



*MMLC Group*  *China Update*

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## **Legal News**

### ***Intellectual Property***

#### **Land Rover Wins Trademark Case Against Geely**

Land Rover was known by most Chinese as “陆虎” (pronounced *lù hǔ*) before Land Rover began selling in China. However, when entering China, Land Rover found that China's largest private auto manufacturer Geely, had registered “陸虎” (Land Rover in traditional Chinese characters) as a trademark in the Chinese Trademark Office. Land Rover requested the Trademark Review and Adjudication Board to cancel the mark owned by Geely, but was unsuccessful.

Land Rover then filed an appeal of this decision in the Beijing No.1 Intermediate

People's Court. The court ruled that Geely's registration of the Chinese characters for Land Rover violated Article 31 of the Trademark Law, which stipulates that unfair means may not be used to pre-emptively register the trademark of another's well known mark – the court ordered the cancellation of the registration. This decision has been widely welcomed in the Chinese trademark law community, as many Chinese translations of well known foreign brands have been registered in China by persons that have no relationship with the foreign brand owners – in the past, many foreign brand owners have been reluctant to take action regarding such registrations, choosing to go through an extensive rebranding exercise in China.

## **Chinese Unfair Competition Law Gets Attention**

The State Administration for Industry and Commerce (SAIC) has submitted to the Legislative Affairs Office of the State Council a revised draft of the Chinese Unfair Competition Law, which focuses on identifying the competent enforcement authorities to ensure uniform enforcement standards and defining new forms of unfair competition to extend the scope of administrative enforcement.

Article 3 of the law states that "where laws, administrative rules and regulations provide that other departments shall exercise the supervision and inspection roles, those provisions shall apply". This provision has caused concern as to which government departments to turn to in relation to certain disputes and led to conflicting decisions in some cases in relation to the same set of facts. The revised law states that "the SAIC and local AIC departments, at various local levels are to exercise the rights of supervision over, and inspection of, acts of unfair competition", hopefully clearing up this ambiguity once and for all.

Interestingly, this law has also received attention from the Ministry of Industry and Information Technology (MIIT), in a consultation draft of the Interim Measures on the Supervision and Management of the Internet Information Service Market Order, published on January 14 2011. The draft acknowledges that the extensive use of the Internet in China, has resulted in new ways to commit acts of unfair competition, and that the current law does not provide provisions that can cope with these new acts of unfair

competition. The draft has provided a number of examples of acts of unfair competition involving the internet or ecommerce, including:

- the unauthorized use of another party's domain name or a commonly used abbreviation of the company name;
- the unauthorized use of identical or similar marks which are well known to the public, and are registered in another country or area; and
- the editing of another party's brand on a product, and offering those products for sale without authority of the brand owner.

In addition, the revised draft allows consumers to take action in these sorts of cases, when the consumers can prove loss or damage. At present, trademark infringement cases and unfair competition cases involving passing off actions are generally limited to brand owners.

## **PRC Supreme People's Court Clarifies Design Patent Infringement Tests**

The PRC Supreme People's Court (China's highest court), in its Interpretation on Some Issues Concerning the Application of Laws to the Trial of Patent Infringement Disputes, has provided some clarity as to the determination of infringement of a registered design in China:

*Infringement of a design patent requires that the infringing design appears substantially the same as the patented design in the eye of an ordinary person who views the design. Further, when determining whether a design is substantially identical, the ordinary person who views the design must make a "comprehensive judgment", based on the design feature(s) of each design, in*

*view of the overall visual effect of the design.*

In a recent case decided by the same court (*Honda v. The Patent Reexamination Board of the State Intellectual Property Office*), the court provided further insight into the "comprehensive judgment" test used to determine design patent infringement. It considered that when designs are adopted for cars, which have or appear to have a common configuration as a whole, this will have limited impact on the overall visual effect on the eye of an ordinary beholder for that type of car. On the contrary, distinctions in sectional design features do have notable visual effects on the design of the car as a whole, and can be determinative in an infringement case.

In this case, the court ruled that differences in the design features such as headlamps and side door windows would have led an ordinary consumer to distinguish the patented design from prior designs. In this case, the two designs (the patented one and the prior art reference in the Honda case) were distinguishable, due to such differences in the designs involved.

Clearly, design patent infringement cases will continue to be judged on each case's merits, however these guidelines provide some assistance in looking at whether a court will decide that infringement has occurred or not.

