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Trade Marks

China: Law & Practice

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Law and Practice

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1. Governing Law and Types of Trade Marks

1.1 Governing Law

Trade marks are governed by the Chinese Trademark Law, which is statutory. The rights are not governed by case law. China is a member of Madrid Agreement Concerning the International Registration of Marks, the Paris Convention for the Protection of Industrial Property, and the convention Establishing the World Intellectual Property Organization, but they are not self-executing.

1.2 Types of Trade Marks

In China's legal system, there are different types of trade marks/service marks, eg, unregistered marks, registered marks, certification marks and collective marks.

According to Article 8 of the China Trademark Law, any sign capable of distinguishing the goods or services of a natural person, legal person or any other organisation from those of other persons – including words, devices, letters, numerals, three-dimensional signs, combination of colours, sounds, etc, as well as the combination of such signs – shall be eligible for application for registration as a trade mark.

Trade dress, company names and trade names are not stipulated types of trade marks in accordance with the China Trademark Law, but they can also be protected under certain circumstances; they are mainly protected by the Anti-unfair Competition Law.

All rights to such trade marks are based on statutory law, rather than case law.

1.3 Statutory Marks

There are no statutory marks in China.

1.4 Well-Known Foreign Marks

In China, well-known foreign marks are not protected. But if the applicant has bad faith, the reputation of the marks will be taken into consideration and can increase the chance of success in actions.

1.5 Term of Protection

A registered mark is valid for ten years.

1.6 Exhaustion of Trade Mark Rights

China sticks to the principle of territoriality. In accordance with the Trademark Law of the PRC, replacing a registered trade mark without the consent of the trade mark registrant and putting the goods into the market with a substituted trade mark shall be regarded as trade mark infringement.

Regarding parallel import, there is no specific stipulation in China's trade mark law determining whether parallel import is a trade mark infringement or not.

1.7 Symbols to Denote Trade Marks

According to Article 63 of the Implementation Regulation of the China Trademark Law, a registered trade mark can be used on goods, package of goods, illustration book or other attachment. It can be denoted "registered trade mark" or ®.

The TM sign can be used to indicate that the sign is used as a trade mark, but this does not indicate registration.

2. Assignment and Licensing

2.1 Assignment Requirements or Restrictions

If a trade mark is assigned, the assignor and the assignee shall sign a written assignment form. The assignment application shall be filed with the CNIPA. The assignment application can be filed against registered marks or marks in the process of application. All identical or similar marks in respect of identical or similar goods/services in the name of the assignor shall be assigned together.

The assignment of a mark shall be published after it has been approved by the CNIPA, and the assignee shall have exclusive use from the date of publication.

2.2 Licensing Requirements or Restrictions

For recordal purposes, a licence shall be filed against only registered marks, as required by the CNIPA.

For the licensing of unregistered marks, there's no specific provision. Usually, a contract between the licensor and the licensee regarding an unregistered mark can be deemed as valid.

All three types of licence – exclusive licence, non-exclusive licence and sole licence – can be recorded. The licence term shall be within the validity period of the registration.

2.3 Registration or Recording of the Assignment

The assignment needs to be recorded with the CNIPA. If not, the assignment cannot be against bona fide third parties. After the approval of the assignment by the CNIPA, the CNIPA will publish the assignment in Trademark Gazette. Certificate of assignment will be issued by the CNIPA to both the assignor and the assignee.

Only after the approval of the CNIPA can the assignee be the trade mark owner in China. Before the approval of the CNIPA, the assignor remains the owner of the mark in China.

2.4 Other Requirements for Licences or Assignments to Be Valid

The licensed goods scope shall be within the registered scope. The licensor shall be prudent to limit the registered goods. Once the CNIPA deems the scope is enlarged, the licence recordal will be rejected.

2.5 Assigning or Licensing Applications

The trade mark under application process is allowed to be assigned, but is not allowed to be licensed. The use of the trade mark is not taken into consideration.

2.6 Trade Marks as Security

A trade mark is considered intellectual property. It can be subject to rights in rem, assigned by way of security, or be levied in execution.

Pledgor and pledgee shall conclude a written contract regarding the pledge of a trade mark which is assignable. Same or similar marks on the same or similar goods/services shall also be included in the pledge contract. Pledge registration shall be filed with the CNIPA.

3. Registration

3.1 Trade Mark Registration

Besides registration, the prior use of a trade mark can also be protected in China, but the protection is not as broad as the registered trade mark.

Trade dress is not a stipulated type of trade mark in China. If a trade mark is considered as lacking distinctiveness, by proving that the mark has acquired secondary meaning the mark can still be approved for registration.

3.2 Trade Mark Register

Trade mark applications shall be filed with the China National Intellectual Property Administration (CNIPA), the only trade mark register in China. The CNIPA has an online database which is available to the public.

It is normal and necessary to conduct a search for prior filed or registered trade marks, so that the applicant may take action against possible obstacles in advance of filing. The examination period is very short, and is decreasing, so it may be too late to take actions after the application is rejected by the CNIPA.

Marks that are already in use but not yet filed with the CNIPA cannot be located through a trade mark search. The CNIPA can do a trade mark search for either word mark or device mark.

The required information includes trade mark, class and goods/services description to be covered.

3.3 Term of Registration

A registered mark is valid for ten years from the registration date. If expired, the trade mark owner can still file a renewal within the grace period (ie, within six months after the expiry date). If no renewal is filed, even in the grace period, the mark will be invalid and the trade mark owner has no way to restore it. A new trade mark application will need to be filed if the trade mark owner still wants to protect the mark in China.

