GossIP

November-December 2020

INSIDE

Dear readers,

Right before your Christmas vacation we are out with the last issue of GossIP, disclosing some IP, Tech and Food law cases.

Registering a 3D trademark is always a bit tricky, and maintain it is even more difficult. We disclose here the case of Van Cleef & Arpels and explain why the famous French jewels luxury company lost the trademark in China on its iconic Alhambra design.

Still on IP topic, we discuss the major changes in the Patent Law that has been announced to go into force in June 2021.

News regard, between others, the protection period for patents, partial design protection, pharmaceutical patents, compensations and damages, and of course good faith, which is a helpful step in the battle against copied patents.

A break with an amazing news regarding Fabio Giacopello and then we go deep on the tech law with 2 articles explaining the new measures for the protection of trade secrets.

We close this November-December GossIP issue with an analysis of the measures taken by the State Administration for Market Regulation regarding food labeling, topic of great interest for product manufacturers, operators and other stakeholders.

Many wishes for a very sweet Christmas and a New Year full of joy.

HFG Law&Intellectual Property

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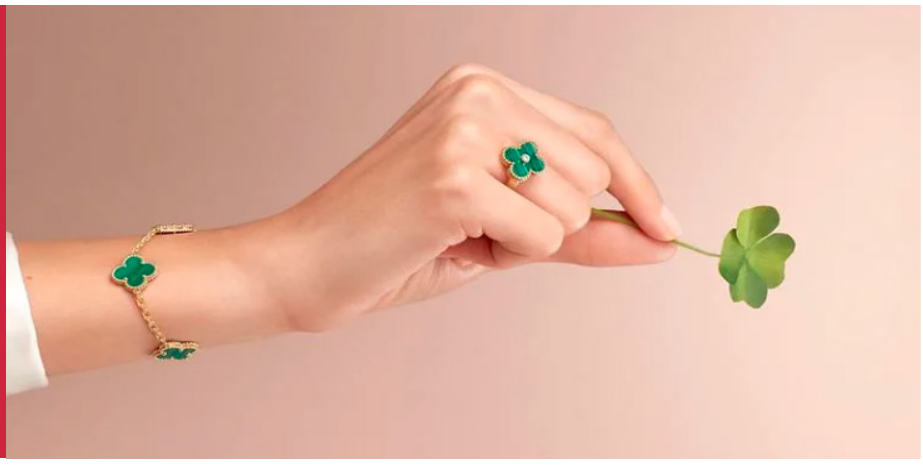
LAW & INTELLECTUAL PROPERTY

IP Law

Why Van Cleef & Arpels lost its 3D trademark



Van Cleef & Arpels is a French luxury jewelry company. Of all the jewelry motifs created by them, perhaps the most widely acknowledged and emblematic is the Alhambra, which was first unveiled in 1968.

The Alhambra is a talismanic design inspired by the four-leaf clover and reminiscent of traditional Moorish quatrefoil (a framework pattern consisting of four overlapping circles). The four-leaf clover Alhambra jewelry collection established itself as a timeless symbol of luck.

3D Trademark for *"four-leaf clover"* registered in China

On November 19, 2014, Van Cleef & Arpels filed for registration of a 3D trademark No.15736970 for class 14 on goods *"watch; ring (jewelry); bracelet (jewelry); earrings; necklace (jewelry); jewelry; watch cases"* with the Chinese Trademark Office. The application was approved to be registered on January 7, 2016.

Disputes on 3D trademark distinctiveness

On April 2, 2018, a natural person BI Qingyu filed an invalidation against the abovementioned 3D trademark based on the lack of distinctiveness in accordance with Article 11.1(3) of the 2013 Trademark Law. After reviewing, the CNIPA declared the invalidation.

The CNIPA (prior the TRAB) deems the mentioned 3D trademark is not easy to be recognized as a trademark by the public and cannot play the role of distinguishing products. Furthermore, the evidence provided by Van Cleef & Arpels is insufficient to prove its acquired distinctiveness.

Van Cleef & Arpels appealed to the Beijing IP Court. The focus of the first instance is still the distinctiveness of the 3D trademark. The Court decides to support the CNIPA and deem:

a. Even if the *"four-leaf clover"* is an original design, the inherent distinctives will not be affected by its originality. In actual use, the pattern is easily regarded as the shape of products by consumers, and it is difficult to distinguish the source of product.

b. Even if the four-leaf clover products have been widely promoted and sold by Van Cleef & Arpels in the Chinese market, they cannot prove the use of such pattern is Trademark Use.

In the nature of lacking inherent distinctiveness, the acquired distinctiveness of the pattern in the products jewelry, necklace (jewelry), etc. cannot be proved sufficiently.

Therefore, Beijing IP Court rejected the request of Van Cleef & Arpels in the first instance. Van Cleef & Arpels further appealed to Beijing High People's Court. The case is now pending in the second instance.

How to review 3D Trademark distinctiveness

Van Cleef & Arpels' *"four-leaf clover"* jewelry is quite famous in China but it is still rejected as a 3D trademark during the aforesaid invalidation and the first instance of the on-going lawsuit.

Then, how to create and demonstrate 3D Trademarks of distinctiveness?

