

Goss IP

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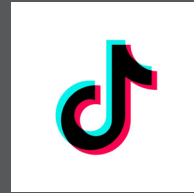
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Dear readers,

We are facing a hard time here in China, but we are wishful to keep our routine and continue to give you updates on new law and regulations, plus some interesting facts on IP in our beloved Country.

In this second issue of 2020, which is published a bit late due to the forced closure of our offices, we deal with several new regulations.

The first one is the new Trademark Law. In fact, since November 1, 2019, China has a new Trademark Law that seeks to combat an prevent trademark squatting with bad intentions.

In the first article of February GossIP, we discuss the Chinese trademark law and the benefits that companies can derive from the change in the law.

The second law regards the internet data protection for children. In October 2019, the new Provisions on Cyber Protection of Children's Personal Information was released, marking another milestone in Chinese Personal Data Protection regulations. The article provides some highlights from this new Provisions.

The third article goes deep into the quite new rules on foreign investments in China. In fact, the Foreign Investment Law and the Regulations on the Implementation of the Law on Foreign Investment, as well as other laws and regulations on foreign investment, officially came into force on January 1, 2020. Aren't you curious?

TikTok, the famous video-sharing app, released its first transparency report highlighting a positive outcome on the legal prospective.

The report provides clarity and insights regarding governmental requests about user's information and other legal aspects, including data on takedown notices from copyright holders.

The last article is about food labeling regulations, with new measures released in November last year and a debt of the new GB7718, namely the cornerstone of food labeling regulation in China.

Here you have something to pass the time at home! Stay safe, stay healthy, read GossIP!

Fabio Giacopello

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NEW LAW**New trademark law in China: the end of trademark squatting?**

Every year many companies are confronted with trademark squatting or in general IPR issues. Trademark squatting, in which someone else registers your trademark, might prevent you from using your brand in China. In case you do use your brand, you can be charged with infringement actions, and can be asked to pay compensation to the trademark squatter who lawfully holds your trademark.

Since November 1, 2019, China has a new Trademark Law that seeks to combat this trademark squatting. This law was introduced to prevent trademark squatting with bad intentions.

This article discusses Chinese trademark law and the benefits that companies can derive from the change in the law.

✔ What is a trademark?

A trademark can be the name of a company (for example Philips), a product (iPhone), a Chinese name (宝马 translated as Baoma, precious horse) for BMW, a logo, (golden arches from McDonald's), a sound (roar from MGM lion), a 3D shape of a product (Ferrero Rocher), a color combination (Ebay), a number combination (1688) or a combination of any of the above.

Every company has to do with trademarks, because every company has a name. If you register a trademark, you will receive a monopoly on use for the trademark for the goods or services for which you register it.

In other words, nobody can legally use that brand except you. This is very interesting, because it means that you can build up goodwill and possibly issue licenses with regard to the trademark.

✔ Why is registration important for China?

A trademark only gives protection in the country you register it for. In China, the 'first-to-file' principle applies.

In other words: the person who is the first to register a trademark in China will acquire the exclusive right to it.

Unfortunately, this has led to a similar problem that we saw in the world around the millennium change regarding domain names. People quickly registered domain names of companies, and then demanded large sums of money from these companies to buy back the domain names.

In China, this practice still happens, but then with regard to trademarks, i.e. trademark squatting. The chance that someone in China has already registered the name of your product or company as a trademark is therefore high.

For that reason, it is important to register brand names for China as quickly as possible as a trademark.

✔ What was the problem with the old trademark law?

The old trademark law did have provisions to recover a trademark that had already been registered by someone else with bad intentions, but this was only the case if there was a relationship with that party, there was an older right, it was a world-famous trademark, or in case there were many different registrations made by someone with regard to already existing brands.

✔ Will it be easier to get a trademark back under the new trademark law?

The new trademark law now states that persons and companies are not allowed to register trademarks in bad faith when they do not intend to actually use the trademark.

The trademark office in China must now check this per trademark application. Even if the trademark office discovers any bad faith, there is the opportunity for everyone to file an opposition against the trademark to be registered after it has been published. Everyone has three months to do this. Even after this time, an invalidation can still be filed by an interested party concerned, on the basis of bad faith and the intention to not actually use the mark.

In short, it will become easier for companies to get their trademark back in China if it has already been registered by someone else.

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✔ Will the compensation for trademark infringement also increase due to the new trademark law?

Under the new law, up to five times the losses suffered by the company or the profit enjoyed by the infringer can now be claimed as compensation.

Even if it is difficult or impossible for a company to prove this, the compensation that the court itself can apply is increased to CNY 5 million.

Are there any other interesting changes?

