



IP, IT and E-Commerce Bulletin

Protection of IP Rights in China

It is no secret that the protection of IPR in China is an uphill struggle and, save in respect of the major brands, the effective enforcement of rights is a near impossibility. However, the position of rights holders is gradually improving as the USA and other major commercial powers maintain continuous pressure on China to clean up its act and Chinese industry itself demands better IPR protection from its government. In years to come it is hoped that a reliable enforcement regime will be available. Until then, any company intending to place a footprint in China should consider taking some of the following legal and commercial actions:

.cn Domain Names

For minimal cost, these are worth registering in respect of your company name and key brands. Doing so will help to minimise the risk of third parties registering the domain names to gain business from your brand or bombarding you with e-mails to purchase the domain names.

Trade Marks

Unlike in the UK, unregistered trade marks are not protected in China, unless you are a major international brand. Not only this, but China operates a "first to file" system, regardless of prior use of the mark in the country. Therefore, if you intend to trade in China consider registering your brand at an early stage together with the Chinese translation. Note that locals will generally refer to the translation of your trade mark and local companies will be quick to use and register the mark and its translation themselves if you fail to do so.

As in the UK, trade mark registrations cover distinctive marks, logos or symbols and must not be descriptive of the goods or services for which the registration is sought. As the expertise and reliability of trade mark agents in China is varied, we recommend that you work with your local trade mark agents in appointing a Chinese agent.

Patents

Patent protection in China covers:

- (a) **Invention Patents** - the equivalent of the UK patent, governed by the PCT patent regime. Invention patents take approximately 3 years to register and give a full term of protection of 20 years. The requirements for patentability are broadly the same as those under English law: novelty; inventive step which makes notable progress on the existing technology; and practical applicability. Exclusions to patentability are also similar including software, unless combined with a computer or computer technique intended to solve a technical problem
- (b) **Utility Models** - protecting novel solutions for the shape and/or structure of a product, taking approximately a year to register and providing 10 years protection
- (c) **Design Patents** - designs for shape, pattern and/or colour of a product and are broadly equivalent to the UK's registered designs, taking about a year to register and providing 10 years protection.

Copyright

As a member of the Berne Convention, China recognises copyright subsisting in works protected by English copyright law. Consequently, copyright is an automatic right and protects original literary, artistic, dramatic and musical works. As in the UK, it does not protect ideas. The term of protection is 50 years from the end of the year of initial publication for corporates and the life of the author plus 50 years for individuals.

Other than reliance on registered and automatic rights, a number of commercial actions can be taken by companies keen to protect their IPR in China, such as only working with trusted partners, undertaking regular visits, limiting disclosure of IPR and requiring partners and their key individuals to sign NDAs.

Summary

It is safest to assume that IPR are likely to be infringed when doing business in China and therefore to take preventive action from the outset.

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Protecting your designs in France

A design or model which has been created outside France can enjoy copyright protection in France even if it has not been registered or has only been registered within its country of origin. To obtain such protection, the design or model must be an original work created by the author. To be noted is that copyright protection in France applies to all creative works of the mind, whatever their kind, form of expression, merit or purpose as long as the work is original.

Should a copyright owner wish to protect its rights in France, it should seize any evidence of infringement wherever it is occurring. The best method of taking such action is by petitioning the president of the *tribunal de grande instance* who will normally provide an order authorising a bailiff to carry out the seizure on the same day. In such circumstances, no payment into court is demanded from the foreign owner.

Following the seizure of evidence of infringement, the foreign owner should bring an action either before the commercial court or the *tribunal de grande instance*, depending on whether the defendant is a natural or a legal person. The owner may choose between summary proceedings (if urgency can be proven), which normally takes 4 to



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6 months, or a plenary action, which normally takes 8 to 12 months. Proceedings in urgent matters are even faster (taking 1 to 2 months) and allow infringement to be stopped almost immediately but the case must still be referred to the courts within the framework of either summary proceedings or a plenary action in order to obtain a ruling on the merits of the case and damages.

