



What's in this issue



p. 2 IP CHINA
Which one comes first:
the trademark or the search?



p. 3 IP CHINA
Tencent dramatic victory
against TikTok copyright
infringement



p. 5 ADVERTISING LAW
All you need to know to
advertise with NFTs in China



p. 7 IP APAC
Oatly fails “Barista”
registration in New Zealand



p. 8 IP CHINA
Kungfu Fighting over
the use of Bruce Lee’s Portrait



p. 9 TECH LAW
New regulation on deepfakes
for a safer cyberspace



p. 11 ANTITRUST LAW
13ml USD fine for
academic database CNKI in China



p. 13 IP CHINA
JÄGERMEISTER wins 10,000,000
RMB damage compensation

Dear readers,

We jump in the year of the Rabbit with a selection of cases, guidelines and tips to better understand the business world in China.

The first article deals with the dilemma that everyone encounters when entering the Chinese market: which comes first, the trademark or the search?

The second article explains what happened in the case Tencent vs TikTok, where the last one has been found guilty of copyright infringement made by the users.

We know in China NFTs shall not be traded or used as any kind of financial instrument. Nevertheless, brands may still be able to use NFTs successfully in their promotions, but they should use it in a careful way.

Back on trademark topic, we discuss the case of Oatly, the famous Swedish oat milk brand. In an attempt of registering “BARISTA”, one of its most successful products, as a trademark in New Zealand, Oatly AB has met some obstacles. Read along to see what happened.

Right after, we explain what happened to a Chinese fast-food chain founded in 1990 which has been using the logo resembling Bruce Lee’s pose since 2004 and got sued in 2019 by Bruce Lee’s daughter.

Speaking about Technology Law, we analyze the new Provision on Internet Information Services Depth Synthesis, issued in China to strengthen the regulation on the internet deepfakes

Just before the last article, where we talk about the great victory obtained in China by Jägermeister, you can read what happened to a Chinese academic database, which got a fine of 87.6 million RMB for monopolistic behavior.

Read us, follow us, share us! And enjoy the new year of the Rabbit.

IP CHINA

Which one comes first:
the trademark or
the search?



Few days ago, a friend called and told me about a new entrepreneurial project. My friend operates in the food & beverage sector and so I have been revealed a coming soon top-notch restaurant in Shanghai. Being aware of the importance of Intellectual Property in China, I am one of the first persons outside the circle of the founders to know about the project.

With great excitement in the voice and shiny eyes, my friend introduced the concept of the new place and – finally - told me the new trademark chosen to distinguish the place. Sorry, for obvious confidentiality reasons, I cannot disclose it here.

This is not the first case I take care of this friend; we have some prior experience and so we agreed to conduct a trademark search – first - and not to rush to file the application without having cleared the registrability.

I did my homework and came back to the friend, reporting that unfortunately the registration of the trademark chosen looks unlikely in China due to prior similar trademarks in the same class. I explained that in China there are over 40 million trademarks in the registry and so nowadays is difficult to find an available slot.

I explained that – at this point – there are two routes.

First is creating different trademark candidates and trying again the trademark search to check the chances of registration. Second is insisting with the “beloved” candidate and attacking the prior existing registrations. For example, a typical cost-effective strategy is filing non-use cancellation(s) against the obstacle-trademark(s) aiming at clearing the way to the registration of the selected trademark.

Though the second route a viable one, it might take more time and more budget than the first one. I would naturally incline toward creating and choosing a different trademark with higher chances of registration. However, I am a lawyer and I tend to underestimate the difficulty of the marketing/communication creative process and overweight the legal issues.

Whatever my friend will decide, investing more in creativity and coming up with more candidates or investing more in legal tools to clear the way to the registration of its first candidate, it will be good.

After all, I thought, this new project and new trademark has no connections with the other existing projects. This is another key point that I want to highlight in this article. When an entrepreneur is launching a new project, he/she has the opportunity of choosing a trademark that has high chances of registration in the commodity class and in the territory where the project is to be developed.

Of course, the first and most important element is that the chosen trademark is suitable and appealing for the kind of products or service to be distinguished. The communication and marketing perspective is essential, but attention not to push too much on this point and forget about the legal point.

The same freedom or opportunity might not be there in other circumstances. Think, for example, to a company selling apparels in Europe that decide to enter Chinese market. Differently than my F&B friend in the story above, the apparel company from Europe is “limited” by its history and reputation. The company must fight to get his trademark registered in China. It is likely that this company will invest to clear the way to the registration of the same trademark they registered and used in other countries.