Under the old law, products that infringe trademark law could be destroyed. Under the new law, the tools used to make the products, as well as the raw materials themselves, can now be destroyed.

This reduces the chance that an infringer will infringe again. It is advisable to demand this in procedures.

Conclusion

The new Trademark Law will indeed make it easier for companies to get back trademarks registered in bad faith.

With higher compensation and the ability to destroy tools and raw materials, it will also become less attractive for infringers to continue their business.

In combination with the social credit system (which punishes IP infringement), it seems that China is intensifying its actions against intellectual property infringement.

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NEWS

What was new in 2019 about Data Protection in China?



Among other regulations the new Provisions on Cyber Protection of Children's Personal Information marked another milestone in Chinese Personal Data Protection regulations.

China has been moving fast especially in the last 2 years to develop new regulations that enhance protection of consumers and personal data in the cyber space environment.

In this context, China's top internet regulator, the Cyberspace Administration of China ("CAC"), continues to show interest in setting more stringent rules governing also the protection of minors in the context of online activities and data privacy.

To this extent, CAC released additional Provisions on Cyber Protection of Children's Personal Information ("Provisions") effective as of October 1st 2019, which contain significant provisions addressing minors' data privacy.

While there were already another legal bodies regulating the treatment of personal data online, this is the first piece of legislation focusing on the protection of children's personal information in China.

Below are some highlights from this new Provisions.

Definition of children:

"Children" in the Provisions refers to minors under 14 years old.

Object of the Provisions:

The Provisions only govern activities relating to the collection, storage, use, transfer and disclosure of children's personal information through networks within the territory of China. The Provisions do not apply to similar activities conducted offline.

Main requirements and obligations:

Article 9 clearly states "where network operators collect, use, transfer, or disclose children's personal information, they shall inform the children's guardians in a conspicuous and clear manner, and shall acquire the children's guardians' consent".

The Provisions set up a higher standard of consent than the usual set out in the Cybersecurity Law to regulate treatment of personal data. In order for a network operator to obtain informed consent from a guardian, it must provide a rejection option and specifically inform guardians of the following:

- ✓ purpose, means and scope of collection, storage, use, transfer and disclosure of children's personal information;
- ✓ storage location of children's personal information, retention period and how the relevant information will be handled after expiration of the retention period;
- ✓ safeguard measures protecting children's personal information;
- ✓ consequences of rejection by a guardian;
- ✓ the channels and means of filing or reporting complaints;
- ✓ how to correct and delete children's personal information.

Additional measures

Network operators must not collect children's personal information unrelated to the services they provide and Network operators' retention of children's personal information must not exceed the time period necessary to realize the purpose of collecting or using it.

The network operator also must restrict internal access to children's personal information. Specifically, personnel must obtain approval from the person in charge of protecting children's personal information, or an authorized administrator, before accessing such information.

Third Parties treatment of children's personal information

If children's personal information is processed by a third-party data processor or children's personal information is to be transferred to a third party, the network operator must conduct a security assessment of the data processor entrusted with the children's personal information and enter into an entrustment agreement with the data processor.

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The data processor is required to assist the network operator in complying with the guardian's request to delete a child's information after termination of service. Sub-entrustment or subcontracting by the data processor is forbidden.

Rights of guardians to correct, delete or cancel children's data collected

Children or their guardians are entitled to request the deletion of children's personal information in certain circumstances and are also entitled in all cases to the correction of children's personal information wherever any such information collected, stored, used or disclosed by a network operator is erroneous.

Additionally, guardians have the right to withdraw consent altogether.

Notification of breach

Where network operators discover that leaks, destruction or losses of children's personal information has occurred or might occur, they shall immediately initiate emergency response plans and employ remedial measures.

If there is or there might be serious consequences arising from the breach, the network operator must immediately report the breach to competent authorities as well as notify the affected children and their guardians.

If it is difficult to send the notice to each affected individual, the network operator shall undertake reasonable and effective means of publishing the relevant notice.

However, there is no specific definition of serious consequences.

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HIGHLIGHT

New rules for the Foreign investment law in China



On January 1, 2020, the Foreign Investment Law and the Regulations on the Implementation of the Law on Foreign Investment and other laws and regulations on foreign investment officially came into force.

On the same day, the Shanghai Market Supervision Administration issued the very first Business License for a Foreign-Invested Enterprise which is established with a Chinese natural person as one of the investors.

The license shows that the type of enterprise is "*Limited Liability Company (foreign investment, non-sole proprietorship)*", which means that the concept of "*Sino-foreign Joint Venture*" and "*Sino-foreign Cooperation*" has officially retired.

Given to this, we will sort out the seven points regarding "*Regulations on the Implementation of the Law on Foreign Investment*" on "*Foreign Investment Law*" provisions of the relevant Articles.