Whichever type of action is chosen, an owner can also claim "unfair competition" in addition to the alleged infringement. Such a claim must be based on facts separate from the alleged infringement, for example, a slavish copy or a significantly lower price than the authentic goods.

There are several different kinds of remedies available to a rights owner, such as the cessation of the unlawful acts, the destruction and return of infringing copies, judicial publication and damages granted on the grounds of both the alleged infringement and unfair competition. Infringement damages typically include lost earnings and pecuniary losses due to depreciation and popularisation.

Only the foreign owner or his assignees can bring an infringement action. An exclusive distributor based in France, for example, could not bring such action, despite suffering losses. It could, however, claim unfair competition and thereby join any proceedings initiated by the foreign owner.

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Increased IPR protection in Spain

In June 2006, Directive 2004/48/EC was implemented into Spanish Law via Law 19/2006, thereby harmonizing Spanish intellectual property law with EU requirements and improving the protection afforded to rights holders.

The law relating to trade marks, designs, patents and copyright, and the procedures for exercising and defending these rights have been substantially modified. The rights of aggrieved parties to information about the source and distribution of infringing products, to evidence of infringement and to redress (including moral damage) have improved. Also, measures for securing evidence and for preventing infringement may now be directed not only against the primary infringer, but also against any intermediaries participating in the manufacturing or distribution chain.

The investigative measures that may now be taken before launching a judicial action (the "Preliminary Inquest") have also expanded to include requests for information about the origin and distribution of



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the infringing products (including the identity of manufacturers, distributors, and wholesalers) and about the number of products stored or sold and sale prices. An aggrieved party can also now require the production of documentation to confirm any information provided and can obtain search warrants and/or declarations of assumed accuracy for his own submitted documentation in circumstances of non-compliance.

The law on securing evidence has also been reformed such that an aggrieved party can now request detailed proof of merchandise and samples and can, in certain cases, seize the tools used for infringement. A court will usually hear a respondent before granting these measures but not if particular urgency can be established.

In addition to the above procedural changes, Law 19/06 also substantially alters the underlying law pertaining to copyright, trade marks, designs and patents. This article concentrates on changes to trade mark law, although practically identical changes have been made to the other rights. Law 19/06 now allows a rights holder to seize and destroy not only infringing articles, but also the means used to commit the infringement (e.g. manufacturing moulds, printing plates). He can also now undertake these actions against intermediaries and can choose to take the materials seized as part of his damages award.

The categories of damages available have also expanded. Now, an aggrieved party can claim compensation for both losses suffered and benefits missed out on. He can also claim moral damages resulting from the defective manufacture or inferior presentation of the products and any expenses incurred in obtaining evidence of infringement.

These changes are a welcome improvement to the position of intellectual property owners in Spain.

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David beats Goliath: The Supreme Court of Canada favours small businesses

The Supreme Court of Canada ("SCC") has recently issued two important and eagerly awaited decisions against owners of famous trade marks. The decisions are consistent with the "Pink Panther" decision, rendered by the Federal Court of Appeal in 1998 (*Pink Panther Beauty Corp. v United Artists Corp.*). In that case, it was held that use of the trade mark *Pink Panther* in connection with hair care and beauty products and related services did not create a reasonable likelihood of confusion with the famous trade mark *The Pink Panther* owned by United Artists Studios, in relation to motion pictures and other goods and services.

In *Veuve Clicquot Ponsardin v Les Boutiques Cliquot Ltée*, the famous champagne maker *Veuve Clicquot* sued a group of six clothing stores situated in Quebec and Ontario, arguing that the respondent's trade mark *Cliquot* and *Cliquot « Un Monde à Part »* were infringing its rights and had depreciated the goodwill attached to its trade mark *Veuve Clicquot*. The champagne maker also alleged that the registration of the *Cliquot* trade marks was creating confusion with its trade marks and thus sought their revocation.

Similarly, in *Mattel Inc. v 3894207 Canada Inc.*, the owner of the trade mark *Barbie* tried to prevent the use of the trade mark *Barbies* in association with restaurant services. *Mattel* argued that the consumers would mistakenly infer that the *Barbies* restaurant chain was related to the famous dolls. *Mattel* argued that the *Barbie* doll is an "iconic figure of pop culture" and so famous that the average consumer would make a connection between the two trade marks.