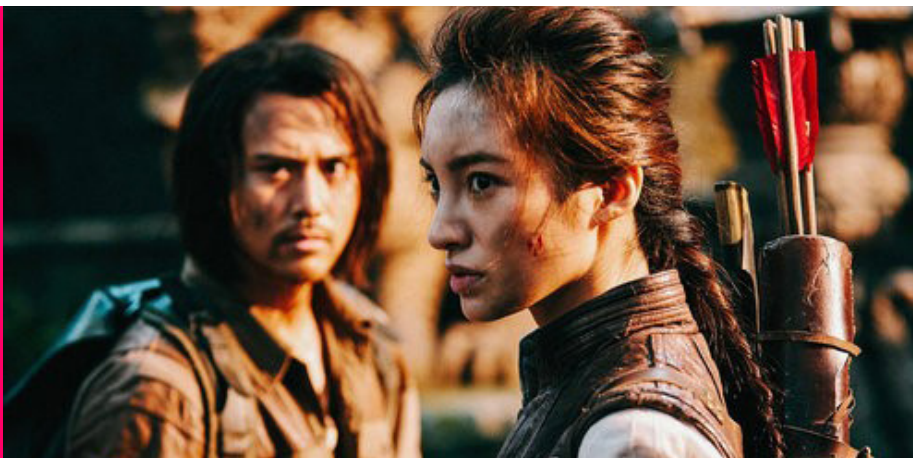
In the F&B story above, there is not a limit given by the existing business and reputation abroad. The only limit is the creativity, the patience, and a good trademark search.

So, if you ask me “which one comes first: the trademark or the search?”, the answer is easy: Surely, the search, and then the search again, and maybe a new search. Finally, it comes the trademark. There is no dilemma.

Fabio Giacobello
HFG Law & Intellectual Property

IP CHINA

Tencent dramatic victory against TikTok copyright infringement



The year 2022 mark the time when many platforms have been "making peace" in the direction of secondary authoring, but related lawsuits and claims have never stopped.

At the beginning of November 2022, Xi'an Intermediate People's Court made a first instance verdict on Tencent's lawsuit against TikTok for the copyright infringement of the adventure drama “云南虫谷” (pinyin: Yunnan chóng gǔ; Eng.: Yunnan Insect Valley) broadcasted by Tencent. The court held that a large number of users on the TikTok platform have published videos of the drama without authorization.

Although TikTok has taken measures to reduce the number of infringing works, the infringement has not been effectively curbed. Indeed, for the Court perspective, TikTok should immediately take effective measures to delete, filter and intercept relevant videos, and compensate Tencent for economic losses and reasonable expenses of more than 32.4 million yuan.

Prior to this, TikTok has reached cooperation with other broadcasting platform such as Sohu Video and iQiyi asking the authorization to publish film and television works. However, in the process from confrontation to embrace, there are still many problems to be solved.

“云南虫谷” is a 16-episode online drama of suspense and adventure theme produced by Penguin Film and Television, adapted from the world's dominant novel Ghost Blowing the Lamp in Yunnan Insect Valley, which will be broadcast independently on Tencent Video from August 30, 2021.

The plaintiff Tencent said that after the play was broadcast, there were a large number of clips of the drama uploaded by users on the TikTok platform. On September 22, 2021, Tencent filed a lawsuit with the Xi'an Intermediate People's Court, requiring TikTok to immediately take down the videos and compensate economic losses and reasonable expenses of 10 million yuan.

The case was formally accepted by the court on October 8, 2021. Before the hearing of the case, Tencent changed its claim and increased the claim amount to 90 million yuan.

The defendant TikTok argued that the relevant videos were uploaded by users themselves, and the number of platform users was large, so it was impossible for TikTok to conduct substantive review of massive information.

Additionally, TikTok platform only provides information network storage services, without the obligation of content review. The platform has reminded users that the uploaded content shall not infringe the intellectual property rights of others, and has fulfilled the obligation to notify deletion, so it does not constitute infringement.

The court held that TikTok should have known and clearly knew that there were a large number of infringing acts against Tencent and had the ability to effectively manage the infringing content of the platform.

It did not take appropriate measures to control and manage the infringing content of the platform within a reasonable period of time and found that it met the constitutive requirements of helping the oblige with the infringement of the information network communication right of the works involved in the case, and there were acts of helping the infringer.

Effective measures should be taken immediately to delete, filter and intercept relevant videos.

