



August 2010

China Head Office  
Level 7, Tower W3, The Towers, Oriental Plaza  
No.1 East Chang Avenue, Dongcheng 100738, Beijing, China  
p: +86 10 8515 1091  
f: +86 10 8515 1089  
w: www.mmlcgroup.com

## Legal News

### *Intellectual Property*

#### **Supreme Court clarifies trademark registration issues**

The Supreme People's Court issued the "Opinion on Several Issues Regarding Administrative Adjudication of Trademark Grant and Confirmation" on 21 April 2010. The opinion states that:

- A mark will be refused registration if it is detrimental to socialist morals or has an "undesirable social impact". According to the opinion, an "undesirable social impact" refers to a negative political, economic, cultural, religious or ethnic impact, or where public interests are adversely affected.
- A mark will be refused registration if its application is made by the agent or representative of the rights owner without the rights owner's authorisation. The opinion confirms that this covers the situation where the applicant was not yet the

authorized to file the application because they were only in business talks, and that this agent/representative relationship only came into being afterwards.

- A mark will be refused registration if it concerns use of improper means to pre-emptively register the mark of a third party that has gained a certain level of influence in China. According to the opinion, this is satisfied if the mark of the third party has been consistently in use in respect of goods that are the same as or similar to those applied for by the applicant.
- A registered mark will be invalidated if its registration falls within any one of the absolute grounds for refusal, or has been acquired by means of fraud or by other improper means. The opinion explains that the "other improper means" provision is a catch-all provision, which is applicable where registration may disrupt the stable trademark registration system, harm public interest, abuse public resources or give rise to unjust benefits.

## **New Trade Mark Office formality requirements**

The Chinese Trademark Office has recently issued new formality requirements (“New Rules”) for the filing of trademark applications. The New Rules have taken effect from 1 July 2010. The New Rules are aimed at dealing with fraudulent applications and trademark agencies. The main changes are:

- An Applicant’s signature is required on all application forms, or the Applicant must have expressly granted the agency the right to sign the application forms for it. We have amended our Power of Attorney forms accordingly, so that in most cases an Applicant will not need to sign the Chinese application forms.
- Certificate of Incorporation – The Chinese Trademark Offices now requires that a copy of a Certificate of Incorporation or Good Standing must be filed with the application forms.

We will keep our clients informed of any changes to these Rules.

## **A “new technical solution” under the PRC Patent Law**

Recently many patent applications have been rejected for failing to fall into the category of subject matter under Paragraph 2 of Article 2 of the PRC Patent Law. The PRC Patent Law defines an invention as, “any new technical solution relating to a product, a process, or improvement thereof.” Thus, in order to determine subject matter an applicant must determine whether their solution falls within the scope of a “technical solution”. The PRC Patent Law defines “technical solution” as, “a collection of technical means employing natural law to solve technical problems.”

Generally, when determining subject matter the focus of analysis should be focused on whether the solution is achieved through technical means which solves technical problems and produces technical effects. This is similar to technical solution standards in most developed countries. For patent applications for electronics and computer software, the courts and Chinese Patent Office has made it clear that Article 2 will be satisfied if the computer

program performs control of an industrial procedure, a measuring or testing procedure, processes external technical data, or improves the internal performances of a computer system.

## **Customs release report on IPR border measures**

The Legal Department of the Chinese Customs General Administration circulated a report in June 2010, called the “Notice on Re-Release of Goods under the IPR Border Protection Measures”. The Notice highlights problems created when IP owners who have recorded their IP with Customs fail to respond to reports of suspicious shipments. The report implies that Customs may no longer be willing to assist IP owners who consistently do not respond to Customs’ notices. In defence of the IP owners, it should be noted that Customs usually only gives the IP owners a few days within which to confirm whether the products being exported are genuine or not – given that many IP owners work with a large number of authorized manufacturers in China, and shipments are often in the name of third party export agencies, it is hoped that Customs could increase notice time to 7 days in the future.