In both cases, the SCC upheld the *Pink Panther* decision, confirming that there was no likelihood of confusion between the relevant trade marks and highlighting the fact that fame does not provide



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indisputable protection of a trade mark. It concluded that there was a difference between the parties' goods and services and their related channels of trade and no confusion was established.

The door is, however, not entirely closed for famous trade mark owners in Canada. The SCC acknowledged that trade marks are valuable business assets and that there could be confusion between two trade marks for which the goods and/or services are different. *Veuve Clicquot* and *Mattel* failed to establish confusion would occur in the marketplace and, therefore, the SCC in Canada rejected both claims. However, if confusion and depreciation of goodwill can be shown, famous trade mark owners may well successfully pursue trade mark infringement proceedings in Canada, even if the parties' goods and/or services are dissimilar.

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Data protection obligations in France

Companies who process personal data in France and fail to comply with the obligations regarding use of personal data introduced by the recently amended "Data-Processing Act" could face heavy sanctions imposed by *CNIL* (the French data protection watchdog). They may also see their disciplinary powers as an employer being undermined.

In France, personal data is any data which enables the direct or indirect identification of an individual. All forms of processing of personal data are regulated and the data controller's obligations depend on the type and end use of the personal data.

In such circumstances, if you are lucky, an online declaration on the *CNIL* website will be all that is required to ensure compliance. However, company directors and their accomplices can face penal sanctions of up to 5 years in prison and a 300,000 euros fine if personal data processing takes place without the requisite *CNIL* authorisation, or if personal data is held beyond authorised deadlines or processed for improper purposes. Administrative and financial sanctions can also be imposed. *CNIL* can issue injunctions and public warnings and levy fines of between 150,000 euros and 300,000 euros for subsequent offences and may also report offences to the Court.

Non-compliance in respect of processing an employee's personal data may prevent an employer from undertaking a dismissal or disciplinary action.



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In a recent case, a badge system was implemented by an employer in order to identify employees on entry and exit of company premises. Despite being fully aware of this system, an employee repeatedly refused to use his badge. However, the Supreme Court held that this could not be used by an employer as a reason to dismiss the employee, because the use of the badge system had not been declared to *CNIL*. This decision is likely to apply to other similar systems such as computer filing, automatic switchboards and video surveillance.

Companies can reduce their risk significantly by appointing a Data Protection Officer. Such a person must be able to act independently but may be an employee or a third party (e.g. consultant, lawyer). The Data Protection Officer's role is to monitor and advise upon compliance and, where relevant, propose solutions to reconcile individual freedom with the company's legitimate interests.

In summary, now is definitely a good time to audit the way you process personal data to check you comply with the *CNIL* requirements (or those relevant in your country of business) and, depending on your company's size and business sector, you might also wish to consider appointing a Data Protection Officer to minimise risk in this highly regulated area.

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Operating unencrypted WLAN-hotspots and online forums in Germany could prove expensive for the unwary

Following a decision by the district court of Hamburg on 27 June 2006, companies in Germany may become liable for damages claims by rights owners whose protected works have been illicitly used via an unencrypted WLAN hotspot. Considering that the number of wireless PC networks (WLANs or Wi-Fi) is constantly growing but that, according to a recent survey, over one third of the WLAN hotspots run by companies and consumers in Germany are not encrypted, this ruling could have surprisingly wide-ranging implications.

Following the decision, a person operating a private WLAN hotspot may be held liable alongside the actual infringer for any losses suffered by victims of illegal acts. Under the case in question, a third party used an unencrypted private WLAN for illegal music downloading by way of file sharing. The court held that a private operator of the WLAN hotspot could be liable for failing to monitor the use of the hotspot and/or to implement a password protection system to prevent unauthorized third parties from using the hotspot for illegal acts. The court also made it clear that an operator could not avoid liability by claiming ignorance of the relevant technical background or of the risks involved as he was under a duty to inform himself of the potential risks and technical protection measures available. While the court has not decided on the facts of the case the extent to which the private operator in question should actually be held liable, one can probably assume from the ruling that a business operating a comparable infringed hotspot in the future will face a strong claim in negligence.