Considering the types of works involved, popularity, possible losses, expected earnings, rights protection, the scale of the defendant's infringement, duration, subjective malice, possible benefits and other factors, the court decided that the plaintiff suffered an average loss of economic benefits of 2 million yuan per episode of the network drama, so the economic losses and reasonable expenses totaled more than 32.4 million yuan.

This is also the highest amount of compensation Tencent has received in film and television copyright litigation. According to the judgment, the production cost of a single episode of “云南虫谷” reached more than 6.6 million yuan, and the total production cost of 16 episodes reached 334 million yuan.

Continue reading

In recent years, short video infringements have been rampant, causing great damage to the legitimate rights and interests of obliges, and courts around the country have increased their efforts to award compensation.

How to determine the amount of compensation in a case is based on the influence of the works involved, production costs and the licensing fees of the episodes that can be referred to, especially the severity of the alleged infringement and the infringement profits.

However, short videos creators of film and television works must eventually move towards compliance. "Authorization before use" is one of the best solutions at the moment. While protecting the legitimate rights and interests of the obligee, it also meets the needs of short video creators to use content flexibly.

Of course, to some extent, the short video platform has become an important content dissemination channel. Producers choose to open accounts to release materials, and some platforms will also jointly launch short videos with creators.

Also, some users lamented that the reason why they would like to see a play is that they "feel good" after brushing some clips. In other words, the existence of secondary creative content can promote users to watch content on the long video platform.

However, the platforms have not disclosed more information about the current authorization cooperation for publishing of short videos. After all, the endless re-creation of content means the accumulation of traffic. The creators earn subsidies from the short video platform, but it is the long video platform that pays for the cost of content, which is also the crux of the imbalance between the demands of both sides. As for the revenue of long video platforms and producers, more perfect cooperation models and solutions are needed.

This decision is highly disputable for below reasons:

1. The infringement claim was filed against TikTok solely based on secondary infringement;
2. Notice-takedown principle seemed to be override: The court ruled that TikTok shall be aware of the large volume of infringement occurred on its platform in the case of repeated prior warning, complaints, lawsuits, and applications for preservation of conduct by rights holders filed by the copyright owner. The court also made the judgement based on the reason that TikTok also has the ability to make sufficient management over the infringement content in the platform.

The ruling by the court seemed suggesting mega platforms like TikTok should've been able to manage the infringement on the platform only based on a letter from right owner (without even indicating the specific link). If TikTok can do that for Tencent, can it do the same for all other right owners?

3. The court override the process of infringement comparison: The court deemed that a detail comparison between the original works and all the claimed infringing pieces are "not the only option" in this case. Instead, the court ruled on substantial similarity based on the "highly consistency and repeatability" in the accused infringing videos.

We understand the court aimed to attack infringing conducts like mechanical video-reclipping or one of those short videos like "5-minutes to finish a movie", but the court also seemed to sacrifice the interest of secondary creation who indeed constitute fair use.

4. Similar decisions nationwide would only award damages below RMB 1 million. Most people would expect a higher damage would occur, but more likely in the court of Shanghai or Guangzhou. A sudden damage award for RMB 50 million in Xi'an seemed to be surprising.

Laura Batzella, Fredrick Xie
HFG Law & Intellectual Property

ADVERTISING LAW

All you need to know to advertise with NFTs in China



Marketing with NFTs (non-fungible tokens) has become a new trend in China. Imagine how exciting when buying a piece of digital artwork on the internet and getting a unique digital token that proves your authority over the artwork you bought. In time, when the NFT artwork sells well online, the offline product price arises as well. Wouldn't it be a unique way to promote a upcoming new product to the consumers?

However, the market and regulatory environment for NFTs in China have evolved quite differently than in many other countries.

Legal Environment: Ambiguous

On May 18 2021, the National Internet Finance Association of China, China Banking Association and Payment & Clearing Association of China issued *the Announcement on Prevention of Speculation Risks Caused by Virtual Currency Transactions*.

In this announcement, it is clear that China completely banned trading and related activities of cryptocurrencies. NFTs are generally created using the same type of programming used for cryptocurrencies. Namely, it relies on the same blockchain technology and are often associated with cryptocurrencies. Therefore, many experts predicted that the NFTs will be banned at that time.

On September 15, 2021, the Circular on Further Preventing and Handling the Risk of Speculation in Virtual Currency Transactions, issued by the People's Bank of China (PBOC) together with 9 other governmental departments, came into effect.

This notice bans the use or circulation of virtual currencies in the market as currency, along with all virtual currency transactions. It also says that it is illegal for overseas cryptocurrency exchanges to provide such services to Chinese residents.