## **New judicial interpretation and regulations relating to Chinese Patent Law**

The Chinese Supreme People's Court issued its “Interpretation on Several Issues Concerning the Application of the Law on Trials of Patent Infringement Disputes” (“Judicial Interpretation”) on 28 December 2009. Notable points are:

- Affirmation of the doctrine of prosecution history estoppel - Article 6 of the Judicial Interpretation affirms the doctrine of prosecution history estoppel which has previously been applied in various courts in China. However, the Judicial Interpretation does not specify whether the doctrine of equivalents may still be applied for a claim

element that was narrowed during prosecution.

- Products that use an infringing component - Article 12 specifies that if a product is made from a component that infringes a patent, the acts of making and selling the product are infringing acts. This provision clarifies an issue that was argued in some patent infringement cases in China. With this clarification, downstream manufacturers would be found liable for using patent infringing components to make their products.
- Interpretation of the prior art defense - Article 14 provides that the requirements of the prior art defense is satisfied "if all the technical limitations which have been accused to have fallen within the scope of protection of patent rights are identical to or have no substantive differences with the corresponding technical limitations of a prior art technical scheme".

### **Motorola sues Huawei for stealing trade secrets**

Motorola Inc, the US maker of mobile phones and two-way radios, sued rival Huawei Technologies Co for allegedly conspiring with former employees to steal trade secrets. Huawei began receiving the information as early as 2001, Schaumburg, Illinois-based Motorola claimed in an amended law suit filed July 16 in federal court in Chicago. Motorola originally sued five former workers in 2008 for allegedly taking trade secrets with them when they left to join Lemko Corp, which has a reseller agreement with Huawei.

### **Taiwan Adopts Westernized Data Privacy Laws**

Taiwan enacted a Personal Data Protection Act in July that overhauls the nation's personal data protection rules. The Act, which will not go into full force until 2012 and is, for now, quite vague on issues of compliance, represents a significant departure from the previous statute (the Computer-Processed Data Protection Act), which since 1995 had established disparate regulations for public and private entities.

Under the earlier framework, if a private entity wanted to collect, process, use or transfer personal data, it

needed to not only get written consent from the data subject, but also apply for a license and registration with "the competent authority with jurisdiction over such entity." Enforcement of these regulations was sporadic.

### **Ecommerce**

#### **New payment restrictions may impact China retailers' revenue channels**

The People's Bank of China ("PBOC") issued a new set of regulations for online payment service providers on 19 May 2010 that will take effect on 1 September. The new regulations bring payment services within the banking regulatory scheme. The new regulations require any non-financial institution that offers such services to obtain a payment service business license ("PS"). The PS license will be issued by the competent local PBOC branch. The new regulations will potentially impact retailers in two ways. Firstly, retailers using prepaid cards will need to ensure that the card issuers have obtained a PS license. Secondly, retailers with an online presence will need to ensure that third party vendors meet the necessary requirements and hold a valid PS license under the new regulation.

#### **China's first law on online games takes effect**

China's first regulation governing the booming market of on-line games takes effect on Sunday, which is expected to protect children from unwholesome content and Internet addiction. The regulation, issued by the Ministry of Culture on June 22, states that on-line games targeting minors must be free of content that lead to the imitation of behavior that violates social morals and the law.

#### **New requirements for online retailers**

From July 1 2010, all e-commerce retailers are required to provide their real names to operate

e-commerce businesses. China's business-to-consumer and consumer-to-consumer (C2C) sales on third-party e-commerce platforms, such as 'taobao.com', 'alibaba.com' and 'paipai.com', are thriving. In 2009 Chinese online sales exceeded Rmb250 billion (approximately \$37 billion), with estimates suggesting that online sales will reach Rmb500 billion (approximately \$74 billion) in 2010. One major concern with these sites, has been that counterfeiters have been able to escape identification when selling products on this site, by using false identities – further, as online ads have been pulled down, the sellers have simply created other false identities to sell the same counterfeits. It is hoped that this regulation is enforced by the major shopping sites and the regulators.

### ***Tax and Customs***

#### **Preferential tax regime for venture capital investment enterprises**

On 30 April 2009 the State Administration of Taxation released a circular with retroactive effect to 1 January 2008. It clarified that if venture capital investment enterprises make equity investments in private small and medium-sized high-tech and new technology enterprises for more than two years, they are entitled to deduct 70% of the total investment in the target enterprises from the venture capital enterprise's taxable income once the two-year period for the equity holding is reached. The deduction can be carried over to the following year if the amount exceeds the tax due in the current year.