The Hamburg district court has also held recently that an operator of an online internet forum should be liable for obviously illegal content submitted by its forum members. This was held to be so, even if the operating publisher had no concrete knowledge of the illicit content. The court has therefore treated the internet forum operator in a similar way to a press publisher who, under German law, has to



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ensure that the media published by him is not used for the distribution of illegal content. This decision suggested that internet forum operators had to monitor all submissions to their forums for illicit content, and represented a reversal from accepted principles. However, the appeal court of Hamburg overruled this decision on 22 August 2006 and returned to principles previously set on 11 March 2004 by the German supreme court in relation to illegal internet auctions. According to the reasons given by the appeal court, the duty to monitor the website and to delete illegal content only comes into existence upon the operator becoming aware of such illegal content. No doubt, operators will be hoping that these principles will be upheld in the future. Otherwise, their future existence could be in jeopardy, given the additional time and cost such extra monitoring would require.

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Procedural aspects of protecting IPR in Belgium

IPR owners in Belgium have the following procedural rights in respect of infringers:

1. A delivery-up procedure meaning certain IPR owners can obtain a court order and thereby enter an infringer's premises (or those of a connected third party) unannounced and seize any instruments or documents that could establish the alleged infringement. To obtain such right, the rights holder files a petition at the court where the relevant premises are located. A ruling will be made within eight days at which the petitioner does not have to be present but may have to deposit a guarantee. Any order can be appealed or opposed but otherwise must be acted upon within a month.
2. A summary procedure may be invoked, if urgency can be established, and the rights holder can quickly obtain sequestrations, reports or assessments that estimate damage and any other measures deemed necessary for the safeguarding of rights. Summary procedure petitions do not prejudice the main case and are brought by a summons which typically takes two days, or longer if the respondent is not based in Belgium. In extreme cases, however, the court will deal with a summons virtually immediately, even on a public holiday and will abrogate any other procedural timings.
3. A customs procedure is also available permitting customs authorities, at the request of the rights holder, to suspend temporarily the passing through customs of any products suspected to be infringing goods, to allow the rights holder to establish infringement via the courts.
4. Finally, rights holders can use any infringement proceedings designated by specific legislation relating to the particular IPR in question, for example:

- in respect of copyright infringements, an occurrence report and a suspension of any infringing activities can be obtained;
- to protect trade marks, a rights holder can take actions for: the transfer of ill-gotten gains and for the taking of accounts; ownership of the infringing goods and the instruments used to produce them; destruction of the infringing goods; and information concerning the identity of any third parties involved;
- drawings and models can be protected by petitioning the Belgian Commercial Court to order the suspension of infringing acts, the seizure of infringing products and any other sanction indicated under Belgian law;
- patent infringement proceedings can be brought, even where a contravening party has acted in good faith. Following the aggrieved party's petition, the court can order: the suspension of any infringing acts; damages; publication of the judgement; and the confiscation of any objects made in infringement of the patent and any instruments especially intended for their manufacture.

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UK approach – a patently good thing?

On 27 October 2006, the Court of Appeal upheld the UK's approach to patentability of software and business methods. Two Patent Court decisions were under review: one in relation to a patent owned by Aerotel Ltd for a system permitting prepaid telephone calls to be made from any telephone (*Aerotel Ltd v Telco Holdings Ltd and others*); the other for an automated method of producing documents for use in the formation of a company (*Macrossan v Comptroller General of Patents Designs and Trade Marks*). Both appeals concerned some of the categories excluded from patentability in Article 52(2) of the European Patent Convention (EPC) which include "schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers". Protection is generally prohibited for these categories because they are not "inventions".

The Aerotel appeal was allowed because the telephone system involved a **technically new physical combination of hardware that amounted to more than just a method of doing business**. However, in *Macrossan*, the Court of Appeal disagreed with the High Court's finding that the process concerned was a method of performing a mental act, and not a method of doing business but agreed that it was a computer program because the program would be used to carry out the process without any additional technical contribution and because the hardware used was standard.