On 13 April, 2022, several industrial associations including the National Internet Finance Association, Securities Association, and the China Banking Association jointly issued a Proposals on Preventing NFT-related Financial Risks.

It makes clearer that NFTs shall not be traded or used as any kind of financial instrument. Therefore NFT in China can only be considered as “digital collectibles” instead of “tokens”, their current status is defined as non-currency so it cannot fall into the scope of trading and related activities of cryptocurrencies.

On July 20, 2022, Tencent decided to close its NFT platform "Huanhe", the biggest NFT platform in China, as a result of the government discouraging any trading or speculation in NFTs.

However, there are still several mainstream platforms offering to mint and purchase NFT works. They are trying to comply with the Chinese government policy.

For example, Alipay updated its NFT platform agreement, saying that NFT cannot be traded between users, and the owners have to hold NFT works for at least 180 days after he or she purchased the NFTs, or 2 years after receiving the NFTs as a gift before giving to the next person. In addition, the owner needs to pass the identity verification and a series of supervision procedures.

What should be emphasized here is that the buyer cannot use the NFTs in any commercial methods without the approval of the copyright owner. Some individuals think that the NFTs issued by Alipay are not NFTs in the crypto asset community. Nevertheless, many citizens are still trading their NFTs in the underground secondary market.

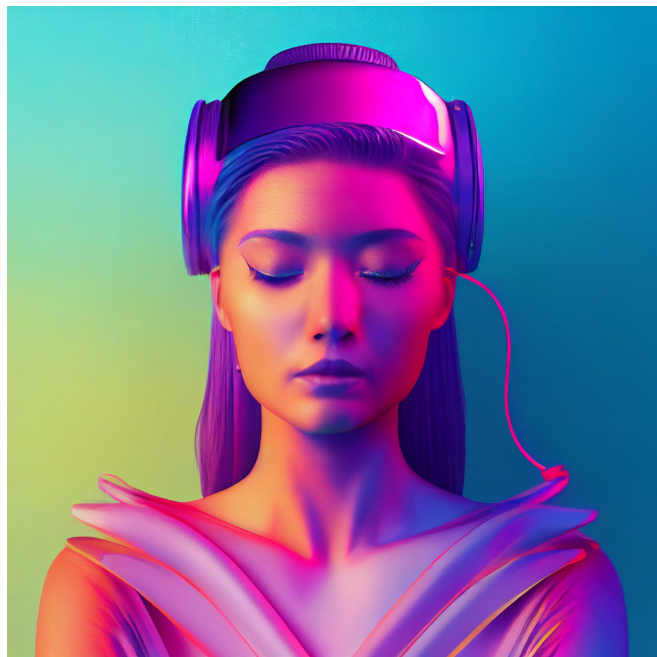
Continue reading

Conclusions

In summary, brands may still be able to use NFTs successfully in their promotions in China but they should use it in a careful way. Currently, global approaches to NFTs are not totally banned, but you need to consider:

- ▶ Register your NFTs legally (choose platforms which obtain the relevant license for the record)
- ▶ Describe NFTs in China as “digital collectibles”, not as “tokens” and never as “currency”
- ▶ Do not allow or encourage any trading or speculation in NFTs, or imply that NFTs may increase in value or can be used as currency. Namely, you can consider buying NFT works as a donation to the owner, in a way, to support their career.

Emily Ma
HFG Law & Intellectual Property



IP APAC

Oatley fails “Barista” registration in New Zealand



The term “barista” is commonly used as a title to describe the person who prepares and serves coffee drinks behind a counter. Can it be owned by someone as a trademark? In an attempt of registering “BARISTA” as a trademark in New Zealand, Swedish oat milk maker Oatly AB has met some obstacles.

One of Oatly’s most popular products is “Barista Edition” oat drink which is dense and foam-able so that everyone can make a coffee latte like a barista.

In 2022, Oatly AB filed an application to register “Barista” as a trademark in New Zealand designating to goods under milk substitutes including oat-based drinks. The application was opposed by wholesale food distributor Bidfood Limited and the opposition has been supported by the Intellectual Property Office of New Zealand.

The opposer Bidfood Limited, who owns a brand named “Barista Federation”, provides evidence to show that “barista” has been used on various soy and almond milk products in New Zealand for nearly a decade.

While no company has previously attempted to legally register the term as their own, Oatly’s application was bound to prohibit many other companies in the country from using “barista”.