## **Privacy**

### **China: Regulating Data Privacy**

China has circulated for public comment, draft guidelines governing the transmission and storage of personal data on computer systems. The guidelines are a set of voluntary principles,

and are broadly similar to the privacy principles seen in other jurisdictions like in Hong Kong and Australia. Companies adopting the guidelines generally need to keep data confidential, and notify and obtain consent from the customers for the collection, use and transfer of the data. The guidelines are seen as a means to test the waters before mandatory standards are put forward for use in China.

## **Investment**

### **China Adjusts Market Access for FDI**

The National Development and Reform Commission (NDRC) has solicited public opinions on its new draft of the "Catalogue for the Guidance of Foreign Investment Industries (a draft for discussing)" ("Draft"). It is understood that numerous submissions were provided to the NDRC, given some concerns as to continued limits on foreign investments in some industries.

Compared to the 2007 version, the Draft proposed the following adjustments:

In the list of Encouraged Industries:

- Added manufacturing of key spare parts for new energy automobiles (foreign investment shall not exceed 50%);
- Deleted manufacturing of complete automobiles (foreign investment shall not exceed 50%) and construction of automobiles research and development organization – it is uncertain as to whether this will mean deletion of the 50% cap in general, or not – further clarification is being sought on this important issue;
- Added venture investment enterprises and intellectual property rights services; and
- Added career skill training.

In the list of Restricted Industries:

- Deleted the restriction on carbonic acid beverage manufacturing;
- Deleted the restriction on medical treatment establishments (limited to equity joint ventures or contractual joint ventures);
- Deleted the restriction on financial leasing companies;
- Deleted the restrictions on franchising, commissioned operation, commercial management and commodity auctions; and
- Deleted the requirement that the majority share should be held by the Chinese partner in a joint venture involved in distributing audio-visual products (excluding movies).

In the list of Prohibited Industries:

- Added domestic courier services; and
- Construction and sales of houses to be changed from the Restricted Sector to the Prohibited Sector.

## **Competition Law**

### **Market Dominance and the Internet**

Hudong.com, China's largest encyclopedia website, is asking the State Administration for Industry and Commerce (SAIC) to fine Baidu, the leading Chinese internet search engine, a total of CNY 79 million (US\$ 12.1 million) due to abuse of a dominant market position. Further, in November 2010, the SAIC received a request for review of Tencent's alleged abuse of a dominant position in the ecommerce market in China. Given the size and reach of Tencent and Baidu, it is not surprising that they are receiving attention from the authorities under China's relatively new Anti-Monopoly Law and associated regulations.

Article 3 of the Anti-monopoly Law defines 'monopolistic conduct' to include monopoly agreements between operators, abuse of market dominance and elimination or restriction of competition by concentration among operators. Under Article 19, market dominance is presumed to exist if one operator's market share represents one-half of the relevant market, if two operators have a combined market share of two-thirds of the relevant market or if three operators have a combined market share of three-quarters of the relevant market.

Baidu's market share in the search engine software market at the same time was around 72%. Tencent's share of the instant message software market is around 76.5%. Under the foregoing provisions, internet companies such as Baidu and Tencent could be presumed to enjoy market dominance – however, this in itself is not actionable of course – it needs to be proved that these companies have abused their positions and engaged in conduct that hurts competition in China.

The decisions are awaited with interest. If the SAIC finds against Baidu and Tencent, it could open the floodgates to a large number of claims in China.

### **China Fines Unilever for Price Comments**

The National Development and Reform Commission fined Unilever two million yuan (US\$308,000) on May 6 for talking publicly about planned price increases. The government considered that Unilever disrupted market order and contributed to a scramble for products like soap and detergent in the inflation-hit country, by discussing these plans openly. In a similar case, a local well known processed food company, Tingyi Holding Corp.,

was given a warning over discussing price increases publicly, but no fine was issued.

The Chinese Pricing Law limits public commentary about future pricing strategies to avoid anticompetitive practices, and social disruption, to discipline Unilever. Controlling inflation is very crucial for the Chinese government to stabilize the country at present, and it is thought that this case was handled in such a dramatic fashion due to this concern.

## **M&A**

### **Taiwan - Amendments to Mergers and Acquisitions Act proposed**

To further liberalize the regulatory framework for M&A activities, the Ministry of Economic Affairs of Taiwan has proposed certain amendments to its Mergers and Acquisitions Act. The proposed amendments cover consideration for spin-offs, amortization of intangible assets and tax exemptions.