The answer lies in two aspects: 1) making sure that the trademark pattern itself is distinctive in nature; 2) If not, collecting sufficient evidence to prove its acquired distinctiveness.

It is not easy for applicants to meet the requirements of trademark distinctiveness when designing the 3D trademark. To make it clear to understand, we can look it from the perspective of ordinary consumers.

When we see a certain package or 3D character, we can instantly associate to its provider without carefully identifying the word, graphics and other *"trademark elements".*

In this regard, the previous package or 3D character assumes the role of distinguishing the source of product, and thus has the distinctiveness in the sense of a trademark.

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In the example below, the 3D trademark on the left is rejected, while the one on the right is registered.

MONTBLANC Pens
IR No. 1160457

HENNESSY XO
No. 10175888

Furthermore, to avoid overlap with Design rights, the examination on the distinctiveness of 3D Trademarks tends to be stricter than 2D trademarks. It does not only require the pattern to be distinctive in nature, but also requires the relative public to take the pattern as a sign indicating source of products.

If the relative public takes the pattern merely as (part of) the shape of the products rather than a trademark, the pattern cannot play the role of distinguishing products and thus will not be deemed as Trademark Use.

Such point has been stipulated in Article 9 of Provisions of the Supreme People's Court on Several Issues concerning the Trial of Administrative Cases Involving Trademark Right issued in 2017:

Article 9

Where an application for registration as a trademark is made regarding a three-dimensional sign originating from the shape or part of the shape of the products itself, as it is hard for the relevant public to recognize the trademark as a sign indicating the source of the products in general circumstances, such sign generally possesses no conspicuous feature as a trademark.

The sole creation or the earliest use of such shape by the applicant cannot be definitely identified as the existence of conspicuous features as a trademark.

However, lacking distinctiveness in nature does not mean absolute impossibility in obtaining a registered 3D Trademark.

If the Applicant has sufficient evidence to prove its acquired distinctiveness through use, it can be registered later.

For example, the superstar in chocolate world, Ferrero Rocher: its golden-wrapped chocolate as 3D trademark is finally registered in China (IR No. 783985) by FERRERO S.p.A. after rejection appeal.

3D Trademark Specimen of Ferrero Rocher

Conclusion

From the legal perspective, perhaps Van Cleef & Arpels' 3D trademark is indeed facing the risks of lacking distinctive in nature. Nowadays, more and more designers use four-leaf clover graphics into their jewelry collection, so it is deemed as a normal shape instead of trademark by consumer. Breakthrough of the case depends largely on whether the evidence submitted by Van Cleef & Arpels' should be deemed as Trademark Use.

Anyway, Van Cleef & Arpels also has different design patents granted in China, including the Alhambra series. Therefore, if the lawsuit loses finally, it won't cause a big storm for the brand within the life of those design patents.

In addition, from the consumer perspective, I believe, for many jewelry lovers, the classic four-leaf clover design is still the instantly recognizable symbol of Van Cleef & Arpels and the message of good fortune at its heart.

As said by Jacques Arpels - the designer of four-leaf clover Alhambra jewelry collection - *"To be lucky you have to believe in luck"*. Which is why good luck symbols and charms have been at the heart of many Van Cleef & Arpels creations since the 1920's.

The invalidation against No. 15736970 is still pending in the second instance. Hoping the four-leaf will bring the luck to the brand this time as usual.

Ariel Huang
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IP Law

China's 2021 New Patent Law: What companies need to know

Prolonged protection period for design patents, protection of partial designs, national emergency novelty protection, a newly introduced patent linkage system, new enforcement mechanisms and higher damages compensation. It took China 13 years to implement a new patent law, but the 2021 Patent law surely comes with major changes.

Having moved to China in 2007 and studying the China's new Patent Law in 2008 during my Masters in Law at Peking University, after years of practicing with the 2008 Patent Law, it brings me joy to write about the new Patent Law in China that has been announced just now to go into force in June 2021.

The 2008 Patent Law can be seen as the Patent law that made China take patent law seriously as the previous law looked at novelty in China rather than in the whole world. It cannot be overstated that the 2008 patent law has contributed to China's current place in the world economy.

Laws with time need updates, and although the Patent law in 2008 was welcome, it needed revision in order to propel China towards the next decennia in which it further builds on the IP mechanism to further economic growth and trust in its laws.

The 2021 Patent Law, as promulgated on 17 October 2020 by the Standing Committee of the National People's Congress, will come into force on 1 June 2021. The new law will provide necessary changes, but also introduces some uncertainty.

Below I have selected what I believe to be the most interesting changes at this moment.

Design patent protection period

The protection period for design patents is prolonged from 10 years to 15 years, hence giving the applicant an additional five years of protection.

The idea behind this is that China can as such join the Hague system, which requires a minimum of 15 years of protection for design rights.

Partial designs protection

Under the 2008 patent Law, design patents could only be obtained when applied for together with a product. So, if you would like to protect Graphic user interface, this would need to come together with a product, for example the iPhone.

This practice is different from the USA and the EU, where partial designs (please bear in mind that the EU has a Design Rights Law, and China has put the design rights under the patent law), can be registered separately. Under the 2021 Patent Law, China has changed its law so that partial designs can be registered too.

Novelty protection

One of the necessary requirements for patentability is novelty. In order to obtain a patent, the subject matter of the patent needs to be new anywhere in the world.