3.4 Updating or Refreshing Registrations

Once the trade mark is registered, it is not allowed to be updated or refreshed. A new application is required.

4. Applying for a Trade Mark Registration

4.1 Application Requirements

The formal requirements to register a trade mark include the following aspects:

- name and address of the applicant;
- clear trade mark sample in electronic form with high resolution;
- class and goods/services items covered – the applicant should use the standard descriptions to avoid an official action;
- power of attorney signed by the applicant, if the application is to be filed through a trade mark agent – according to the Chinese Trademark Law, a foreign applicant must entrust a legally established trade mark agency to file trade mark applications; and
- a copy of the commercial registry (certificate of good standing) for a company applicant, or a copy of passport or ID card for an individual applicant.

Any natural person, legal person or other organisation can apply for trade mark registration with the CNIPA.

Any sign capable of distinguishing the goods or services of one natural person, legal person or any other organisation from those of other persons shall be eligible for application for registration as a trade mark. At present, scent cannot be registered as a trade mark in China.

Multi-class applications are allowed, but are not suggested.

4.2 Use in Commerce Prior to Registration

In China, there is no requirement for use before registration is issued.

4.3 Series Mark Registrations

China does NOT allow for the registration of series marks, ie, a number of trade marks within the same application which resemble each other to some respect. Separate trade mark applications must be made for each.

4.4 Consideration of Prior Rights in Registration

During the examination of application for registration, the trade mark office only considers prior similar trade marks. If the application is rejected citing a similar trade mark, the letter of consent issued by the prior applicant is usually accepted as long as the two trade marks have certain difference. The rejection can be overcome by assignment of cited mark.

4.5 Consideration of Third-Party Rights in Registration

If the application is preliminarily approved, an opposition can be filed within a three-month opposition period. If the opposition is based on absolute reason, any party can file it. If the opposition is based on relative reasons, only a prior right owner can file it.

If the applicant files a large number of applications, beyond the normal use, or copies many other trade marks, a letter can be submitted to the CNIPA to prove bad faith before an application is approved, upon receipt of which the CNIPA might reject the application.

4.6 Revocation, Change, Amendment or Correction of an Application

After an application for registration of a trade mark is filed with the CNIPA, the applicant has right to withdraw the application or remove the registration. It is also allowed to delete goods. However, it is not allowed to change, amend or add goods to the trade mark sample during the application process or once registered.

4.7 Dividing a Trade Mark Application

It is possible to divide a trade mark application. However, a divisional application shall only be filed after a mark is partially refused by the CNIPA. The divisional application shall be filed with the CNIPA within 15 days after receipt of the refusal notification. A divisional application is irrevocable.

4.8 Incorrect Information in an Application

If information is provided incorrectly due to negligence, ie, incorrect name or address, the applicant can file a recordal of correction with the CNIPA to amend it.

However, if the information provided for trade mark filing is by improper means, according to Article 44 of the China Trademark Law, where a trade mark registration violates the provisions of Articles 4, 10, 11, 12 and 19 (4) of this law, or the registration of a trade mark was acquired by fraud or any other improper means, the examination division of CNIPA shall invalidate the registration at issue. Any organisation or individual may request that the Review Division make a ruling to invalidate such a registered trade mark.

4.9 Refusal of Registration

A trade mark will be refused by the CNIPA based on absolute grounds, such as descriptive character of the mark, lack of distinctiveness, or misleading character, malicious filing with no intent to use.

The absolute refusal grounds are mainly stipulated in Articles 4, 10, 11 and 12 of the China Trademark Law, as follows.

Article 4 states that natural persons, legal persons, or other organisations that need to obtain exclusive rights to their trade marks for their goods or services in the production and business operations shall apply to the CNIPA for trade mark registration. An application for the registration of a malicious trade mark not for the purpose of use shall be rejected.

Signs Not to Be Used as Trade Marks

Article 10 requires that the following signs shall not be used as trade marks:

- those identical with or similar to the State name, national flag, national emblem, national anthem, military flag, army emblem, military anthem, or decorations of the People's Republic of China, etc, and those identical with the name or symbol of a central government department of the State, or with the name of the particular place, or with the name or image of the symbolic building, where a central government department of the State is located;
- those identical with or similar to the State name, national flag, national emblem or military flag of a foreign country, etc, unless consent has been given by the government of the country;
- those identical with or similar to the name, flag or emblem of an international intergovernmental organisation, etc, unless consent has been given by the organisation or the public is not likely to be misled by such use;
- those identical with or similar to an official sign or hallmark indicating control and warranty, unless authorisation has been given;
- those identical with or similar to the name or symbol of the Red Cross or the Red Crescent;

- those having the nature of discrimination against any nationality;
- those having the nature of fraud, being liable to mislead the public about the characteristics of the goods such as the quality or the place of origin; or
- those detrimental to socialist morality or customs, or having other unhealthy influences.

The geographical name of an administrative division at or above the county level or a foreign geographical name well-known to the public shall not be used as a trade mark, unless the geographical name has another meaning or the geographical name is used as a component part of a collective mark or a certification mark; registered trade marks consisting of or containing geographical names shall continue to be valid.

Signs Not to Be Registered as Trade Marks

In Article 11, the following signs shall not be registered as trade marks:

- signs which consist exclusively of the generic names, designs, or model numbers of the goods in respect of which the trade mark is used;
- signs which consist exclusively of direct indications of the quality, primary raw material, functions, intended purposes, weight, quantity or other characteristics of goods; or
- other signs which are devoid of any distinctive character.