It also added that “Barista” is a generic and descriptive term that is commonly known as someone who prepares and serves coffee as a professional and cannot distinguish Oatly’s products from those of the other companies.

Therefore, to associate such a purely descriptive term with one brand of milk substitute would potentially give that brand, i.e. Oatly, an unfair advantage in the market because the use of the word “barista” could imply that Oatly’s milk is more suitable than other plant-based milk brands.



Oatly attempted to argue that “barista” isn’t generic for its purposes as it was specifically tied to oat milk and submitted evidence related to the use of such mark outside of New Zealand, however, these evidences have not been considered as particularly helpful for Oatly to survive the opposition.

The opposition has been upheld by the IP Office and the registration hasn’t been granted.

It’s worth mentioning that Oatly’s two other trademarks “Barista Edition” and “Hey Barista” in New Zealand, which contains the word “barista” but are with additional elements, are considered as more distinctive and thus will not be influenced by this decision.

Crystal Yulan Zhang
HFG Law & Intellectual Property

IP CHINA

Kungfu Fighting over the use of Bruce Lee's Portrait



In December 2019, Bruce Lee Enterprise LLC, a California-based company run by Shannon Lee, daughter of Bruce Lee, sued Guangzhou fast food chain Zhen Gongfu (Real Kung fu), alleging that the chain restaurant has been using her father's image without permission for many years.

Zheng Gongfu is a Chinese fast-food chain founded in 1990 and has been using the logo which resembles Bruce Lee's pose since 2004.

Over the years, the company has become one of the leading players in catering services and runs dozens of restaurants across China. Its logo consists of a man dressed in a yellow top with the overall impression highly similar to Bruce Lee and his classic "ready to strike" pose. In 2016, Zhen Gongfu upgraded its brand image and adapted to a more blurred facial features of the character. However, the difference isn't essential.

Below is a comparison of Zheng Gongfu's old logo and updated logo.



In October 2022, the CNIPA has issued its decision on invalidating 20 trademarks owned by the Zhen Gongfu under the article 10.1.7 (likelihood of confusing the consumers with regard to the source of services) of the Trademark Law. The invalidation is made based on:

1. The applicant is the exclusive owner of all commercial merchandising and allied rights involving Bruce Lee, including his name, image, logos, and photographs.
2. The disputed trademarks use the classic image of the kung fu master, which leads the public to associate the related service with Bruce Lee and therefore cause confusion with regard to the source of the services.

3. The owner of the disputed trademark uses the image of Bruce Lee without permission of the relevant obligee, which is likely to create negative impact on the social and public interests.

The CNIPA concluded that, as a promoter and master of Chinese martial arts, Bruce Lee is known as the "King of Kungfu" and was already a well-known public figure with great popularity as well as global influence before the disputed trademarks were registered.

Zheng Gongfu's trademarks are with the image which is almost identical to Bruce Lee's classic pose. When being used as trademarks on the designated services, they are bound to create confusion among the public, leading them to believe that Bruce Lee is somehow associated to the fast-food chain.

It is noteworthy that Zhen Gongfu is the owner of the disputed trademarks in China and have been used them for over 10 years. Seeking for invalidation against such trademarks is a difficult mission due to the time limit of invalidation, which is normally within five years from registration of the trademark in China, but the CNIPA still invalidated the disputed trademarks.

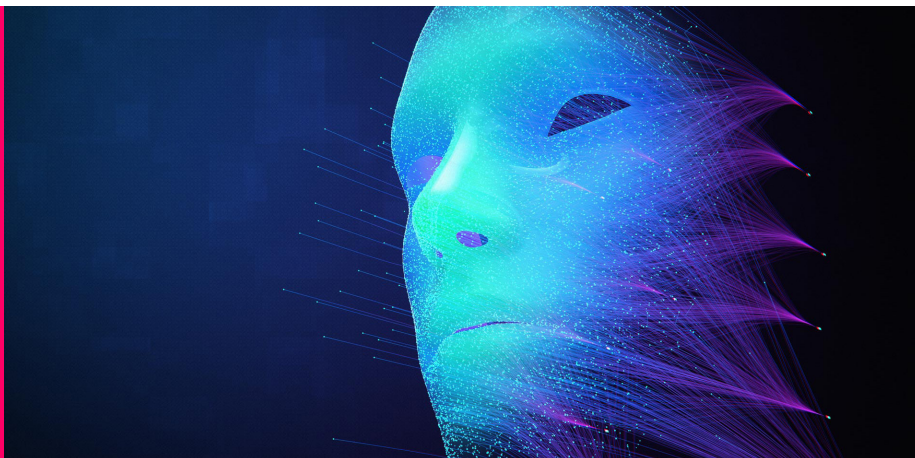
The lawsuit was heard in the Shanghai No.2 Intermediate People's Court in August 2022 and the case has not been ruled on yet. The CNIPA's decision is certainly a significant step during the procedure. However, the case concerns an infringement of portrait rights rather than a trademark infringement, and infringement of portrait rights could be difficult to prove.