The 2021 Patent Law introduces a six-month novelty protection in case of national emergency or any extraordinary state of affairs. A good example of future beneficiaries of this provision could be pharmaceutical companies that make vaccines. As such, these companies can in an early stage release information regarding the potential patent whilst not losing novelty.

Pharmaceutical patents

The protection term for pharmaceutical patents can be extended if requested by the patentee in case delays in the application process occurred for approval of a new drug marketing in China. The maximum amount of extension is five years, with the total effective time of the patent after being approved for the market not being more than 14 years.

Also, patent extension is possible in case CNIPA has caused unreasonable delay during the examination process of a patent.

Patent Linkage system

China has introduced the patent linkage system in its 2021 Patent Law. This mechanism that seems to be a result of trade negotiations between Washington and Beijing, means that generic drugs can only be market approved after the patent protection time of a drug patent has expired.

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As such, this patent linkage system in the 2021 Patent Law, means that CNIPA and CDFA will work together in order to regulate the market approval of drugs to any potential patent dispute regarding the new drugs, Market approval can only be granted after the dispute is dealt with.

Administrative patent enforcement mechanism

Although China already has an administrative enforcement mechanism for patent infringement (the administrative route), which can be followed separately or together with patent litigation at the courts (the litigation route), the 2021 Patent Law gives further provisions regarding this process and empowers CNIPA.

This is interesting, as previously the administrative route for patent infringement was not followed much for invention patents as it would be difficult for administrative officers to decide whether or not a patent was infringed. The new procedures put a lot of emphasis with CNIPA, so it can be expected that this might become an interesting route for companies to follow in the future.

Increased compensation

The statutory amount of compensation will be increased from 10 thousand RMB to one million RMB under the 2008 Patent Law to 30 thousand to five million RMB under the 2021 Patent Law.

In most patent cases the judge will award statutory compensation as it might be difficult to prove the other ways of damage compensation.

Punitive damages

China introduces punitive damages in the 2021 patent law. Punitive damages can be awarded up to one time or five times the amount of the original damages.

As such, punitive damages will try to discourage potential patent infringers from infringing a rightsholders patent.

Evidence regarding illegal profits – shift of the burden of proof

Under the 2021 Patent Law a judge may order the defendant to submit to the court their financial books and other related documents related to the illegal against of infringement.

In case the party does not disclose this, then the court may award damages based upon the proof of the rightholder and claims put forward by the rightholder.

Good faith, not harming public interest and not restricting competition

A double-edged sword in the new law seems to be that under the new law, patents should be filed in good faith, should not harm the public interest and shall not restrict competition.

The good faith principle is a first step that could be really helpful in the battle against patents that are applied for by companies in China that have copied foreign patents.

On the other hand, the public interest part and the not restricting competition part needs to be further explained. If not explained further, it could create legal uncertainty for rightholders.

After all, patents are monopolies that are meant to be the exception to competition law (anti-monopoly law). The legal thinking behind this is that society grants inventors a short monopoly in exchange for giving the knowledge of the patent to the public, which benefits society in the long term.

We will see in the future which path China takes regarding this.

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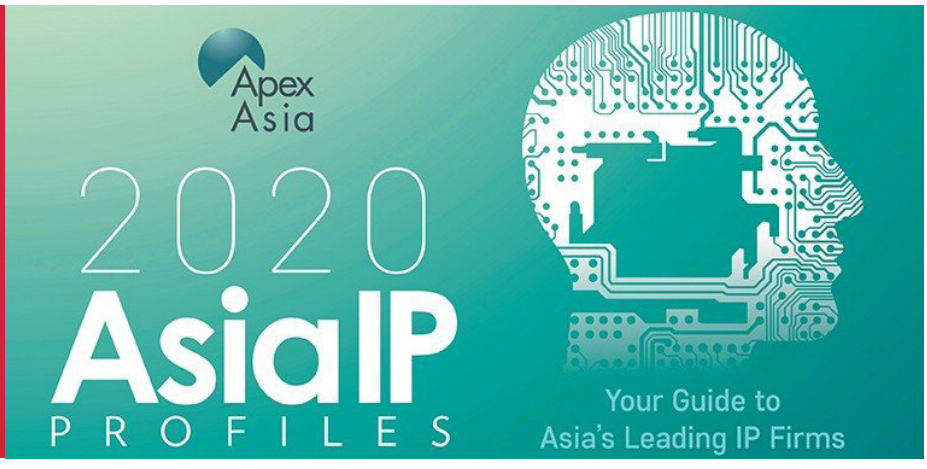
HFG Law&Intellectual Property

HFG NEWS

Fabio Giacopello is one of the best 100 IP Experts in China!



We are happy to announce that in the October edition of Asia IP, HFG partner Fabio Giacopello has been identified and recognized among the 100 IP Experts in China!

This important recognition is the result of extensive consultations with corporate counsels, and comes from significant feedback from lawyers themselves.

Being identified as an IP Expert means that Fabio is recognized for his outstanding work by his peers and corporate clients.

Asia IP is the region's leading source for analysis of the IP issues facing companies in Asia; a vital source of intelligence for IP-owning companies, and law firms that want to keep ahead of the key issues.