Signs mentioned in Article 11 may be registered as trade marks if they have acquired distinctive character through use and are capable of being readily identified and distinguished.

Article 12 says that, where a three-dimensional sign is the subject of an application for registration of a trade mark, the trade mark shall not be registered if it consists exclusively of the shape which results from the nature of the goods themselves, the shape of goods which is necessary to obtain a technical result, or the shape which gives substantial value to the goods.

4.10 Remedies against the Trade Mark Office

If the applicant is dissatisfied with the refusal, it may file a review with the Review Division. During the process of review, the applicant may take some actions against the cited marks to increase the chance of success, such as non-use cancellation and letter of consent.

4.11 The Madrid System

China participates in the Madrid system.

There is no procedure for notification of amendment for international trade mark registration designating China. If the goods/services are not accepted, the CNIPA will refuse the mark

and there is no review on refusal based on non-acceptance of goods/services description. The applicant has to re-designate the international registration into China.

5. Opposition Procedure

5.1 Timeframes for Filing an Opposition

An opposition can be filed within three months after the publication of a trade mark; this is non-extendable. For international trade marks designating China, the deadline for filing the opposition is the last day of the third month since its publication by WIPO, which is non-extendable. Supplementary evidence can be filed within three months from the filing of opposition.

After filing of the opposition, the CNIPA usually issues an official filing receipt in approximately three months. It takes the CNIPA 12 months to make the decision on opposition. The term can be extended for another six months.

5.2 Legal Grounds for Filing an Opposition

An opposition can be filed based on absolute grounds, such as malicious filing with no purpose of use, lack of distinctiveness, being misleading as to the characteristics of the goods/services, having bad social influence, etc. The opposition can also be filed based on prior rights such as prior trade mark right, well-known trade mark, prior-use right, etc.

5.3 Ability to File an Opposition

Any person can file the opposition based on absolute grounds. Only a prior right-owner or an interested party can file opposition based on prior rights.

A Chinese opponent can file the opposition either personally or through a trade mark agent recorded with the CNIPA. A foreign opponent must file opposition through a trade mark agent.

The official fee for filing an opposition is CNY500 (approximately USD76). The attorney fee is usually charged depending on the complexity of the case, working hours required, etc.

5.4 Opposition Procedure

After an opposition is filed, the CNIPA will forward the opposition grounds and evidence to the opposed party and request the opposed party to make a response within 30 days from receipt of the notification. The opposed party has an additional three-month period to supplement evidence. There is no evidence-exchange procedure for opposition.

The CNIPA will not forward the grounds and evidence filed by the opposed party to the opponent for counter arguments. Instead, the CNIPA will make a decision on opposition directly.

5.5 Legal Remedies against the Decision of the Trade Mark Office

After the decision on opposition is made, only the opposed party is allowed to file an appeal. Since it is an administrative procedure, no award will be involved.

6. Revocation/Cancellation Procedure

6.1 Timeframes for Filing Revocation/Cancellation Proceedings

If the revocation is based on absolute reason, there is no limitation to file. If the revocation is based on relative reasons, it can be filed within five years from the date of registration. Where the registration has been made in bad faith, the owner of a well-known trade mark shall not be bound by the five-year time limit.

6.2 Legal Grounds for Filing a Revocation/Cancellation Proceeding

Where a registered trade mark has no effectiveness or has a bad social influence, or the registration of a trade mark has been acquired by fraud or any other unfair means, the CNIPA shall declare the registered trade mark invalid; any other organisation or individual may request the CNIPA to declare a mark invalid.

Where a registered trade mark is a copy, imitation or translation of a prior well-known trade mark; has a misleading geographical indication; the registrant is an agent or has another relationship with the true owner of the mark; the registered mark is similar to a prior registered or applied mark on similar goods/services; or it is an infringement of another's prior right or a copy of another's mark which has been used and has gained certain reputation, the earlier right-owners or any interested party may, within five years from the date of registration, request the CNIPA to declare the registered trade mark invalid. Where the registration has been made in bad faith, the owner of a well-known trade mark shall not be bound by the five-year time limit.

Where a trade mark registrant, in using a registered trade mark, alters the registered trade mark, or changes the name or address of the owner of a registered trade mark, or other matters contained in the registration, without the prescribed procedure, the CNIPA shall order it to make corrections within a specified time-limit, or the registered trade mark can be cancelled by the CNIPA, if no corrections are made at the expiry of the specified time-limit. Where a registered trade mark has become a generic name for its designated goods, or has not been used for an uninterrupted period of three years without justified reasons, any entity or individual may request the CNIPA to cancel the registered trade mark.

If the registration is obtained with improper means, anyone can file revocation.

6.3 Ability to File a Revocation/Cancellation Proceeding

If the revocation is based on absolute reasons, any one can file it. If the revocation is based on relative reasons, only a prior right owner can file it.

6.4 Revocation/Cancellation Procedure

Revocation or cancellation can only be brought before the Examination Division or Review Decision of the CNIPA. If dissatisfied with the decision on such a revocation/cancellation of the Review Decision, an administrative litigation can be filed with the Beijing Intellectual Property Court.

6.5 Partial Revocation/Cancellation

A partial revocation is allowed.

6.6 Amendment in Revocation/Cancellation Proceedings

After the revocation is filed, it can also be withdrawn any time before the decision is made.

6.7 Combining Revocation/Cancellation and Infringement

Revocation/cancellation is examined case-by-case. For revocation with the same nature (the same application, same registrant of the disputed mark, same supporting evidence) and filed at the same time, it is possible to request the examiner to examine them together. However, decisions are still made on a case-by-case basis.