Europe's approach to protection of software differs from other key countries, such as the USA. US law gives wide scope to the types of patentable invention. This permissive attitude originated with the Patent Act of 1793 (which defined patentable inventions as "any new and useful art, machine, manufacture, or composition of matter, or any new or useful improvement thereof") and has largely been embraced by later US legislation. This difference in approach dismays UK and EU computer software developers who begrudge the ease with which patents are awarded to their US competitors for similar 'inventions' and European patent offices have been lobbied accordingly. The Court of Appeal has itself criticised this US liberalism as there is no evidence that it increases innovation or investment in the excluded categories. Indeed, any decision on



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the patentability of developments like computer programs would probably have little effect on the pace of technological progress anyway. So, although it has done nothing for global conformity, this latest Court of Appeal decision may still be no bad thing!

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Trade mark protection in Brazil

Intellectual property rights in Brazil are called "inventor rights" and are governed by Brazilian Commercial Law. In Brazil, applications for patent, design and trade mark registrations are filed with the National Industrial Property Institute ("INPI"). INPI is a federal institute, linked to the Ministry of Industry and Commerce, and its aims include to impose and enforce the law relating to intellectual property, to regulate technology transfer, to grant patents and trade marks and to acknowledge international treaties.

The Industrial Property Law n° 9.279/1996 ("IP Law") was enacted in Brazil by the Federal Government in 1996 and introduced several provisions contained within the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS") which Brazil had already adopted into the Brazilian Legal System. The IP Law distinguishes between 3 types of trade marks subject to registration in Brazil:

- (i) **Product and service trade marks** - used to distinguish products or services from others which are identical or similar
- (ii) **Certification trade marks** - used to certify that a product or service complies with certain technical specifications regarding quality, nature or methodology employed
- (iii) **Collective trade marks** - used to identify products or services as those of members of a particular organization or association.

The IP Law also provides protection for "highly known trade marks" ie trade marks known by a large number of people in all Brazilian States and obtaining protection in all areas of business.

The rights conferred on a trade mark owner or registration applicant include the right to assign the registration or registration application, the right to license its use and the right to protect its integrity or reputation. Brazilian trade marks are in force for a period of 10 years from the date of grant and may be renewed for successive 10 year periods. The IP Law also confers priority rights to foreign trade mark owners, if that foreign owner's country has entered into a relevant recognition agreement with Brazil. The extent and nature of the rights conferred will be determined by the relevant international agreement.

In September 2006, under Regulation 127/2006, INPI created the trade mark registration electronic system known as "e-marcas" (e-trade marks). Under this system, the processing of all trade mark registration proceedings will be carried out

electronically, using the internet. The new system has been welcomed wholeheartedly by the Brazilian professional community as it is expected to simplify trade mark registration proceedings and accelerate the analysis and granting of trade mark registration certificates.

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New information requirements

On 1st January 2007, Regulations came into force in the UK extending the provisions of the Companies Act 1985 requiring companies in the UK to include on all business letters and order forms, whether they are sent in electronic, hard copy or any other form (i.e. e-mails), and on the company's website, details of their company name, place of registration, registered number and registered office address. Previously the Companies Act only required this information on business letters and order forms in paper form. To avoid being in breach and having to decide which e-mails sent by a company fall under the Regulations, it would be prudent for companies to include the required information in the footer of every e-mail they send and also on the main pages of their website.

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TO OUR READERS

This Bulletin is intended to introduce and explain on a regular basis areas of European, North and South American Intellectual Property, IT and E-Commerce law of general interest to all of our clients. It is jointly written and produced by PLG's IP, IT and E-Commerce International Network which includes legal practitioners in several PLG firms and their contacts worldwide. We always welcome comments and questions on any matters raised in our Bulletin. Further information is available on all topics but nothing in the PLG IP, IT and E-Commerce Bulletin is to be regarded as a definitive statement of the law or as specific legal advice. Reliance should only be placed on specific advice obtained directly from the relevant practitioners after consideration of all relevant facts and circumstances. Readers are requested to direct their enquiries to the author of the relevant article.

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