The magazine includes an extensive range of in-depth features, news, surveys and analysis designed to meet the information needs of in-house counsel, senior business leaders and partners at Asian and international law firms.

Congratulation to Fabio for this amazing acknowledgment!

TECH LAW

Protection of Trade Secrets (Draft for Comments). Part I

In order to further strengthen the protection of intellectual property rights and encourage independent innovation, the General Administration of Market Supervision (the *"General Administration"*) issued the notice of Provisions on Protection of Trade Secrets (Draft for comments) – the *"Draft"* - on September 4, 2020 for the public comments, which on the basis of the Provisions on the Prohibition of Infringement of Trade Secrets implemented in 1998 and the Anti Unfair Competition Law revised in 2019.

We will sort out the key terms of the first three chapters of the Draft for comments.

Chapter I - General Provisions

On the basis of the existing legislation, the applicable scope of the Draft is further indicated.

Applicable Scope: Regardless of the nature of the subject is domestic or abroad, as long as they carry out the act of infringing on the trade secrets of the owner of trade secrets in China or provide assistance for the infringement.

Chapter II - Definition of Trade Secrets

The Draft further explains the infringement act of trade secrets of the Article 9 of Anti Unfair Competition Law

1. Defines the trade secrets, technical information, business information and commercial information

Trade Secrets: Technical information, business information and other commercial information that are unknown to the public, have commercial price and have commercial value and are subject to corresponding confidentiality measures taken by the obligee.

Technical Information: Technical solutions obtained by using scientific and technological knowledge, information and experience, including but not limited to design, program, formula, product formula, manufacturing process, production method, research and development records, experimental data, technical know-how, technical drawings, programming specifications, computer software source code and relevant documents.

Business Information: All kinds of information related to the business activities of the obligee, including but not limited to management know-how, customer list, employee information, source information, production and marketing strategy, financial data, inventory data, strategic planning, purchase price, profit model, base bid price and tender content in bidding.

Commercial Information: related to the commercial activities, any type and form of information including but not limited to technical information and business information.

2. The Draft further lists the three most important elements of identifying trade secrets

Unknown to the public, excluded:

- ✔ It has been publicly disclosed in public publications or other media at domestic and abroad, or has been made public through public reporting meetings, exhibitions, etc..
- ✔ It has been publicly used at domestic and abroad.
- ✔ Common sense or industry practice generally mastered by relevant personnel in the field.
- ✔ Easily obtained without cost or from other open channels.
- ✔ Only involves the product size,structure, simple combination of components and other content information. After entering the public, the relevant public can obtain it through simple methods such as observation, mapping and disassembly.

Commercial value - Because of the information's secrecy, the information has real or potential commercial value, which can bring commercial benefits or competitive advantages to the obligee.

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Included one of the followings:

- ✔ Bringing economic benefits to the obligee.
- ✔ Having a significant impact on its production and operation.
- ✔ In order to obtain the information, the obligee has paid the corresponding price, R & D cost or operation cost and other material input.
- ✔ It is suspected that the infringer obtains or attempts to obtain the trade secrets of the obligee by improper means.

Comment: According to Article 10 of Interpretation of the Supreme People's Court on Some Matters about the Application of Law in the Trial of Civil Cases Involving Unfair Competition (the *"Interpretation"*), the commercial value shall be ascertained as capable of bringing about benefits to the obligee.

However there has been lack of official explanation on the specific content of commercial value. The current provisions explain the determination of commercial value from the economic benefits, operating capital, material input costs or other can bring competitive advantages can be identified as having commercial value.

Take corresponding confidentiality measures

- ✔ Limit the confidentiality level, confidentiality period and scope of knowledge of confidential information, and only inform the relevant personnel who must know the content.
- ✔ **During the post leaving interview, remind and warn the current employees and the resigned employees to fulfill their confidentiality obligations.**
- ✔ The information carrier is encrypted, locked, decompiled and other preventive measures, or the relevant carrier is marked with security signs or encryption tips.
- ✔ Password or code shall be adopted for confidential information.
- ✔ For confidential machines, factories, workshops and other places to restrict visitors, take basic physical isolation measures, such as access control, monitoring, authority control, etc.
- ✔ Formulate corresponding confidentiality management system and sign confidentiality agreement with relevant personnel.
- ✔ **The confidentiality obligation is clearly stipulated in the non-competition agreement.**
- ✔ **The scope of trade secret is clearly defined by the obligee in the labor contractor confidentiality agreement and is consistent with the scope of the secret claimed by the obligee.**

Comment: Compared with the interpretation, the provisions in bold stated above are new added that are all relevant to the confidentiality obligation of employees. In recent years, the disclosure of trade secrets becomes a common phenomenon, especially for the employees who are in the position which is able to reach and control the trades secrets of enterprise more easily.

This provision provides more practical operability for the confidentiality and management of trade secrets.