We will keep a close eye on its developments.

Crystal Yulan Zhang
HFG Law & Intellectual Property

TECH LAW

New regulation on deepfakes for a safer cyberspace



The rapid development of technologies in the entertainment industry has made the practice of editing photos, video frames and images widespread. Often, it is not possible to distinguish whether what is published online is real or the result of processing by artificial intelligence.

In December 2022, the Cyberspace Administration of China (CAC), together with the Ministry of Industry and Information Technology (MIIT) and Ministry of Public Security of China (MPS), published the “Management Provision on Internet Information Services Depth Synthesis” (Provision), greatly drawing the public interest as the provision will directly strengthen the regulation on the internet deepfakes, which aims to create a safer internet environment.

Whether you admit it or not, deepfakes have changed the experience of internet users, which can become harmful without proper restriction. All entities involved in the process, such as technical supporters, as well as service providers and users, shall pay attention to this Provision to keep the internet environment safer.

✓ What are deepfakes?

It may be an overlooked phenomenon, but the internet is filled with deepfakes.

The Provision has classified deepfakes in five types, namely texts, images, videos, audios, and VRs, which can be performed in various forms.

Deep synthesis in texts and writing takes on the form of chatting robots like ChatGPT, which can edit and produce text the same way a person would. Image and video deepfakes are by far the most common ones, using apps or simple technology to create or change human faces at will.

When it comes to audios, voice imitators and generators are the most common tools for deep synthesis. Virtual realities, including the metaverse, are also considered to be deep synthesis technologies.

By using tools such as the ones mentioned above, one is able to fake virtually anything, hence why products generated by such technology are referred to as “deepfakes”.

✓ How can the deepfakes influence our legal interests?

The infringements of deepfakes can go beyond our imagination.

While initially created for entertainment, deepfakes are being used more and more to deceive and scam people. Audio deepfakes have been used to mimic voices in order to scam companies out of thousands of dollars by falsely authorizing payments.

Identity fraud is also becoming an increasingly popular use of deepfake technology, however by far the most common use is to take images of women and insert them into explicit content. Because of the increasing use and quality of deepfake technology, it is important to remain aware of them while browsing.

✓ Who is responsible for the compliance?

Most people know that the service providers are responsible for the compliance, yet the Provision also imposes the responsibility of technical supporters. While not bound from management responsibility such as that of service providers, technical supporters shall bear other fundamental compliance responsibilities such as data compliance and safety evaluations.

✓ Deep Synthesis and PIPL

For certain deep synthesis technology, it is necessary to use people’s facial and vocal features to fake their faces or voices, which falls into the scope of sensitive personal information.

Thus, the provision requires relevant platforms to acquire the “separate consent” of the users before collecting their facial and voice data, which is in accordance with the “Personal Information Protection Law of People’s Republic of China” (PIPL).

Continue reading

✓ What to do for the compliance?

▶ Conduct safety evaluation

Before uploading the deep synthesis technology online, the technical supporters, service providers or app stores are required to conduct safety evaluation on such technology. Different from the safety evaluation stipulated in the PIPL, this evaluation mainly focuses on ensuring the safety and compliance of the algorithmic mechanism, especially for technologies related to biometric information, national security or public interest.

▶ Update service terms

While the deep synthesis platforms provide services to the public users, the Provision requires them to facilitate the users with comprehensive management rules, platform convention and service terms in order to keep the environment healthy.

For example, in the service terms the platforms shall clearly notify the users to bear information on their safety obligations as well.

▶ Mark the Deep Synthesis content

Identifying the content of deep synthesis is the prerequisite for the users to protect their rights. To help the users better identify such content, the Provision requires service providers to mark the most realistic “deepfakes” with highlighted signs; and for less realistic contents, the service provider can also notify the users to voluntarily mark them up when encountering such content.

If we look into the near future after the Provision comes into effect, we can expect that the marked deepfakes will be difficult to hide among the enormous internet content, the individual and public interest will be better protected, and in the end the deep synthesis technology may be prevented from being damaging.