1 Clarifying the term "*other investors*" in the Foreign Investment Law

Foreign Investment Law Article 2 This Law applies to foreign investment in the territory of the People's Republic of China (hereinafter referred to as "*within the territory of China*"). Foreign investment mentioned in this Law refers to the investment activities of foreign natural persons, enterprises or other organizations (hereinafter referred to as "*foreign investors*") directly or indirectly within the territory of China, including the following:

- ✓ Foreign investors set up foreign-invested enterprises in China alone or jointly with other investors;
- ✓ Foreign investors investing in new projects in China alone or jointly with other investors; Regulations on the Implementation of the Law on Foreign Investment.

Article 3 "*Other investors*" referred to in (1) and (3) of paragraph 2 of Article 2 of the Foreign Investment Law include natural persons in China.

2 Clarifying the policies and publicity supporting the development of the enterprise

Foreign Investment Law Article 9 Foreign-invested enterprises may, in accordance with the law, equally enjoy the State policies concerning the support of enterprise development.

Regulations on the Implementation of the Law on Foreign Investment Article 6 The government and its related departments

shall treat foreign-invested enterprises and domestic-funded enterprises equally in accordance with the law in terms of government funding arrangements, land supply, tax and fee reductions, qualification permits, standard formulation, project declaration, and human resources policies.

3 Clarifying the way of soliciting opinions and suggestions of foreign-invested enterprises

Foreign Investment Law Article 10 Before the formulation of laws, regulations and rules related to foreign investment, appropriate measures shall be taken to solicit opinions and suggestions from foreign-invested enterprises.

Regulations on the Implementation of the Law on Foreign Investment Article 7 The formulation of administrative regulations, rules, and regulatory documents related to foreign investment, or draft laws and local regulations related to foreign investment by the government and its relevant departments, in accordance with the actual situation.

It shall take various forms such as soliciting written opinions, holding seminars, demonstrative meetings, and hearings, and soliciting opinions and suggestions from foreign-invested enterprises and related chambers of commerce and associations.

Opinions and suggestions on issues that widely reflected or involve significant rights and obligations of foreign-invested enterprises, shall feed back the adoption of the opinions through appropriate manners.

4 Clarifying that participation for foreign-invested enterprises equally in the setting of standards in accordance with the Law

Foreign Investment Law Article 15 The State ensures that foreign-invested enterprises have equal access to the standard-setting work according to law, and strengthens information disclosure and social supervision regarding standard-setting.

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Regulations on the Implementation of the Law on Foreign Investment Article 13 Foreign-invested enterprises can participate in the setting and revision of national standards, industry standards, local standards, and group standards on an equal basis with domestic-invested enterprises in accordance with laws.

Foreign-invested enterprises may set enterprise standards on their own or jointly with other enterprises.

5 Clarifying that foreign investors are free for foreign exchange in China

Foreign Investment Law Article 21 Foreign investors' capital contribution, profits, capital gains, assets disposal income, intellectual property license fees, legally obtained damages or compensation, liquidation proceeds, etc., may be freely remitted to overseas in RMB or foreign exchange according to law.

Regulations on the Implementation of the Law on Foreign Investment Article 22 Foreign investors' capital contributions, profits, capital gains, income from asset disposal, intellectual property right royalties, compensation or indemnification obtained in accordance with law, liquidation income, and so forth, that are made or obtained in mainland China, may be freely transferred into or out of mainland China in RMB or foreign exchange in accordance with law; and the currency, amounts, and frequency of import or export, must not be restricted by any unit or individual.

The salary and other lawful income of foreign national staff of foreign-invested enterprises and the staff of Hongkong, Macau, Taiwan may be freely remitted.

6 Clarifying a system for foreign investment information reporting

Foreign Investment Law Article 34 The State establishes a system for foreign investment information reporting. Foreign investors or foreign-invested enterprises shall submit investment information to the competent commerce departments through the enterprise registration system and the enterprise credit information publicity system.

Regulations on the Implementation of the Law on Foreign Investment Article 38 Foreign investors or foreign-invested enterprises shall submit investment information to the competent departments for commerce through the enterprise registration system and the enterprise credit information publicity system.

The State Council departments for commerce and market supervision and administration are to complete connections and work linkages between related business systems and provide guidance for foreign investors or enterprises with foreign investment in submitting investment information.

7 Clarifying "Five-year transition period"

According to the Article 42 of Foreign Investment Law and Article 44 of Regulations on the Implementation of the Law on Foreign Investment, once the Foreign Investment Law comes into effect, the original law on foreign-funded enterprises shall be abolished at the same time.