Chapter III - Infringement of trade secrets

The Draft further defines the forms of infringing trade secrets of the Article 9 of Anti Unfair Competition Law

1. Define the situation of obtaining trade secrets by theft and other improper means

- ✔ Sending commercial spies to steal trade secrets of obligees or holders.
- ✔ By providing financial, tangible or intangible benefits, high salary employment, personal threats, design traps and other means to lure, cheat and coerce the employees or others of the obligee to obtain trade secrets for them.
- ✔ Entering into the obligee's electronic information system without authorization or beyond the scope of authorization to obtain trade secrets or implant computer viruses to destroy the trade secrets, among which, electronic information system refers to all electronic carriers storing the obligee's trade secrets, including digital office system, server, mailbox, cloud disk, application account, etc.
- ✔ Unauthorized access to, possession or reproduction of documents, articles, materials, raw materials or electronic data under the control of the obligee, containing or deriving trade secrets, so as to obtain the business secrets of the oblige.

2. Define the *"Confidentiality obligations"* or *"the requirements of the obligee on keeping trade secrets"*

- ✔ The agreement on keeping trade secrets with the obligee in labor contract, confidentiality agreement, cooperation agreement, etc. through written or oral express contract or implied contract, etc.
- ✔ The unilateral requirements of the obligee on the holder who knows the trade secrets include but are not limited to the confidentiality requirement for the counterpart who knows the trade secrets through the contractual relationship, or the confidentiality requirement for the holder who knows the trade secrets through participating in research and development, production and inspection, etc.

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✔ In the absence of confidentiality agreement, labor contract, cooperation agreement, etc., the obligee, through other rules and regulations or reasonable confidentiality measures, puts forward other requirements for keeping trade secrets of employees, former employees and partners.

Comment: The provision can be considered as the supplement to the Labor Contract Law - the employer and the employee may agree in the labor contract to keep the employer's business secrets and confidential matters related to intellectual property rights - which obviously states that the compliance with confidentiality obligation is not only based on the labor contract, and also includes the other form of employment, cooperation and any relationship that has the opportunity to know trade secrets.

3. Define *"restricted use of trade secrets"*

Restricted useThe legal or agreed restrictions on the use of trade secrets concluded with the obligee in the confidentiality agreement, labor contract, cooperation agreement, contract, etc. are excluded from the knowledge, experience and skills formed by the employees or former employees in the working process.

4. Define the situation of infringing others' business secrets by instigating, luring and assisting

✔ Convincing, persuading and encouraging others to violate the obligation of confidentiality or the requirements of the obligee to keep trade secrets by providing technical and material support through words, behaviors or other means, or by means of position promises and material rewards.

✔ The act of providing convenience for others in violation of confidentiality obligations or the obligee's requirements for keeping trade secrets in various ways, so as to obtain, disclose, use or allow others to use the obligee's trade secrets.

5. Define the *"Customer list"* as the protection of trade secrets

Customer list: The customer's name, address, contact information, trading habits, intentions, contents, etc. constitute the special customer information which is different from the relevant public information, including the customer roster of numerous customers and the specific customers who maintain long-term stable trading relationship.

After paying the commercial cost, the obligee has formed a relatively fixed list of customers with unique trading habits in a certain period of time, which can be protected by trade secrets.

6. Define the behavior that does not belong to the infringement of trade secrets

✔ Independent discovery or self-development.

✔ Obtaining trade secrets by reverse engineering or other similar means, except for reverse engineering in which trade secrets or products are obtained by improper means or in violation of confidentiality obligations.

✔ The shareholder obtains the company's trade secrets by exercising the right to know in accordance with the law.

✔ The employee, former employee or partner of the owner or holder of the trade secrets must disclose the trade secrets based on the needs of public interests or national interests such as environmental protection, public health, public security, exposing illegal and criminal activities, etc.

It does NOT constitute reverse engineering that the person who contacts and understands the technical secret of the obligee or the holder obtains the technical secret of the obligee by recalling and dismantling the end product.

The above is the Part I of the Draft for comments, to be continued.

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TECH LAW

Provisions on Protection of Trade Secrets. Part II

In the last article, we sorted out the main provisions on the scope of application, definition and infringement of trade secrets in the Draft.

For the second part, we will brief the followings of the investigation and punishment of suspected infringement of trade secrets and the legal responsibility for infringement of trade secrets.

Chapter IV - Investigation and punishment of suspected infringement of trade secrets

1. Legal conditions of trade secrets and preliminary evidence of infringement of trade secrets

When the obligee thinks that his trade secret has been infringed, he shall provide the relevant Market Supervision Administration (*"MSA"*) with the business information that meets the legal conditions of trade secret, including but not limited to:

- ✔ development process and completion time of trade secret;
- ✔ the carriers, forms and contents of trade secrets are unknown to the public;
- ✔ the commercial value of trade secrets;
- ✔ the protection measures of trade secrets.

Meanwhile, if the obligee submits one of the following materials, which shall be deemed that he has provided preliminary evidence reasonably indicating that his trade secret has been infringed:

- ✔ there is evidence that the suspected infringer has channels or opportunities to obtain trade secrets, and the information used by the suspected infringer is essentially the same as that of the oblige;
- ✔ there is evidence that the suspected infringer has channels or opportunities toobtain trade secrets, and the confidential facilities are damaged by thesuspected infringer by improper means;
- ✔ there is evidence that the trade secrets have been disclosed or used by the suspected infringer, or there is a risk of disclosure and use;
- ✔ the obligee has submitted statements, confessions, expert opinions, evaluation reports and other evidences formed in civil, criminal or other legal procedures related to the case, which are used to reasonably show that his trade secrets have been infringed.