Ashley Jia
HFG Law & Intellectual Property

ANTITRUST LAW

13ml USD fine for academic database CNKI in China



What would be a fine for monopoly acts carried out by giant e-commerce platforms in the People's Republic of China?

Different cases may provide different answers. For the food delivery business platform Meituan, the fine imposed was 3.4 billion RMB, 3% of the annual sales; for Alibaba the fine was 18.2 million RMB, 4% of the annual sales; and, more recently, the Chinese academic database platform CNKI provides a new answer: it just received a fine notice for 87.6 million RMB, 5% of the amount of its recent year's annual sales.

After a 7-months investigation, on December 26, 2022 the (P.R.C) State Administration for Market Regulation (SAMR) issued a fine of 87.6 million RMB to CNKI for its monopoly behavior, amounting to 5% of its annual sales in 2021.

✓ How did CNKI get into trouble with the Antitrust laws and authorities, and why should we care about this case?

CNKI stands for "China National Knowledge Infrastructure", which is the main database platform controlling over 95% of the Chinese academic resources.

Its business model is similar to the one of Elsevier, that is collecting published academic resources by signing the exclusive agreement with the author or publisher with little monetary consideration, then providing the database service for users including colleges, universities and individuals with "high" fees. Under such mode, CNKI almost blocks other competitors from sharing the market on the one hand, then leaves users with few choices for such database on the other hand.

With the word "national" in its name, CNKI is usually considered an institute supported by governmental departments, so many colleges and universities cooperate with CNKI and buy its service. However, it is in fact a for-profit corporation owned by a public listed company.

As stated in the investigation report of SAMR, over 90% of college students and scholars use CNKI to prepare their essays or papers, thus CNKI requires them to give the exclusive right to publish and use relevant works after their essays or papers are completed.

It is no doubt that CNKI has acquired a dominant position in the market and its business practices have become more and more aggressive towards the users in recent years.

In April 2022 one of the top universities in China announced its intention to stop using the service provided by CNKI as the annual fees had reached 10 million RMB, drawing wide attention of the public. Then another university reported that the service fee of CNKI rises around 19% each year, and that in 6 years the service fees paid have risen by 132.86%. The SAMR then decided to initiate an antimonopoly investigation on CNKI.

✓ What may be deemed as monopoly in the P.R.C?

Following a thorough investigation, the SAMR found that the market concentration status shown by the Herfindahl-Hirschman index (HH index)^[1] of CNKI reached 5488 points, which is near the HH index of Meituan (5854 points).

Under the same investigation, the SAMR also found that CNKI held two monopoly behaviors, as complained by the university users:

- 1 continuing to rise its service fee with unjustifiable reason, and
- 2 obliging the authors to sign exclusive cooperation agreement to restrict the authors' authorization to other platforms. Such a situation lead to the fine imposed on CNKI.

The “P.R.C Anti-Monopoly Law” provides for 3 situations of monopoly. Apart from the “abuse of dominant market position” of CNKI mentioned above, the other two monopolistic behaviors include: “conclusion of a monopolistic agreement”, such as “coordination of prices”; and “concentration of undertakings that eliminates or restricts competition or may eliminate or restrict competition”. Such business behaviors are not rare to witness in our daily life.

✔ How can the anti-monopoly law improve our future?

Consumers are harmed by monopolistic behaviors, and the cases of CNKI, Meituan and Alibaba well illustrate such situation.

If the monopolistic behaviors are not limited, the market competition is restrained; then consumers will have no other choice than to use the services of enterprises operating as monopoly. This situation is economically unhealthy and unfair for both the consumers and other small-scale businesses wishing to enter or fairly compete in the market.

Thus, the anti-monopoly law aims at protecting the legitimate rights of the entities in the market, by improving and levelling the playing-field conditions, and the consumers which should benefit from a fairer competition between the market players. Influential cases like CNKI becoming more and more familiar to the public, both the consumers and the business entities will more easily notice how anti-monopoly laws tend to protect their rights.

✔ What to do for the compliance?

The compliance responsibility mainly falls onto the business owners with significant market shares, especially when exceeding 30% percent. Such business entities should therefore avoid to fall into the three situations where their conduct may be deemed as monopolistic.

In general, business operators should keep in mind the following directions:

- ▶ when they are operating in a dominant position in a relevant market, not to abuse of such position,
- ▶ refrain from entering into monopolistic agreements, and
- ▶ check compliance with the antimonopoly laws before any mergers, acquisitions of shares or actual control over other commercial entities with similar business operation.