#### **New transfer pricing requirements in China**

China's transfer pricing regime has been strengthened with the enactment of the EIT Law and its Implementation Rules. The new provisions and the clarifications provided in the Implementation Rules bring China's transfer pricing regime closer to international standards by:

- Providing additional guidance on the acceptable transfer pricing methods by: reducing uncertainty in the application of the traditional transactional methods; and specifically recognizing the transactional net margin method and profit split

method as reasonable methods;

- Emphasizing the use of advanced pricing arrangements as an administrative tool and introducing concepts such as thin capitalization, cost sharing agreements, controlled foreign corporations, and general anti-avoidance rules;
- Establishing a requirement for taxpayers to prepare and maintain contemporaneous transfer pricing documentation;
- Expanding the scope of China's transfer pricing regime to include domestic enterprises, in addition to foreign invested enterprises and foreign enterprises.

#### **GAC and others issue diverse changes to Customs rules**

The General Administration of Customs (GAC) and the National Development and Reform Commission have approved 31 standards for unit consumption for processing trade operations involving various finished products, including stainless steel wire, iron wire, steel cord, books, bonding sheet materials, plastic containers, plastic tableware and palladium jewelry.

The GAC has also streamlined the administration of the security bank deposit system by issuing Announcement 5/2010, which states that an electronic system will be implemented for the processing trade industry, enhancing the efficiency and quality of its administration. Under the new system, an enterprise must first register with its local customs house, where it will be issued with certain licences.

The State Council recently approved the duty-free import of collectibles into China by way of donation, return, recall and purchase by any state-owned charity for charitable purposes. These items are exempt from customs duty, import value-added tax and consumption tax. In order to execute the State

Council decision, the Ministry of Finance, the GAC and the State Administration of Tax jointly issued the Provisional Regulations on Tax Exemption on Collectibles Imported by State-Owned Charities.

### ***Tort Law***

#### **Supreme Court specifies application of Tort Liability Law**

The China Supreme Court issued "Notice on Several Problem of the Application of Tort Liability Law" on 30 June 2010, which came into effect on 1 July 2010. Per China Tort Liability Law, people may sue for damages following medical accidents, road accidents, harm from pollution, mental distress, and violations of privacy or reputation on the Internet, etc. In cases of privacy violation or reputation damages, the victim has the right to inform the Internet service provider (ISP) to delete it and that ISP must face joint liability for damages if it fails to act.

### ***Competition***

#### **Hong Kong's Competition Law unveiled**

Hong Kong's Competition Bill was gazetted on 2 July 2010. Formal public consultations on a cross-sector competition law for Hong Kong commenced in 2006. The Bill will be tabled in Hong Kong's Legislative Council on 14 July 2010. When the Bill becomes law, it will be known as the Competition Ordinance. The Bill prohibits three categories of conduct:

- the First Conduct Rule prohibits from engaging in agreements, concerted practices or decisions with the object or effect of preventing, restricting or distorting competition in Hong Kong;
- the Second Conduct Rule prohibits undertakings with a substantial degree of market power from abusing that power by engaging in conduct which has the object or effect of preventing, restricting or distorting competition in Hong Kong;

- the Merger Rule prohibits undertakings from directly or indirectly carrying out a merger that has, or is likely to have, the effect of substantially lessening competition in Hong Kong.

#### **Divestiture rules highlight importance of choosing the right trustee**

The Ministry of Commerce released the Provisional Rules on Implementing Divestiture of Assets or Businesses on 8 July 2010. The rules can be seen as part of China's aggressive but practical efforts to perfect the concentration review regime under the Anti-monopoly Law. The trustee system prevalent in the EU and US models has been transplanted into the rules. The rules create two types of trustee: the supervisory trustee and the divestiture trustee. The rules on the dual trustee system include ambiguous and contradictory provisions. Supervisory and divestiture trustees are to receive their authorizations from the trustor (or the concentrating undertakings), yet they remain fully answerable to the ministry, to which they must report on their work.