COMMENT: When the obligee claims that his trade secrets have been infringed, firstly he should prove to the relevant department that the business information he owns conforms to the three characteristics of trade secrets, that is, *it is unknown by the public, has commercial value and the obligee takes corresponding confidentiality measures.*

This is also consistent with the determination of trade secrets stipulated in the Anti-unfair Competition Law.

Secondly, for the infringement of the obligee's trade secrets, the weight of evident of the materials submitted by the obligee only needs to reach *"the preliminary evidence reasonably indicates that his trade secret has been infringed"*, and no damage result is required.

As for the requirement to prove that the information used by the infringer is essentially the same as the obligee's trade secrets, we can refer to Article 13 of the provisions of the Supreme People's Court on Several Issues concerning the application of law in the trial of civil cases of infringement of trade secrets implemented in September 2020.

In determining whether the information used by the infringer is essentially the same as that of the obligee, the following factors can be considered, including but not limited to:

- ✔ the similarities and differences between the accused infringing information and trade secrets;
- ✔ whether it is easy for the relevant personnel in the field to think about that the difference between the accused infringement information and the trade secrets when the accused infringement occurs;

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- ✔ whether there is any substantial difference between the accused infringing information and trade secrets in terms of use, use mode, purpose and effect;
- ✔ information related to trade secrets in the publics.

Compare with litigation, it is more flexible and convenient for the obligee to report the infringement of trade secrets to the MSA. If the administrative intervention is carried out earlier, the trade secrets of the obligee can be protected in time.

2. Circumstances in which the suspected infringer is unable to provide or refuses to provide evidence:

- ✔ the suspected infringers, interested parties and witnesses shall truthfully provide relevant evidence to the MSA;
- ✔ if the obligee can prove that the information used by the suspected infringer is essentially the same as the trade secrets claimed by himself, and can also prove that the suspected infringer has the right to obtain his trade secrets.

However the suspected infringer cannot provide or refuse to provide the information used by him is evidence obtained or used legally, the MSA may, on the basis of relevant evidence, determine that the suspected infringer has infringement behavior.

COMMENT: The above-mentioned defines the distribution of burden of proof. The obligee should prove that the information used by the suspected infringer is essentially the same as the trade secrets claimed by himself, and the infringer has the conditions to obtain the trade secrets.

The proof of the foregoing said contents by the obligee is the requirement of the above *"preliminary evidence".*

After that, the burden of proof will be on the suspected infringer. If the suspected infringer fails to provide or refuses to provide evidence, the infringement can be deemed to be established.

3. Evidence preservation

- ✔ Upon application and preliminary proof provided by the obligee, the MSA may seal and detain the evidence which may be found as infringement of trade secrets during the process of law enforcement investigation, including but not limited to the email, chat record, storage medium, infringing goods and equipment, internal sending and meeting minutes, etc.
- ✔ If the infringement of trade secrets involves computer technology, the relevant computer server, host computer, hard disk and other storage devices shall be seized, and the evidence shall be fixed in time by means of copying, mirror image, camera shooting, screen capture and data recovery.

COMMENT: The MSA may adopt administrative compulsory measures to preserve the relevant evidence. For the infringement of trade secrets involving computer technology, the storage equipment must be seized to fix the evidence.

For the computer technology, which includes the basic principle of operation method and arithmetic unit, instruction system, CPU design, pipeline design and storage system etc.

4. Guarantee of ordering to stop infringement

In the process of investigating and dealing with trade secrets infringement cases, if the suspected infringer illegally discloses, uses or allows others to use the trade secrets, which will cause irreparable loss to the obligee, the obligee may request and shall issue a written guarantee of voluntary liability for the consequences of compulsory measures, and the MSA may order the suspected infringer to stop selling and using the obligee's trade secrets to produce the products.

COMMENT: The above-mentioned makes it clear that under the premise that the obligee meets the conditions, even if the infringement fact of the suspected infringer has not been found out, the obligee can apply for the MSA to intervene in advance to protect his own rights and interests by issuing a written guarantee of liability for the consequences of compulsory measures.

Chapter V - Legal Responsibility

For the act of infringing on trade secrets, it shall be punished in accordance with Article 21 of the Anti-unfair Competition Law. That is, order to stop the illegal act, confiscate the illegal income, and impose a fine of 100,000-1,000,000 yuan. If the circumstances are serious, a fine of 500,000-5,000,000 yuan shall be imposed.

The following main circumstances can be regarded as *"serious circumstances"* mentioned above:

- ✔ where the loss of the obligee exceeds 500,000 yuan due to infringement of trade secrets;
- ✔ where the profit exceeds 500,000 yuan due to infringement of trade secrets.

COMMENT: In Article 4 of the Interpretation of the Supreme People's court and the Supreme People's Procuratorate on Several Issues concerning the specific application of law in handling cases involving infringement of intellectual property rights (3), which is clear that if the amount of loss caused to the obligee of trade secrets or the amount of illegal gain of the infringer is more than 300,000 yuan, it shall be deemed as *"causing significant loss to the obligee of trade secrets".*

In this draft, the amount of loss or profit is set at more than 500,000 yuan. Therefore, in terms of strengthening the crackdown on the infringement of trade secrets, it is more conducive to the protection of trade secrets to revise the amount of loss and profit to 300,000 yuan.

