



## ***MMLC GROUP***

An international legal and corporate advisory group

BEIJING

709, Tower W3

The Towers

No.1 East Chang An Avenue

Dongcheng District 100738

Beijing, China

北京东城区东长安街1号东方广场东方经贸城

西三办公楼709室, 邮编100738

writer's p: +86 10 8515 1091

f: +86 10 8515 1089

### **Trademark Appeals in China**

By Yu Du, Associate, MMLC Group

yudu@mmlcgroup.com

www.mmlcgroup.com

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Trademark appeals in China include the following three types: appeals of objections, appeals of oppositions and appeals of cancellations. Once the application is rejected by China Trademark Office (CTO) or dissatisfied the decision of the opposition, or dissatisfied the decision of the cancellation, the interested party may, within 15 days from receipt of the Notification of Refusal or the Decision on Opposition of Trademark or the Decision on Cancellation of Trademark issued by the CTO, appeal to the Trademark Review and Adjudication Board (TRAB), established under the administrative authority for industry and commerce under the State Council, responsible for handling matters relating to trademark disputes.

#### ● **Required Formalities**

1. Application (If there is (are) a respondent/respondents, the applicant shall file as many copies of the Application as there are respondents.<sup>1</sup>), including the following information:

- 1) the applicant's name, address of residence, mailing address, the name of the

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<sup>1</sup> See Article 13 of the Guideline for Trademark Review and Adjudication. [need date of issue]

person to be contacted, and telephone number; (If the respondent(s) is (are) indicated in the review and adjudication application, the name and address thereof need to be indicated; if a trademark agency is appointed to attend to the matter of the trademark review and adjudication, the name, mailing address, the name of the person to be contacted, and telephone number of the agency also need to be indicated.)

- 2) the trademark in dispute and its application number or preliminary approval number, registration number and the issue number of the Trademark Gazette;
  - 3) specific request for the review and adjudication, and the facts, grounds and legal bases for the request.<sup>2</sup>
2. Power of Attorney (Copies are fine and no need for notarization nor consularisation. - For local Chinese/Chinese companies and foreigners/foreign companies with permanent address in China, it is much better to find an intellectual property firm to do the filing as the agent. However, for foreigners/foreign companies with no permanent address in China, it is necessary, since China laws require them to entrust a local firm for the appeal in China.<sup>3</sup>)
  3. Further Evidence (3 months from the date of the Application filing is given to collect more best evidence to supporting the appeal, considering 15 days is too short to prepare precise submissions and enough evidence. It's worth noting that if interested party needs to supplement relevant evidence after filing the Application, he must make a statement in the Application and submit altogether the same number of copies of the proofs as that of the Application; if the applicant does not make the statement or fails to submit the relevant proofs at the expiration of the time limit, he will be deemed to have given up supplementing the relevant proofs, with the exception that the evidence is based on the new facts that occur after the expiration of the time limit or there is any other justifiable reason.<sup>4</sup>)
  4. List of Evidence (The interested party shall categorise number and list each proof he submits, briefly explain the source thereof, and specific facts of the evidence, and sign and seal them.<sup>5</sup>)

## ● Rules of Evidence

According to relevant provisions of the Guideline for Trademark Review and Adjudication, issued by the State Administration for Industry and Commerce (SAIC) on 2 November 1995, modified for the third time on 26 September 2005, commencing operation on 26 October 2005, an interested party shall be under the burden of proof to testify the facts on the basis of which he requests for the review and adjudication or

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<sup>2</sup> See Article 14 of the Guideline for Trademark Review and Adjudication.

<sup>3</sup> See Article 10 of the Guideline for Trademark Review and Adjudication.

<sup>4</sup> See Article 20 of the Guideline for Trademark Review and Adjudication.

<sup>5</sup> See Article 22 of the Guideline for Trademark Review and Adjudication.

on the basis of which one rebuts the other party's review and adjudication request. In case that there is no evidence or there is not sufficient evidence to attest to the factual claims by an interested party, the interested party under the burden of proof will bear the adverse consequences.<sup>6</sup>

The interested party who furnishes the TRAB with documentary evidence shall furnish the original, including the original text, the authentic text, and the copy. The interested party who has difficulty furnishing the original may furnish the corresponding Xerox copies, photographs or extracts. If the furnished documents are Xerox copies, photographs or extracts of the original documentary evidence kept by a relevant department, the sources shall be indicated, and the documents be sealed by the department upon verification.<sup>7</sup>

The interested party who furnishes the TRAB with material evidence shall furnish the original material. The interested party who has difficulty furnishing the original may furnish the corresponding reproduction or other evidence such as photographs or video-recordings of said material evidence. If the original is of relatively many varieties, a part thereof will be furnished.<sup>8</sup>

If an interested party has doubt about the Xerox copies or photographs of the documentary evidence and material evidence furnished by the other party, and has relevant proofs in support of the doubt, or the TRAB deems necessary, the doubted interested party will furnish or show the original or the notarized copy of the relevant evidence.<sup>9</sup>