We understand that many details lie in the three situations, so the compliance check shall be a case-by-case procedure, and if you are interest in more details, please do not hesitate to reach us for further elaboration.

Ashley Jia
HFG Law & Intellectual Property

[1] The index measures the size of companies relative to the size of the industry they are in and the amount of competitiveness. The HHI is calculated by squaring the market share of each firm competing in a market and then summing the resulting numbers. It can range from nearly 0 to 10,000, an HHI of 2,500 or greater is highly concentrated.

IP CHINA

JÄGERMEISTER wins 10,000,000 RMB damage compensation in China



The Beijing IP court recently issued a judgement on the case Jägermeister vs Yego Hunter which grants a stunning damage compensation of 10 ml RMB explicitly including the punitive damages.

Jägermeister is a German digestif made with 56 herbs and spices. The recipe was developed in 1934 and – it is said that - never changed since its creation and continues to be served in its signature green glass bottle with the logo on the front representing a deer's head and a cross over it.

Yego Hunter is a liqueur produced and commercialized (as we learn from the decision) by a group of companies and individuals: Shengluo Company Qingdao Wine Co., Ltd. (简称圣罗拉公司), Hefei Puyuan Commerce & Trade Co., Ltd. (合肥葡园商贸有限公司), and an individual named Chang.

The infringers used the logos “野格哈古雷斯” (Ye Ge Ha Gu Lei Si) and “YEGO HUNTER” as well as a deer head graphic on the labels of the bottles and on their website. The first two Chinese characters are the exact same of the trademark registered by Jägermeister and therefore are considered the Chinese translation of it.

Jägermeister sued the above companies, accusing them of trademark infringement and unfair competition.

✓ No.G795174



✓ No.G287599



✓ No.G1291858



It also mentioned that “野格” and “JÄGERMEISTER” have constituted well-known trademarks with high reputation among Chinese consumers.

The plaintiff has sent a cease-and-desist letter, warning the defendants to stop using the trademarks immediately, however, the defendants kept using them and continued misleading the consumers. Thus, the plaintiff plead with the Court to confirm the trademark infringement and unfair competition of the defendants.

The defendants argued that they have registered the trademark No.31027236 “野格哈古雷斯” and they shall have the right to use their registered trademark on their products. Therefore, they claimed that they did not infringe the plaintiff's trademark rights.

On December 15th, 2022, the Beijing IP Court stated that:

1. Trademark No.5614224 “野格” and No.992806 “JÄGERMEISTER” are considered as well-known trademark because they have been widely recognized by Chinese consumers before the defendant applied for the No.31027236 “野格哈古雷斯”, based on the evidence.
2. Trademark No.31027236 “野格哈古雷斯” (The defendant's trademark) have constituted copy of the plaintiff, and it infringed the plaintiff's trademark rights.

	Infringed Trademark	Infringer Trademark
App. No.	5614224	31027236
Class	33	33
App. date	2006-09-18	2018-05-21
Mark	野格 (Jägermeister in Chinese)	野格哈古雷斯 (Jägermeister in Chinese+Ha Gu Lei Si)
Package		

In this case, Jägermeister claimed to be the owner of the trademarks:

- ✓ No.5614224 “野格”
- ✓ No.992806 “JÄGERMEISTER”

Continue reading

The defendant's use of "野格", "YEGE", "Yege Hunter", "YEGO HUNTER", "deer head" logo in the production and sale of the infringing goods have constituted use of the trademarks similar to the plaintiff's trademarks ("野格" and "JÄGERMEISTER").

In addition, the whole visual structure and the exterior appearance of the 3D trademark of the defendant is similar to the one of the plaintiff.

3. Considering the bottle has been deemed similar to the plaintiff's trademark by the court, it not only violates the trademark law, but also the Article 6 (4) and 8 of unfair competition law. In fact, this similarity created a certain relation between the plaintiff's trademark and the defendant's trademark and caused confusion to the customers. Also, the images and logo were used for fake advertisement on the website to mislead the consumers.

4. Last but not the least, the court ordered the defendants to stop using the trademarks and supported the 10,000,000 RMB punitive compensation claimed by the plaintiff.



In this case, the punitive compensation calculation is mainly based on the monthly sale invoices offered by the defendant. These documents show that the defendant has received 8,538,200 RMB from purchasers in 2 months which is way more than the damage compensation of 5,000,000 RMB required by the plaintiff. Also, the court decided to grant punitive compensation which is 5,000,000 RMB. Thus, the compensation amount is 10,000,000 RMB in total.

Emily Ma
HFG Law & Intellectual Property