Under the existing provisions, only new shares may be offered as consideration in a spin-off. Under the proposed amendments, consideration for spin-offs can also be made in the form of cash, equity or other assets.

Further, it has been proposed to allow the amortization of the following intangible assets in an M&A transaction:

- management rights (over a period of 10 years);
- copyright works and subject matter (over a period of 15 years);
- trademarks, patents and franchise rights (over the period for which legal protection would be given under law); and
- other intangible assets (over a period of 15 years).

Under the existing rules, a company spinning off its business will enjoy tax exemption only if its shareholders will receive 100% of the new shares offered as consideration in the spin-off. Under the proposed amendments, tax exemption will be granted if the shareholders will receive no less than 80% of the new shares. Furthermore, the company may enjoy tax exemption to the extent of the consideration received by its shareholders and claim losses from the spin-off to the extent of the consideration not received by its shareholders under the proposed amendments.

## **Employment/Labor Law**

### **Criminal Liability for Not Paying Wages**

According to an amendment to the PRC Criminal Law by the National People's Congress, since May 1 2011, a company and its responsible managers are liable to criminal prosecution if a company intentionally (and without reason) fails to pay wages to its employees on time. Offenders may be liable to up to three years' imprisonment, a fine or both. However, a three to seven-year imprisonment may be imposed on serious and regular offenders. In some industries, like the construction and mining industries, delays in the payment of wages have led to social unrest problems.

## **Other**

### **China's New Indoor-Smoking Ban Takes Effect**

The rules released by the Health Ministry in late March on the management of public places that now ban smoking in more venues like

hotels and restaurants, came into effect on May 1 2011. Interestingly, we have seen virtually no attempts to enforce this new regulation in Beijing or Shanghai. The revised guidelines call for no-smoking signs to be put up in public places and require owners or managers of venues considered public places, to allocate staff to stop patrons from smoking. Chinese media reports have cast doubt on the effectiveness of the ban as it is likely to be ignored by smokers and operators of public places because it fails to specify punishments for violators – further, management will prefer to ignore the regulation in order to maintain patronage.

## **Business News**

### **Finance**

#### **HKMA Warns of Local Rate Rises**

The Hong Kong Monetary Authority (HKMA) Chief Executive, Norman Chan Tak-lam, warned on April 28 that local interest rates will rise in response to strong demand for loans; and warned the public to be prepared for the interest rate risk and avoid overstretching of their bank loans. The loan-to-deposit ratio of local banks reached 81 per cent in January, up from 71 per cent at the start of last year, according to HKMA figures. Many Chinese and Hong Kongers have taken advantage of the low interest rates to expand their property portfolios, putting down minimal deposits in the hope that property prices would continue to rise.

### **Real Estate**

#### **China Housing Inflation Slows**

China's Real Estate Index System said earlier this month, that residential property prices in 100 major cities in China were up 0.40% in April from March, less than March's 0.59% increase. In April, property prices were up in 77 cities and down in 22 - one city remained the same. Average home prices in April rose to 8,773 yuan (US\$1,351) per square meter from 8,738 (US\$1,345) in March according to a survey of property developers. There is no doubt that the property market in China's major cities has cooled with real estate agents struggling to find buyers.

## Shanghai Office Rents Up

Strong demand of Grade-A office buildings in core areas in Shanghai has pushed up average rents by 7% - the vacancy rates for Grade-A offices in Shanghai fell slightly to 9.6% in the first quarter.

### **Government & Policy**

#### **12th Five-year Plan Well Received**

The fourth session of the 11th National People's Congress has discussed and approved the PRC Outline of the 12th Five-year Plan for National Economic and Social Development (the 12th Plan). Compared to the previous five-year plans, the 12th plan focuses on:

- Increasing “national wealth”;
- Selective domestic opening-up;
- Going global;
- Deepening the reform of the financial system;
- Assurance of “people living plentiful lives”;
- Lifting of restrictions on foreign investment in medical institutions; and
- Developing a better social insurance law.

During the past 30 years, China's rapid development has undoubtedly lifted millions of citizens out of poverty and improved standards of living throughout the country but also raised the question of sustainability, leaving many feeling that the basis of growth for the last 30 years has reached its limit. The Chinese leadership is aiming to solve this sustainability problem by increasing “national wealth” and creating a larger wealthier middle class in China (both in regional areas and the larger cities).