For the evidence generated beyond the territory of China, it is not necessary for applicant to notarize and consularize the evidence in the review and adjudication process, unless the opposed party challenges the authenticity of the evidence with supporting proof, or the TRAB believes it is necessary to do so.<sup>10</sup> However, if an interested party furnishes to the TRAB instruments or explanatory material in a foreign language, he shall attach their Chinese translation. If an interested party who has furnished evidence in a foreign language fails to submit their Chinese translation, the evidence in the foreign language will be deemed not to have been submitted. Further, if necessary, an entity accepted by both parties may be entrusted with the translation of the entire text or the part of the text which has been used or to which objection has been raised. If no entity can be accepted by both parties, the TRAB may entrust a professional translation company with the translation. Each party bears 50% of the translation fees.<sup>11</sup>

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<sup>6</sup> See Article 40 of the Guideline for Trademark Review and Adjudication.

<sup>7</sup> See Item 1 of Article 42 of the Guideline for Trademark Review and Adjudication.

<sup>8</sup> See Item 2 of Article 42 of the Guideline for Trademark Review and Adjudication.

<sup>9</sup> See Item 3 of Article 42 of the Guideline for Trademark Review and Adjudication.

<sup>10</sup> See Article 43 of the Guideline for Trademark Review and Adjudication.

<sup>11</sup> See Article 44 of the Guideline for Trademark Review and Adjudication.

To add the chance of winning the appeal, direct and strong evidence should be filed as much as possible. The presence and strength of evidential force in relation to the following aspects:

- 1) the original text, original material as the evidence will be deemed to be stronger than the copy or reproduction. In case that only copy or reproduction can be provided, that it is consistent with the original should be further proved;
- 2) the evidence is relevant to the facts of the case;
- 3) the evidence conforms to the law in terms of form or source;
- 4) the evidence is highly believable in content;
- 5) the witness or the person furnishing the evidence has no interest in the interested party.<sup>12</sup>

### ● Appeals to the court from the TRAB

The adjudication or decision made by the TRAB is not final. Any interested party who is dissatisfied with the adjudication or decision made by the TRAB may, within thirty (30) days from receipt of the notification of the adjudication or decision, institute legal proceedings with the people's court.<sup>13</sup>

The court of first instance for an administrative litigation to the TRAB is the No. 1 Beijing Intermediate People's Court. The review of the TRAB's decision on the Notification of Refusal issued by the CTO is usually heard in the administrative chamber of the Intermediate Court, while the review of the TRAB's decision on the Decision on Opposition of Trademark or the Decision on Cancellation may be heard in either the administrative chamber or the civil chamber, depending on whether there are other civil disputes between the parties.

Generally, when initiating the administrative litigation, the plaintiff needs to submit to the court a Power of Attorney – only a lawyer at a Chinese law firm can be entrusted<sup>14</sup>. If the plaintiff is a company, a formal document attesting to the fact that the named agent is the legal representative of the plaintiff, and the company's business license must also be filed. If the plaintiff is a foreign company, the documents that are to be submitted must be notarized and consularised. In practice, the notarization and consularization may not be completed within 30days. Thus, the documents not be notarized and consularised are allowed to be submit first in order to avoid exceeding the time limit, and then the notarization and consularization should be supplemented as soon as completed.

According to the PRC Administrative Procedure Law issued by the National People's

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<sup>12</sup> See Article 45 of the Guideline for Trademark Review and Adjudication.

<sup>13</sup> See Article 33 of the PRC Trademark Law.

<sup>14</sup> See Article 73 of the PRC Administrative Procedure Law.

Congress on 4 April 1989, commencing operation on 1 October 1990, once the court accepts the case, it shall forward the complaint to defendant within 5 days of receipt. The defendant should respond within 10 days of receiving notice. The court will then transfer the response of TRAB to the plaintiff within 5 days and send hearing notice to all the parties involved.<sup>15</sup> In the case of review of an opposition or cancellation decision, in addition to the plaintiff and the defendant TRAB, there is usually a third party.<sup>16</sup> The third party will be the party involved in the previous opposition or cancellation. The third party is also allowed to file a response with the court within 10 days of receiving notice.

During the course of hearing, the court will examine the legitimacy of the administrative decision made by the TRAB.<sup>17</sup> The legitimacy will be considered from the following three aspects: whether the evidence before the administrative board supports the decision rendered, whether the TRAB in deciding the case applied the laws correctly, and whether the process complies with China's procedural law.<sup>18</sup>

After review the decision, the court can issue three possible decisions: it may uphold the TRAB decision, cancel the decision and order the TRAB to make a new decision, or uphold part of the TRAB decision and return the case to the TRAB for further consideration if necessary.<sup>19</sup>

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<sup>15</sup> See Article 43 of the PRC Administrative Procedure Law.

<sup>16</sup> See Article 27 of the PRC Administrative Procedure Law.

<sup>17</sup> See Article 52 of the PRC Administrative Procedure Law.

<sup>18</sup> See Article 54 of the PRC Administrative Procedure Law.

<sup>19</sup> See Article 54 of the PRC Administrative Procedure Law.