Revocation/cancellation and infringement are not heard together. The court for infringement has discretion to determine whether the court will wait for the decision on revocation/cancellation.

7. Initiating a Lawsuit

7.1 Timeframes for Filing Infringement Lawsuits

The Interpretation of the Supreme People's Court Concerning the Application of Laws in the Trial of Cases of Civil Disputes Arising from Trademarks states that the trade mark infringement claims shall be brought within three years, counting from the day when the trade mark registrant or the interested right holder knows or should have known about the infringement and the obligor. If the trade mark registrant or the interested party initiates the civil action after the three-year's statute of limitation, and if the infringing act continues at the time when the action is initiated, the people's court shall rule that the

defendant stop the infringement within the validity period of the trade mark exclusive right. The compensation for infringement shall be calculated till three years before the day when the right holder files the civil litigation with the people's court.

7.2 Legal Grounds for Filing Infringement Lawsuits

A trade mark owner could pursue infringement through legal proceedings in the people's court, or request the competent administration to take raid actions against the infringer. The protections on registered trade marks and unregistered trade marks are different in the PRC. The owners of the registered trade marks have exclusive trade mark right, which is granted by the Trademark Law.

Unregistered trade marks can only be protected under certain circumstances based on "prior use". If the unregistered trade mark reaches the "well-known" status, it could be protected in accordance with the Trademark Law. If it obtains "certain influence", it could be protected in accordance with the Anti-Unfair Competition Law.

A trade mark owner can bring claims for dilution or cybersquatting. The claims for dilution could be brought when the trade mark owner claims that the trade mark reaches a well-known status. For cybersquatting, it is regulated in the Interpretation of the Supreme People's Court on Application of Laws in the Trial of Civil Disputes Over Domain Names of Computer Network.

7.3 Parties to an Action for Infringement

The plaintiff of an action for trade mark infringement could be the trade mark registrant, the licensee to a contract for the licensed use of registered trade marks and the lawful heirs of the trade mark registrant. The defendant of an action for trade mark infringement would be the manufacturer and distributor of the infringing products.

Both the exclusive and the non-exclusive licensee could file an action for infringement. Under Trade Mark Law, there are three kinds of licensees based on the contents of the licence agreement: the monopolised licence, the exclusive licence and the ordinary licence. The monopolised licensee could initiate an action with the people's court. The exclusive licensee could initiate a civil action with the trade mark registrant or file an action on its own under the condition that the trade mark registrant refuses to initiate an action. The ordinary licensee could file the action with an explicit authorisation from the trade mark registrant.

As indicated in 7.2 **Legal Grounds for Filing Infringement Lawsuits**, it is possible for a trade mark owner to take action to stop infringement before its mark is registered, if the unregis-

tered trade mark obtained the well-known status or reached the status of having "certain influence" based on prior use.

7.4 Representative or Collective Actions

Regulations on representative and collective actions are included in our Civil Procedure Law. For joint litigation, it is required that one side or both sides of a civil action consist of two or more parties, the subject matter of action for each party is same or is of the same kind, the people's court considers that the disputes of all the parties could be tried concurrently and all related parties agree. Trade mark infringement litigations are handled in accordance with the Civil Procedure Law, but there is hardly any representative or collective actions for trade mark proceeding as it could not reach for requirements for joint litigation.

7.5 Prerequisites and Restrictions to Filing a Lawsuit

There is no prerequisite to initiate an infringement-related civil lawsuit. It is suggested that client initiate the trade mark infringement litigation based on a registered trade mark. If client does not have any registered trade mark, client shall prepare documents proving the reputation of the trade mark obtained through prior use as indicated in 7.2 **Legal Grounds for Filing Infringement Lawsuits**, otherwise the unregistered trade mark might not be protected. Most remedies available are for registered trade marks which is the main subject to be protected under Trade Mark Law. For unregistered trade marks that have obtained "certain influence", it could be protected under Anti-Unfair Competition Law.

The defendant could argue that the trade mark owner's claims are groundless, the infringement litigation is filed as misuse of trade mark right or belongs to unfair competition in nature. The people's court would determine whether the defendant's argument could be supported. As regulated in the Trade Mark Law, the trade mark owner's claims might not be supported when filed against "fair use" and "prior use" of marks. If the registered trade mark has not been in use for three consecutive years, the claims for compensation of the damages might not be supported. If the trade mark is registered in bad faith and the civil litigation is filed in bad faith, the claims might not be supported by the people's court.

7.6 Initial Pleading Standards

The standards for initiating a lawsuit is as follows:

- the plaintiff is a citizen, legal person or any other organisation with a direct interest in the case;
- there is a specific defendant;
- there are specific claims, facts and reasons; and

- the case is within the scope of civil actions accepted by the people's courts and under the jurisdiction of the people's court in which the action is initiated.

There are no special provisions for lawsuits in trade mark proceedings that differ from non-intellectual property proceedings. As the facts and reasons are required to be specific, the plaintiff in trade mark infringement litigation shall collect evidences proving the infringements through investigations and by means of notarised preservation of online information as well as notarised purchase. It is also suggested that the plaintiff submit evidence proving the reputation and wide use of the trade mark in China.

It is possible to supplement pleadings with additional arguments after the acceptance of a case and it shall be before the end of court debate. It is also possible for a defendant in a trade mark action to initiate a counterclaim or a lawsuit in response. If the counterclaim filed by the defendant and claims of plaintiff are based on the same legal relationship and there is causation between such claims, or the counterclaim filed by the defendant and claims of plaintiff are based on the same facts, the people's court shall try them concurrently.