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FOOD LAW

Brief introduction of SAMR's Food Labeling Measures

***"Measures for the Supervision and Administration of Food Labeling"* will be issued soon and it is of great importance to food product manufacturers, operators and other stakeholders involved as it will have great impact on current food labeling method and operation model.**

Here below is a brief introduction to the *"Measures for the Supervision and Administration of Food Labeling (Draft for Comment)"* (abbr. Draft for Comment).

On July 27th, 2020, the State Administration for Market Regulation (SAMR) released the *"Measures for the Supervision and Administration of Food Labeling (Draft for Comment)"* amended based on the 1st round opinion/suggestion collection in 2019. The Draft for Comment is for the second round of opinion/suggestion collection.

Food Labeling

Food labeling refers to all the items (words, symbols, numbers, picture and other illustrations, etc.) attached, printed, marked or tagged to the food or its package to identify and illustrate the basic information, characteristics and properties of the food.

Food labeling includes food label and instruction. Color of words and symbols on food labeling must be of clear contrast with the background.

HIGHLIGHT: Say NO to the pale white letters on transparent packaging materials.

Draft for Comment unified the labeling requirement on pre-packaged food, bulk food, edible agricultural products, irradiated food, GMO food, special purpose food, imported food and food additives.

Production Date and Best Before Date

Compared with GB 7718-2011 National Food Safety Standard: General Rules of Pre-packaged Food Labeling (abbr. GB 7718), which only stipulates that the real food name reflected the true attribute of the food should be clearly labeled together with the product name, Draft for Comment suggested that the Production Date and Best Before Date (Shelf Life) should also be labeled prominently on the package and can be printed on white background of the package surface and the minimum font height of the date is 3MM.

HIGHLIGHT: Draft for Comment specifies the font height of the date on all food or its package.

Draft for Comment is stricter and more detailed on Production Date and Best Before Date (Shelf Life) compared with GB 7718.

HIGHLIGHT:

- ✔ If there is no space between Year, Month and Date and number of Month/Date is not of 2 digits, *"0"* should be added before the number. e.g. August 26th 2020 should be 20200826.
- ✔ If Shelf Life is less than 72 hours, the Production Date and Best Before Date (Shelf Life) should be labeled to *"hour"* in 24-hour display.
- ✔ If one outer package contains several individual packaged food product inside, the Production Date on outer package should be the date that outer package is finished, Best Before Date (Shelf Life) on outer package can be either the earliest Best Before Date (Shelf Life) among the individual packaged food inside or the individual Best Before Date (Shelf Life) of each packaged food inside.
- ✔ Storage Condition should be listed on food labeling. If there is requirement on storage temperature, it should list stored in room temperature, cold storage or freezer. If cold storage or freezer is required, temperature range of cold storage or freezer should be specified. If there is any other requirement on humidity, light or other storage conditions, it should be listed on food labeling.

Food Name and Name of Ingredients

Draft for Comment standardizes the labeling of food name and name of ingredients, **HIGHLIGHT:**

Continue reading

✔ If a food product is made from 2 or more than 2 kinds of food materials that are evenly mixed and cannot be separated anymore, its food name should reflect the nature of the mixture and can use 1 or 2 of its main ingredients in its naming.

✔ Ingredient list of Co-pack food should list all the original ingredients of the product being co-packed.

✔ Requirements on Labeling of iodized salt and reconstituted milk are added: if salt is iodized, *"Iodized"* and *"Iodine content"* should be marked on the main display panel of food package; if salt is NOT iodized, it should mark *"NOT iodized"*.

If reconstituted milk is used as raw material for liquid milk, *"reconstituted milk"* should be marked next to the product name and the ingredient list should state that reconstituted milk is used as raw material with actual ratio. The labeling of *"reconstituted milk"* should be prominent and its font size should be at least the same as the font size of product name.

Food Additives

Draft for Comment stipulated that the specific name of food additives should be listed in the ingredient list. If function name such as Sweetener, Preservatives, Colorants, Emulsifiers and Thickeners are listed, specific name of food additives should be listed next to the function name.

HIGHLIGHT: food additive name will be specified and current labeling method such as INS will not comply.

Special Group of Consumers

Draft for Comment stipulated that food labeling should NOT use words or pictures to express, imply or emphasize that the food product is suitable for special group of consumers such as infant/baby, children, elder people, pregnant women if no relevant laws and regulations and standards are in force.

HIGHLIGHT: food advertising and marketing will be affected as words and pictures involving special group cannot be used anymore.

Edible Agricultural Product

Detailed requirement on edible agricultural products are listed in **Draft for Comments:**

✔ Food operator should list the name, origin or source, supplier and other information of the edible agricultural product accurately on the product package or display the information prominently at the site of selling.

✔ If preservatives and other food additives are used in packaging, food preservation and storage, name of food additives should be labeled.

✔ Encourage display prominently the harvest date or packaging date, storage condition and best before date of the edible agricultural product on the package or at the site of selling.

Group Standard

The most important clause in Draft for Comments need to be highlighted is the clause that clarified the status of *"group standard"*.

Draft for Comments stipulated that Food labeling should list the product standard code that the manufacturer followed in production. Product standard code can be the code of national food safety standard, local food safety standard, national food standard, industry food standard, local food standard, group food standard or manufacturer food standard.