## **Business News**

### **3 Chinese firms break Fortune 500's top 10**

Sinopec and two other energy conglomerates, the State Grid and China National Petroleum, made it to the top 10 of this year's Fortune 500 list. Sinopec ranks seventh on the list, followed by the State Grid, China's largest power grid operator. China National Petroleum is 10th on the list. A total of 54 Chinese companies made it onto the list this year.

Top 10 of this year's Fortune 500 list

Rank	Company	Revenues (\$ millions)	Profits (\$ millions)
1	Wal-Mart Stores	408214	14335
2	Royal Dutch Shell	285129	12518
3	Exxon Mobil	284650	19280
4	BP	246138	16578
5	Toyota Motor	204106	2256
6	Japan Post Holdings	202196	4849
7	<b>Sinopec</b>	187518	5756
8	<b>State Grid</b>	184496	-343
9	AXA	175257	5012
10	<b>China National Petroleum (CNPC)</b>	165496	10272

### **China's CIC may spin off Huijin unit**

China Investment Corporation (CIC) may spin off its Huijin unit, which is the majority shareholder in many banks such as Bank of China. The move is being championed by China's Vice Premier Wang Qishan and would allow CIC to invest in the United States, where it is interested in targeting equities, bonds and real estate.

### **Foxconn to open IT chainstores in central China**

The world's leading IT contractor Foxconn is talking with the government of Henan province in central China about opening some 2,000 chainstores -- an attempt to diversify its business mode. The chainstores are expected to enjoy preferential policies.

### **GE, Eaton among suppliers for China jet**

Diversified U.S. manufacturer Eaton Corp has formed a joint venture in China to develop airplane fuel and hydraulic systems, one of several U.S. aerospace

companies tapped to supply components for what is expected to be China's first large commercial aircraft. The venture will be majority owned by Shanghai Aircraft Manufacturing Co, Ltd, a subsidiary of the state-owned Commercial Aircraft Corporation of China with Eaton owning 49 percent.

### **Starr invests China's Top Grade Healthcare**

Starr International Company, a privately-held global financial services group, has made a \$40 million investment in Top Grade Healthcare Ltd., a provider of diagnostic imaging equipment and hospital management services in China. The capital injection was made through Starr's private equity fund unit. The stake size Starr acquired was not disclosed.

### **Developers cut property prices to jumpstart sales**

More property developers have begun to cut prices and adjust their business portfolios to cope with sluggish transaction numbers due to government tightening of the real estate sector. Most Beijing developers have lowered prices by 15 percent on new projects.

### **Lending dips as growth slows in China**

Don't expect any new stimulus measures, analysts said, despite the fact that China's money supply and lending tailed off in June in line with the country's anticipated economic slowdown. In June, 603.4 billion yuan (\$88.9 billion) in new yuan loans were distributed, according to the People's Bank of China. That is considerably less than the May figure of 639.4 billion yuan and 1.53 trillion yuan last June.

### **China faces challenges to maintain healthy banking industry**

China faces many challenges in its efforts to maintain the health of the banking industry, including risks from local government financing vehicles, property loans and

industrial overcapacity, bank regulator Liu Mingkang said. The regulator reiterated previous orders for banks to step up scrutiny of lending to local government financing vehicles and to curb credit to new investment projects run by local authorities after outstanding loans to these entities surged 70 percent last year to 7.38 trillion yuan.

### **China approves Geely's purchase of Volvo**

China's Ministry of Commerce has given its approval of Zhejiang Geely Holding Group Co.'s purchase of Ford Motor Co.'s Volvo car unit. This allows the \$1.8 billion acquisition, which was agreed by the two companies in March, to proceed for completion.

### **Workers walk off at Omron plant in Guangzhou**

Japanese auto electronics component manufacturer Omron is facing labor unrest at its Guangzhou plant. Several hundred workers walked off work at the company's Guangzhou plant, which supplies components to carmakers in southern China, including Ford Motor and compatriot firm Honda, which suffered similar labor unrest earlier in the summer. Toyota has also been affected by strikes at its Chinese plants.