7.7 Lawsuit Procedure

The people's courts apply a "final after two trials" system. The first instance of trade mark infringement cases is generally handled by a basic people's court; two exceptions are that the first instance of a major foreign-related intellectual property case and the case involving the recognition of a well-known trade mark are handled by an intermediate people's court. The second instance is handled by the people's court at the next higher level. The party who deems that an effective judgment or ruling is erroneous may file a petition for retrial with the people's court at the next higher level.

During the recent years, IP tribunals have been established in each province. The first instance of trade mark infringement case involving recognition of well-known trade mark shall be filed with the IP tribunal.

The costs for investigations into the possible defendant, as well as the costs for evidence collecting – especially for the notarised preservation of the relevant evidences – are the costs typically arising before filing a lawsuit.

The parties in trade mark litigation are not required to be represented by a lawyer. The parties may retain one or two litigation representatives, who could be lawyers or legal service workers, close relatives or staff members and citizens recommended by the community or an entity related to a party or citizens recom-

mended by a relevant social group. It is common that the parties retain a lawyer in trade mark litigations.

7.8 Effect of Trade Mark Office Decisions

The CNIPA's decisions that have influence on the registration status of the registered trade marks will have influence on infringement actions. The reason is that unregistered trade marks could only be protected as obtained "well-known" status or with "certain influence" and most of the infringement actions are initiated based on registered trade marks in the PRC.

If CNIPA issues the decision to cancel a registered trade mark, the right to use such a registered trade mark exclusively shall be terminated from the date of publication. When the registered trade mark is cancelled, the infringement action might not be initiated based on this cancelled mark.

If CNIPA issues a decision to declare invalidation of a registered trade mark, the right to use such a registered trade mark exclusively shall be deemed void at the inception. The effect of the judgment, ruling, or consent judgment made and enforced by a people's court in a trade mark infringement case before the trade mark is declared to be invalid will not be influenced. However, the trade mark registrant shall compensate others for losses caused by its bad faith.

7.9 Declaratory Judgment Proceedings and Other Protections for Potential Defendants

The alleged infringer could initiate a lawsuit requesting confirmation of non-infringement. The lawsuit for confirmation of non-infringement could be filed by a specific party which is warned of infringement by an intellectual property right-holder who fails to initiate a lawsuit within a reasonable period.

In a trade mark infringement case, the defendant could initiate trade mark cancellation or invalidation action with the CNIPA against the registered trade mark involved in the trade mark dispute. Generally, the court will not suspend the case and wait for the result of the cancellation or invalidation action. In the meantime, the defendant could prepare evidences proving its "fair use" of the relevant trade mark, the "non-infringement defence" or the "prior use" defence.

The defendant could not require a bond to be posted by the trade mark owner. While if the plaintiff files an application with the people's court for pre-action preservation and litigation preservation measures, the people's court would require the plaintiff to file a bond.

7.10 Counterfeiting

Counterfeit is considered as a kind of trade mark infringement act. There are special statutes concerning dealing with the cases

involving counterfeit. It is regulated that while hearing trade mark dispute case, the people's courts shall, at the request of the right holders, order the destruction of goods bearing counterfeit registered trade marks, except in special circumstances, and shall order the destruction of materials and tools that are mainly used to manufacture such goods without compensation; or, under special circumstances, prohibit the aforementioned materials and tools from entering commercial channels without compensation. Products bearing counterfeit registered trade marks shall not enter commercial channels after only removing the marks.

For the manufacturer and seller of the counterfeit goods and for those who manufacture and sell the labels of other's registered trademark, if crime is constituted, in addition to compensating for the loss of the victim, the infringer shall also bear criminal responsibility in accordance with law.

8. Litigating Trade Mark Claims

8.1 Special Procedural Provisions for Trade Mark Proceedings

There are no special provisions for lawsuits in trade mark proceedings that differ from non-intellectual property proceedings. Trade mark infringement litigations are handled in accordance with the Civil Procedure Law of the PRC. Trade mark cases are determined by collegial bench, which may be formed by judges and jurors or by only judges. There must be an odd number of members of a collegial bench. Civil cases tried by simplified procedures shall be tried by a single judge.

Generally, the parties do not have any influence on who is the decision-maker. However, under certain circumstances, the parties could request disqualification of the judge, court clerk, interpreters, identification or evaluation expert, and surveyor, either verbally or in writing.

8.2 Requirement to Establish Use of a Sign as a Trade Mark

It is necessary to establish that the defendant has used the sign as a trade mark. In the Trademark Law of the PRC, it is regulated that "use of a trade mark" means using a trade mark on goods, on the packages or containers of goods, in the trading documents, or for advertisements, exhibitions, and other commercial activities for the purpose of identifying the origin of goods. Trade mark infringement acts are defined based on the "use of a trade mark". Nominative and descriptive use is a defence for "trade mark fair use".

8.3 Factors in Determining Infringement

At least two factors must be taken into consideration in determining whether the use of a sign constitutes trade mark infringement, which are similarity of signs (trade marks) and similarity of goods or services. The following principles shall be followed when determining whether the signs are similar or not:

- they should be judged according to the common perception of the relevant public;
- they should not only be compared in overall appearance, but also in the main part of the marks – the objects should be compared in isolation; and
- distinctiveness and reputation shall be taken into consideration.