HIGHLIGHT: Draft for Comments clearly definite the scope of applicable product standard and group standard is included. In 2018 Standardization Law clarified the legal status of group standard, group standard can be followed to restrain the industry practice, but there is no conclusion whether group standard can be used as food standard on food labeling.

Now Draft for Comments clarified that group standard can be used as food standard on the national regulation level.

Infant/baby Formula Milk Powder

Draft for Comments stipulated that:

✔ Infant/baby Formula Milk Powder for 0 to 6-month should not have content claim and function claim.

✔ Infant/baby Formula Milk Powder for 6-month above should not have content claim and function claim on its essential ingredient. Content claim and function claim on its optional ingredient can be made on the minor display panel in words permitted by relevant national food safety standard.

✔ Labels and instructions of Infant/baby Formula Milk Powder that claim the source of raw milk and milk powder material should label its country (region) of origin accurately.

✔ Infant/baby Formula Milk Powder that claims the animal source in its product name, the animal source of dairy material, such as raw milk, milk powder, whey (protein) powder, should be listed accurately in its ingredient list.

✔ If the dairy material contains more than 2 kinds of animal source, ratio of different animal sources should be labeled. If edible vegetable oil is used, detailed vegetable oil names should be listed based on its adding amount in descending order.

✔ Infant/baby Formula Milk Powder using base powder as raw material should list *"base powder"* in ingredient list and list the raw material of base powder in brackets next to it based on adding amount in descending order.

Continue reading

OEM

Draft for Comments unifies the labeling for OEM. Draft for Comments stipulates that the OEM food product should list the name, address of both entrusting party and the entrusted party (manufacturer).

HIGHLIGHT: Only the name and address of entrusting party need to be listed as per GB 7718. Draft for Comments is stricter as it stipulates that the production license number of entrusted party (manufacturer) should also be listed in the labeling of OEM food.

Penalty on non-compliant labeling

The cost of violation, i.e. penalty on non-compliant labeling, is much higher in Draft for Comments as it follows the penalty rules in Food Safety Law of P.R.C.

HIGHLIGHT: for example, the amount of fine and its application:

Food Safety Law: Clause 125 part I: Fine amount:

- ✔ for product value less than RMB10,000: RMB5,000 – RMB50,000;
- ✔ for product value more than RMB10,000: 5–10 times of actual product value.

Penalty applied to (not limited to):

- ✔ using fake, exaggerated and misleading wording or pictures in food labeling;
- ✔ using drug name (excluding food material which can also be used as Chinese traditional medicine, food material used as nutrition fortifier, raw material name or health food already registered) as food name, or adding claim on disease prevention and treatment;
- ✔ ordinary food product using health food name or health function claim;
- ✔ ordinary food product using special purpose formula food name or clinic effect claim;
- ✔ fake labeling in ingredient list or other compulsory content;
- ✔ not labeling the food additive added as per regulation required, or labeling method of food additive not compliant with relevant regulations and food safety standards;
- ✔ imported food without Chinese labeling;
- ✔ GMO food without GMO labeling.

Imported Food

Draft for Comments stipulates that for placement and content of Chinese labeling of imported food:

- ✔ Cannot cover original foreign labels by Chinese labels.
- ✔ Content of Chinese label and original label should match each other one by one.

HIGHLIGHT for import agent: it is very difficult to follow in practice:

- ✔ laws and regulations differ between China and abroad;
- ✔ different countries have different labeling method;
- ✔ some countries are not as strict as in China for claims;
- ✔ difficult to tell if the Chinese label reflects the real attribute, ingredient, nutrition value, claim of the imported food.

Draft for Comments stipulates that Chinese label should be attached, printed or marked on the smallest single selling unit of imported food during production and should not add Chinese label onto original foreign labels.

HIGHLIGHT for import agent:

- ✔ That means the only way is to print Chinese label during production, otherwise, the cost will be higher.
- ✔ It is difficult to handle the region of origin for food product imported from Taiwan.

Claims prohibited on labeling

Draft for Comments stipulates that:

If the food does not contain or does not use certain kinds of material, following claims are prohibited on labeling:

✗ 0 (zero) adding; ✗ no adding; ✗ not contain.

If the food does not use GMO food material, following introduction are prohibited in labeling:

✗ not contain GMO material; ✗ non-GMO.

Food name against principle of public order and good custom or using registered drug name as food name are prohibited.

Wording such as *"special supply for"*, *"specially made"*, *"specially needed"* and *"supervised by"* are prohibited.

Plant Based Meat

Draft for Comments defines plant-based meat as animal meat imitate food product made from plant source food material. Plant-based meat should have *"imitate"*, *"manmade"* or *"vegan"* in its product name and label the name of its real attribute.

As there is a certain overlap between GB 7718 and the Measures, we believe that stricter standards should be applied to the priority application of the two. If there is a conflict between the two, we suggest sending a letter to the relevant authorities to confirm its application.

Generally speaking, from legal perspective, since GB 7718 is endowed with a higher level of legal effect by the Food Safety Law, GB 7718 should be applied in priority in case of conflict.Based on above brief introduction and highlights, we can find that the Draft for Comments keeps up with times and is more precise and accurate.

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