## Revised Import Catalogue

To optimize the diversity of China's imports and promote the import of advanced technologies and environmentally friendly products, the National Development and Reform Commission, the Ministry of Finance and the Ministry of Commerce jointly revised the catalogue on May 13 for technologies and products that the country wants its companies to import in 2011. High-end equipment manufacturing, new generation information technologies, clean energy production and materials, are all treated favourably.

#### **New Internet Regulator in China**

China has created a new State Internet Information Office to supervise the Internet. The new agency will be run by officials from the State Council Information Office, which regulates online content, the Ministry of Industry and Information Technology, which is responsible for technology and telecommunications, and the Ministry of Public Security, a law-enforcement body. More details on the new regulator are awaited in detailed implementing regulations due out in June.

#### **China Naming and Shaming Foreign Brands**

Mainland Chinese are deeply attached to foreign products and are willing to pay a premium for foreign products as compared with domestically made/branded products and services.

The official attitude towards foreign brands has shifted significantly though, and no longer are foreign brands thought of as being white knights or above the law. Last month, the Beijing Consumers Association, sponsored by

the government, singled out several imported brands, including Zara, Hush Puppies, Marlboro Classics and Hong Kong's G2000, for failing to meet quality standards on their apparel. This month, as discussed above, the National Development and Reform Commission fined Unilever for discussing future price increases.

This is leading to a change in perception of foreign brands – many local news sites are reporting that Chinese consumers are becoming concerned that the quality of products made by the multinationals on the mainland may well be inferior to those made in their home country for home country consumption. Some news sites are saying that this leading to consumers choosing to buy online from foreign sites offering foreign made products. This is clearly going to be something that foreign brands need to look at in relation to their local manufacturing and distribution policies.

### **Food Industry**

#### **Diageo Pushes Whisky in China**

Diageo, one of the world's leading alcoholic beverage companies, which makes Johnnie Walker scotch and Smirnoff vodka, has said that it is focusing on developing the high-end whisky business in China. China's whisky market has increased rapidly over the last 5 years. The company is developing more premium Scotch whisky products for the Chinese market and is also hoping to get ahead in the *baijiu* (a fiery, translucent spirit normally drunk in shots) spirits market, which accounts for 32% of China's alcoholic-drinks market. Diageo has been waiting for 12 months for regulatory approval to take control over a well

known local baijiu maker, Sichuan Swell-Fun Co., Ltd.

### **Investment**

#### **IMF: China's Economy to Surpass US in 2016**

The International Monetary Fund (IMF) predicted on the basis of "purchasing power parities" that China's GDP will rise from US\$11.2 trillion in 2011 to US\$19 trillion in 2016, while the US economy will increase from US\$15.2 trillion to US\$18.8 trillion. Based on these figures, China could surpass the US in 2016. We feel that as the US economy gains pace, and manufacturing picks up in the US, these figures will be revised significantly.

#### **Carlyle-backed Firm Entangled in Graft Allegations**

China Forestry Holdings Co (0930.HK, CHFY.OTC) which had received US\$55 million in investments from the US based Carlyle Group in 2008 and US\$30 million from Switzerland based Partners Group in 2009, said that its former CEO was arrested by Chinese authorities on February 24 on charges of embezzling US\$4.6 million from the company. The company reported a 2010 loss of US\$417 million.

### **IT**

#### **"China's Facebook" Surges On IPO**

Shares of Renren (RENN.NYSE), the largest social-networking site in China, surged 29% to close at US\$18.01 on its first day of trading on the New York Stock Exchange. Meanwhile, it is understood that Facebook and Twitter are

continuing to look at ways of entering China.

## ***Aerospace***

### **Honeywell Supplies China Jumbo Jet Parts**

Honeywell International Inc. signed a US\$11.3-billion master contract last year with the Commercial Aircraft Corporation of China (COMAC) to supply aviation parts for the C919 - China's homemade narrow body commercial aircraft. Honeywell is now in the final stages of establishing three joint ventures with Harbin Dongan Engine Corp Ltd, a subsidiary of Aviation Industry Corporation of China (AVIC), Hunan Boyun New Materials Co Ltd, and AVIC's Flight Automatic Control Research Institute.

The growth in the number of new aircraft and airports in China has attracted the world's aviation players. Honeywell transferred its Asia-Pacific headquarters from Singapore to Shanghai in 2007. Honeywell's aerospace business grew 8 per cent in the first quarter of 2011 and it is predicted that the company will have at least 15 to 20 per cent annual growth over the next five years.

*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.*