Similar goods mean the goods are similar in respect of function, usage, manufacturing section, sales channel and consuming target, etc, or the relevant consumers deem they have certain association and are likely to be confused. Similar services mean the services are similar in respect of service purposes, content, manner, target, etc, or the relevant consumers deem they have certain associations and likely to be confused.

8.4 Elements of Other Trade Mark Claims

According to Trade Mark Law, the elements of trade mark claims or the acts of trade mark infringement are listed as follows:

- uses a trade mark that is identical with a registered trade mark in relation to identical goods without the consent of the owner of the registered trade mark;
- uses a trade mark that is similar to a registered trade mark in relation to similar goods, or uses a trade mark that is identical with or similar to a registered trade mark in relation to similar goods, without the consent of the owner of the registered trade mark;
- sell goods that are in infringement of the exclusive right to use a registered trade mark;
- counterfeits, or makes without authorisation, representations of a registered trade mark of another person, or offers for sale such representations;
- changes a registered trade mark and put goods bearing the changed trade mark on market without consent of the owner of the registered trade mark;
- deliberately provide conveniences for infringement of the exclusive right of trade marks of others, and help others to implement the infringement of exclusive rights of trade marks; and
- causes, in other respects, prejudice to the exclusive right of another person to use a registered trade mark.

8.5 Effect of Registration

The Trademark Law of the PRC protects registered trade marks and unregistered trade marks are under protection only in special situations as indicated in 7.2 **Legal Grounds for Filing Infringement Lawsuits**. Based on a registered trade mark, the trade mark owner could directly file a litigation against infringement while for unregistered trade mark, evidences proving “prior use” and reputation of the trade mark shall be submitted. After obtaining the trade mark registration, the trade mark owner shall keep using the trade mark, otherwise the trade mark might be cancelled for “non-use” of three consecutive years. With regard to invalidation procedure, the trade mark registered for more than five years is comparatively stable and third party needs to prove the registration is in bad faith in order to invalidate it.

8.6 Defences against Infringement

There are procedural defences and substantive defences. For procedural defences, the alleged infringer could file opposition against jurisdiction, challenge the qualification of the plaintiff, prove the legitimate sources of the accused infringing goods, etc.

Substantive defences include “fair use” or “prior use” as regulated in Article 59 of the Trade Mark Law. The alleged infringer could also challenge the effectiveness of the trade mark right, as the status of the trade mark right might be influenced by the official decisions. If the trade mark is cancelled or invalidated during the litigation, it will influence the result of the litigation against the trade mark infringement.

Defences against trade mark infringement also include “non-infringement” defences, claiming both the trade marks and the goods involved are not identical or similarly. Besides, the alleged infringer could challenge the use status of the trade mark involved. If the trade mark registrant could not prove the use of the trade mark within three years before filing the infringement litigation, the alleged infringer will not bear the liability for compensation.

8.7 Obtaining Information and Evidence

In accordance with Article 61 of the Civil Procedure Law of the PRC, lawyers and other agents ad litem have the right to investigate and collect evidence, and can consult materials of the case. The scope of and measures for consulting materials related to a case shall be prescribed by the Supreme People’s Court.

In accordance with Article 64 of the Civil Procedure Law of the PRC, a people’s court shall investigate and collect evidence if a party and its lawyers and other agents ad litem are unable to collect due to objective reasons and evidence that the people’s court deems necessary for trying a case.

In accordance with Article 67 of the Civil Procedure Law of the PRC, a people’s court shall have the authority to investigate and collect evidence from the relevant entities and individuals, who shall not refuse to co-operate with such investigation and evidence collection.

8.8 Role of Experts and/or Surveys

According to the regulations, the parties concerned may apply to the people’s court to have one or two experts to appear in court to offer answers to the specialised questions relating to the case. The judges and parties concerned may interrogate the experts that appear in court. Upon the approval of the people’s court, the experts – as applied for by each party concerned – may express their opinions on the issues concerned in the case.

The experts and/or survey regarding likelihood of confusion, secondary meaning, and the generic quality of the mark are considered as ordinary evidence which is not decisive. The courts will not make decision only based on the experts’ opinions. Other supporting evidences shall also be submitted.

8.9 Trade Mark Infringement as an Administrative or Criminal Offence

Trade mark infringement can constitute an administrative or criminal offence. It is clearly regulated in the Trade Mark Law that the competent administration (the administration for market regulation) shall have the authority to investigate and punish according to the law any infringement upon the right to use a registered trade mark exclusively; those suspected of a crime shall be transferred to the judicial authority in a timely manner according to the law.

Administrative Offence

Regarding the administrative offence, the trade mark registrant could file a complaint with the administration for market regulation, when trade mark infringement disputes arise. If the administration handling the dispute determines that an infringement is constituted, it:

- shall order immediate cessation of infringement;
- shall confiscate and destroy the infringing goods and the tools specifically used to manufacture the infringing goods and counterfeit representations of the registered trade mark; and
- may impose a fine of not more than five times the illegal business revenues if the amount of illegal business revenues reaches CNY50,000, or a fine of not more than CNY250,000 if there is no illegal business revenue or the amount of illegal business revenues is less than CNY50,000.

Any person who commits trade mark infringement acts more than twice within five years or has other serious circumstances

shall be given heavier punishment. If any party unknowingly sells goods that have infringed the exclusive right to use a registered trade mark and can prove that the goods were obtained from a legitimate channel and can indicate the suppliers of the goods, the administration for market regulation shall order them to stop selling the infringed goods.