### **SAIC Motor says H1 profit may more than quadruple**

SAIC Motor Corp, China's largest automaker, said its first-half profit may have more than quadrupled from a year earlier because of rising demand for vehicles in the world's most populous nation. The Shanghai-based automaker didn't provide earnings figures in a statement to the city's stock exchange. Net income was 1.4 billion yuan (\$207 million) in the first half of 2009.

### **Chinese automakers eye growing Russian market**

Chinese auto manufacturers are eyeing opportunities in Russia as that country witnesses a recovery in its domestic automarket. Fu Jianguang, district manager of the Great Wall Motor Company Limited, said that Russia is considered one of the most important overseas markets for Great Wall Motor and will continue to be so in the future.

### **China auto parts in M&A drive to move up value chain**

Chinese auto parts makers are moving into the overseas M&A fast lane, eyeing a distressed global market to close a technology gap with world leaders to meet sizzling demand at home and eventually sell overseas. Several major deals have already been inked and more are expected in the months ahead as the global industry retrenches, planting the seeds for a future crop of Chinese titans to compete with the likes of Robert Bosch and Denso.

### **China confirms Google's operation license renewed**

China had approved renewing the operation license of Beijing Guxiang Information Technology Co. Ltd., operator of Google's China website. Guxiang submitted an application letter to the MIIT on June 29 to renew Google's Internet Content Provider (ICP) license, a permit to run websites in China. In the application letter, Guxiang pledged to "abide by Chinese law," and "ensure the company provides no law-breaking content as stipulated in the 57th statement in China's regulations concerning telecommunications."

### **Shaanxi fines three cities for polluting river**

Northwest China's Shaanxi province has fined the local governments of three cities for excessively discharging pollutants in the Weihe River, a major tributary of the country's second largest river, the Yellow River. This is the first time the province has fined local governments directly over pollution

### **China mulls law to cap prices in monopoly industries**

China's government could take powers to cap the prices of monopolized goods and services. The Legislative Affairs Office of the State Council of China said the draft regulation on cost supervision and examination of goods and

services priced by the government would be open to public submissions until September 1.

### **China June power demand growth slows sharply**

China's power consumption growth in June slowed down sharply, as power use in the country's heavy industry trended lower. Growth in June power consumption fell significantly, after exceeding 20 percent year-on-year for the first five months of the year.

### **Corning to build LCD plant in Beijing**

Corning announced that it will invest US\$800 million in a liquid-crystal-display (LCD) production facility in Beijing, expanding its current capacity. The company makes LCD glass and fiber optics for use in electronic displays such as computers and televisions. Corning predicted demand for its LCD glass would come in at the high end of its current forecast of 2.9-3.1 billion square feet as market demand is high.

### **China's 3G users hit 25.2m by end of June**

China's third-generation (3G) mobile phone service subscribers numbered 25.2 million at the end of June, up 40 percent from the first quarter. Direct investment in 3G for the whole year would be between 90 billion and 95 billion yuan (\$13 billion-\$14 billion) compared with 160.9 billion yuan last year.

### **China's software industry revenue up 29.1% in H1**

Revenue in China's software industry rose by 29.1 percent year on year to 604.8 billion yuan (\$89.34 billion) in the first half of 2010. The speed of the growth was 6.4 percentage points higher than the same period last year. Further, export volume of software grew by 22.7 percent to \$10.33 billion in the first six months, but the speed of the growth was 6.4 percentage points lower than the average level of the industry.

### **Baidu profits up; Google search share down**

Baidu, which runs China's most popular search engine, beat analyst estimates with its second-quarter profits thanks in part to enduring weakness of competitor Google. Baidu doubled net income in Q2 to US\$123.6m, beating the analyst consensus of US\$104.6m. Baidu has won new advertisers thanks to Google's decision to shut its mainland-based search engine and redirect users to its Hong Kong servers to avoid requirements that it censor search results and to protest alleged hacking of its servers in China.

*This update is aimed at keeping our clients informed of developments in Greater China. Whilst every care has been taken to ensure the accuracy of this update, it should not be relied upon before individual advice is obtained. The MMLC Group is an international legal and corporate advisory group.*