners and cooperation projects, it is necessary to conduct full evaluation and judgment to ensure the maximum effect of monetisation and long-term benefits.

BRANDS MORTGAGE FINANCING

Companies can apply for loans from financial institutions by pledging their brand's property rights as collateral to obtain funds. This approach provides short-term financial support for companies and enables monetisation by utilising the brand's value. In January 2023, data released by the Chinese National Intellectual Property Administration (CNIPA) showed that the total amount of patent and trademark pledge financing reached 486.88 billion yuan in 2022, maintaining a growth rate of over 40% for three consecutive years, benefiting 26,000 enterprises, 70.5% of which were small and medium-sized enterprises. Generally, the higher a brand's reputation and revenue contribution rate, the higher the financing amount for trademark pledges. For example, in 2008, China's Shandong Lu Hua Group obtained a RMB1.5 billion bank loan credit from the Agricultural Bank of China Shandong Branch by pledging its well-known trademark 'Lu Hua'. In practice, the brand owner first submits a written application for brand pledge financing to the bank. An evaluation agency assesses the value of the patent right, trademark right, etc. The bank reviews the enterprise's basic information and, once approved, the two parties sign a loan and a pledge contract. The brand owner then registers the pledge with CNIPA, and the loan contract can be executed. The brand pledge financing needs to comprehensively consider factors such as brand value, financial institutions, risks and benefits. When selecting a financial institution and determining the amount of financing, it is necessary to fully evaluate and judge to ensure the effectiveness of monetisation and the ability to repay. At the same time, during the pledge period, it is necessary to maintain the reputation of the brand to avoid adverse effects on long-term development.

SEEKING COMPENSATION THROUGH LITIGATION PROCEEDINGS

The basic purpose of litigation and rights protection is to stop infringement and eliminate reputational and economic losses caused by infringement. For companies with stable and influential brands, seeking compensation through litigation is a common channel for

monetisation. When a company discovers others infringing its legitimate rights related to the brand or engaging in unfair competition, such as false advertising or defamation, it can file relevant lawsuits to seek compensation. For example, the international well-known brand 'Durex' was awarded 50 million yuan in trademark infringement and unfair competition cases, and the well-known sports brand 'NEW BALANCE' was awarded 25 million yuan in trademark infringement and unfair competition cases. However, monetisation through compensation obtained from lawsuits involves legal procedures and carries certain risks and uncertainties. Before filing a lawsuit, companies need to fully evaluate the risks and benefits of litigation and choose appropriate legal strategies. During the litigation process, it is also important to maintain the brand's reputation to avoid negative impacts on the long-term development of the enterprise.

CONCLUSION

The management and monetisation of intellectual property rights are complex systems, involving trademark rights, trade name rights, copyright and other rights. Today, China remains one of the most attractive investment destinations globally, and the long-term positive trend in the Chinese economy will provide development opportunities and broad space for foreign-funded enterprises. The Chinese government has provided high-quality legal support and the policy environment to promote the marketisation and transaction circulation of brands, provided rich channels for the introduction of foreign brands and supported the development of technology-oriented and innovative enterprises as well as overall economic growth.

Against this background, we hope to effectively assist enterprises in managing and protecting their brands' intellectual property rights in China, achieve monetisation of the brands' intellectual property, reduce the risk of brand misuse or misappropriation and safeguard the reputation and market position of brands and enterprises.



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