Criminal Offence

Regarding the criminal offence, it includes the following three circumstances:

- when without being licensed by the trade mark-owner, a party uses a trade mark identical with the registered trade mark on identical goods, if any crime is constituted, the party shall be subject to criminal liability according to the law, in addition to compensating the victim for losses;
- when a party forges or manufactures without authorisation the labels of a registered trade mark of another party or sells the labels of a registered trade mark forged or manufactured without authorisation, if any crime is constituted, the party shall be subject to criminal liability according to the law, in addition to compensating the victim for losses; and
- when a party knowingly sells goods on which a registered trade mark is falsely used, if any crime is constituted, the party shall be subject to criminal liability according to the law, in addition to compensating the victim for losses.

8.10 Costs of Litigating Infringement Actions

The typical costs include investigations fees, notarisation fees, translation fees paid to the qualified translation firm (if documents in foreign languages are involved), attorney fees and expenses, court fees.

9. Remedies

9.1 Injunctive Remedies

The interim or preliminary injunctions are available. The application for injunctions could be filed with the court under the condition that the trade mark registrant or an interested party has evidence proving that another person is engaged in (or will soon engage in) an act of infringement of the former's exclusive right to use their registered trade mark and that (unless the act is stopped in a timely manner) irreparable injury will be caused to their legitimate rights and interests. The application could be filed with the competent court before instituting legal proceedings or in the middle of legal proceedings, requesting for measures prohibiting the act or preserving the assets in accordance with relevant laws.

The applicant shall provide security if ordered by the court. After accepting the application, the people's court must issue

a ruling within 48 hours under urgent situations; if it rules to take a preliminary injunction/preservative measure, the measure shall be executed immediately. For application filed before instituting the legal proceedings, the applicant shall initiate an action or apply for arbitration in accordance with law within 30 days after the people's court takes the preliminary injunction/preservative, otherwise the people's court shall remove the measures.

9.2 Monetary Remedies

The amount of damage awarded for trade mark infringement shall be assessed on the basis of the actual losses suffered by the right-holder because of the infringement. Where it is difficult to determine the actual losses, the amount may be assessed on the basis of the profits the infringer has earned because of the infringement. Where it is difficult to determine the losses the right-holder has suffered or the profits the infringer has earned, the amount may be assessed by reference to the appropriate multiple of the amount of using the registered trade mark under a contractual licence.

The amount of the damage shall also include the reasonable expenses of the right-holder incurred in stopping the infringing act. Where it is difficult to determine the losses suffered by the right-holder, the profits the infringer has earned and the fees of licensing a registered trade mark, the people's court shall grant a compensation not exceeding CNY5 million, according to the circumstances of the act of infringement.

9.3 Impoundment or Destruction of Infringing Articles

The people's court is not likely to permit remedy of impoundment or destruction of infringing products. When hearing trade mark infringement case, the people's court may decide that the infringer shall bear the responsibility to stop the infringement, remove the obstruction, eliminate the danger, compensate for losses, eliminate of the impact, etc, and may make a decision of civil sanctions including imposing a fine, confiscating properties for producing the infringing goods, forged marks and the materials, tools, equipment mainly used to produce infringing goods.

9.4 Attorneys' Fees and Costs

The plaintiff could request that the defendant shall bear the reasonable costs in the litigation. If the plaintiff wins the case, the judge could request the defendant to bear a certain amount of the reasonable costs, including the attorneys' fees. It is at the judge's discretion to decide the amount of reimbursements based on the evidence submitted by the plaintiff.

9.5 Ex Parte Relief

The trade mark owner could seek relief without notice the defendant. Notice is never required. If the trade mark owner sends a warning letter to the infringer and the infringer refuses to stop the infringement act, the warning letter could be used as a evidence to prove the infringer's bad faith as it continuous the infringement with full awareness.

9.6 Rights and Remedies for the Prevailing Defendant

Generally speaking, if a defendant prevails in the trade mark infringement case, the court will declare that the defendant is not guilty of trade mark infringement. If the defendant would like to request compensation from the plaintiff, the defendant shall file a counterclaim or initiate new litigation for compensation.

9.7 Customs Seizures of Counterfeits or Criminal Imports

The Chinese legal system provides for customs seizure of counterfeits. China started to adopt customs protection of intellectual property rights (IPRs) in 1995. For the purpose of customs protection, the owner of IPRs – which might include trade mark, patent and copyright being already approved, granted or registered by competent state authorities – should record its IPRs with the China General Administration of Customs on the basis of a certificate for each recordation.

If a designated IPR has been successfully recorded with the China General Administration of Customs, the information of the IPR will be added to the official computer system of the China General Administration of Customs to be shared by every customs office within Chinese territory. When customs officers carry out routine inspection on imported or exported goods, they will pay more attention to the goods bearing the recorded IPRs. If customs suspect some goods have infringed the recorded IPR, it will notify the IPR owner and, upon application filed by the IPR owner with remittance of the required security bond, customs will detain the suspected goods. The security bond will be based on the value of the suspected goods.

9.8 Different Remedies for Different Types of Trade Marks

There are no different type of remedies for different types of trade marks.

10. Resolving Litigations

10.1 Options for Settlement

The defendant could file an application for mediation and both sides of a civil action may reach a settlement themselves.

When a people's court conducts mediation, it may be conducted by one judge or by the collegial bench; mediation shall be conducted on the spot, as much as possible. When a mediation agreement is reached, the people's court shall prepare a consent judgment. A consent judgment shall state the claims, facts of the case and results of mediation. The judges and court clerk shall affix their signatures and the people's court shall affix its seal to a consent judgment, which shall be served on both sides. Once a consent judgment is signed by both sides, it becomes legally binding.

10.2 Prevalence of ADR

Alternative dispute resolution (ADR) is not a compulsory element of settling a trade-mark infringement case. In accordance with the Trademark Law of the PRC, when trade mark infringement dispute arises, the parties concerned shall resolve the dispute through negotiation; if they are reluctant to resolve the dispute through negotiation or the negotiation fails, the trade mark registrant or an interested party may initiate a civil litigation in a people's court or request the administration for market regulation to handle the dispute.

Disputes concerning trade mark matters can be handled/resolved through arbitration, if agreed by the opposing parties.

10.3 Other Court Proceedings

According to the law, if the current cases depend on the results of the trial of another case which has not been concluded, the current cases shall be suspended.

In the meantime, the collegial bench of the current proceeding has the right to decide whether to suspend the current case to wait for the result of another proceeding.

11. Appeal

11.1 Timeframes for Appealing Trial Court Decisions

If any party is not satisfied with the judgment of the first instance, it shall have the right to file an appeal with the people's court at the next higher level within 15 days from the date of service of the written judgment. The original trial people's court shall, within five days after receiving a written appeal, serve the copies of the written appeal on the opposing parties, and the opposing parties shall, within 15 days after receiving the copies, submit their written statements of defence.

The original trial people's court shall, within five days after receiving the written statements of defence, serve the copies of the written statements of defence on the appellant. After receiving both the written appeal and the written statements of

defence, the original trial people's court shall, within five days, transfer them along with the entire case file and evidence to the people's court of second instance.

According to the Civil Procedure Law of the People's Republic of China, a people's court shall complete the trial of an appeal case against a judgment within three months after the appeal is docketed. Any extension of the aforesaid period under special circumstances shall be subject to the approval of the chief justice of the people's court.

A people's court shall issue a final ruling for an appeal case against a ruling within 30 days after the appeal is docketed.

11.2 Special Provisions for the Appellate Procedure

The appellate procedure of a trade mark proceeding is generally the same as the appellate procedure for other civil proceedings.

11.3 Scope of the Appellate Review

The people's court of second instance would review both the facts of the case and the application of law in relation to the claims in appeal.

The people's court of second instance would not refer to issues not included in the party's claims, unless the first-instance judgment violates the prohibition of the law, or harms the national interest, the public interest, or the legitimate rights and interests of others.

12. Trade Marks and Other Intellectual Property

12.1 Copyright and Related Rights

A trade mark can also be protected by copyright if it satisfies the requirements of the Copyright Law. If a party claims copyright over a mark, the people's court shall, in accordance with the relevant provisions of the Copyright Law, determine whether the claimed object constitutes a work, whether the party is a copyright owner or other interested party with the right to claim copyright.

12.2 Industrial Design

If a trade mark is also granted with patent right as a design patent, it could be protected by industrial design laws, otherwise it could not be protected by industrial design laws.

12.3 Rights of Publicity and Personality

There is no special regulation on using one's own surname (or name) as a mark. It is regulated that in certain domains using the name of a public figure to file a trade mark application would

be regarded as "having any other adverse effect" – which is prohibited from registration in accordance with Article 10 of the Trademark Law.

12.4 Unfair Competition

Our jurisdiction has Anti-unfair Competition Law that could affect trade marks. It is generally considered that unregistered trade mark could be protected under certain conditions in accordance with the Anti-unfair Competition Law. The product name with certain influence in the Chinese market, the trade name as well as domain name are under the protection of the Anti-unfair Competition Law.

13. Additional Considerations

13.1 Emerging Issues

"Punitive damages" in trade mark infringement cases is enhanced. Some provincial courts issued further explanations on implementation of "punitive damages" which is regulated in the 2013 Trademark Law. Another key issue is to fight against bad faith registration. It is regulated in 2019 Trade Mark Law that no application for trade mark registration may infringe upon the existing prior rights of others, and bad-faith registrations by illicit means of a trade mark with a certain reputation already used by another party shall be prohibited.

13.2 Trade Marks and the Internet

Internet service provider infringes the civil right or interest of another party through network shall assume the infringement liabilities. If network users use network services to commit infringements, the infringed party has the right to notify the network service provider to take necessary measures such as deleting, blocking, and disconnecting links. If the network service provider fails to take necessary measures in time after receiving the notice, it shall be jointly and severally liable with the network user for the enlarged part of the damage.

The service provider, mainly online platforms, will require for trade mark registration certificates to remove goods which are claimed by the trade mark owner as infringing goods.

13.3 Trade Marks and Business

It is required that some products must bear a registered trade mark. For example, it is regulated that cigarettes, cigars and packed cut tobacco shall not be produced and sold before obtaining a registered trade mark to be used on the products. Chinese companies now have a strong sense of IP protection, therefore even it is not required to have a registered trade mark, most Chinese companies would file applications for registration of trade marks in order to protect their rights and interests.

CCPIT Patent and Trademark Law Office is one of the oldest and one of the largest full-service intellectual property law firms in China. The firm has 294 patent and trade mark attorneys, among whom 87 are qualified as attorneys-at-law. The firm provides consultation, prosecution, mediation, administrative enforcement and litigation services relating to

patents, trade marks, copyrights, domain names, trade secrets, trade dress, unfair competition and other intellectual property-related matters. Headquartered in Beijing, the firm has branch offices in New York, Silicon Valley, Tokyo, Munich, Madrid, Hong Kong, Guangzhou Shenzhen and Shanghai.

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