The Foreign Investment Law has set up a "five-year transitional period", that is, if a foreign-invested enterprise is established before the enforcement of this law, the original enterprise organization form can be retained or adjusted and changed in accordance with the Company law and the Partnership Enterprise Law within five years after the implementation of this law.

However, after the expiration of 5 years, if the relevant procedures are not handled to change, the relevant departments will not handle the other registration matters applied for, and the relevant circumstances will be publicized.

The promulgation and implementation of the Foreign Investment Law and the Regulations on the Implementation of the Law on Foreign Investment are of milestone to provide a clearer institutional framework for foreign investors, and it is believed that foreign investment will have a broader prospect in the Chinese market.

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INTERESTING

TikTok transparency report highlights positive outcome on IP



Last month TikTok, the famous video-sharing app, released its first transparency report highlighting a positive outcome on the legal prospective.

The Chinese-born platform dates back on 2016, owned by tech startup ByteDance (owner also of the Chinese app Douyin), increased drastically its number of downloads and popularity in a short period of time, to the point that is on the top 10 list of download apps of the decade.

This first report covers the first half year of 2019 from January 1st to June 30th; while a second part of the transparency report will be show later on 2020.

The report provides clarity and insights regarding governmental requests about user's information and other legal aspects.

Publishing this report, TikTok outlined the number of legal requests received in the first semester of 2019.

The company's public policy and affairs attorney detected that the report shows that the company respond to 298 legal requests of information received by 28 different countries worldwide and also, they respond to legally valid requests and only for a requisite amount of information.

According to the report, the government request for user information with the help of law enforcement ranks a total of 278 requests for user data and content removal from 28 countries during that time period, including a total of 110 from India, 74 from the U.S. and 31 from Japan. China is not one of the countries listed.

Country	Government request
Australia	2
France	2
Germany	1
India	11
Israel	1
Italy	1
Japan	3
United Kingdom	1
United States	6

Regarding the intellectual property field, it includes data on takedown notices from copyright holders, of which 3,345 were lodged in the first six months of 2019.

According to the company, 85% of these requests were honored; the highest rate if we compared it with other platform giants such as Facebook and Instagram (respectively with 70% and 65%).

In the app policy, it is attested that none of the contents should violate someone's copyright, trademarks, or other intellectual property rights.

Additionally, they actively contribute sharing an email address in which individual or brand can report a suspected IP infringement and consequently the platform is committed to solve the problem in a certain period of time.

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BUSINESS

New draft on food labeling regulation published



2020 promises to be a very important year for food regulatory in China – at least for food labeling.

We saw that in November new draft of food labeling administration measures was issued, and indeed on the very last day of 2019 we saw the publication of the new draft GB 7718 – the cornerstone of food labeling regulation in China.

Here a brief summary of some of the most relevant provisions.

1 Allergens

Ingredients containing allergens – as widely announced – become a mandatory item. In particular, the mandatory allergenic labeling concerns the following ingredients:

- ✓ gluten-containing cereals and their products (such as wheat, rye, barley, oats, spelt wheat or their hybrids);
- ✓ crustaceans and their products (such as shrimp, lobster, crab);
- ✓ fish and its products;
- ✓ eggs and their products;
- ✓ peanuts and their products;
- ✓ soy and its products;
- ✓ milk and dairy products (including lactose);
- ✓ nuts and nuts products.

Beside those, voluntary labeling can be done for other ingredients containing possible allergens.

2 Quantitative labeling of Ingredient

Positive claims

Some provisions clarify when an ingredient is considered emphasized (and therefore its QUID necessary).

Ingredients mentioned on food label or in food product instruction slip is not considered emphasized in the following cases:

- ✓ ingredient or component mentioned in allergy alert, other warnings, or reminders;
- ✓ ingredient or component mentioned only in use instruction or product pairing;
- ✓ only used for description of sensory attributes such as product physical specs, flavor, taste, mouth feeling, technology etc.

Ingredients or component mentioned in food product name are considered emphasized, except in the following cases:

- ✓ food product name is identical to (or is equivalent to) those provided by a National, Industry or local standard, and its equivalent name, same meaning or substantially equivalent;
- ✓ ingredient or component content already regulated in National, Industry or local standard;
- ✓ ingredient or component used only to describe sensory attributes such as product physical specs, flavor, taste, mouth feeling, technology and so on. In such case the word “*flavored*”, “*flavor*” and so on shall also be used.

Graphics or picture printed on package, to illustrate taste, flavor and so on, if related to a food or food ingredient, does not constitute emphasis. However, photograph of raw material or food is not allowed to be used in case the food product only contains the related essences.

Negative claims

When using “*no*” or “*without*”, the content of such ingredient or component shall be 0.

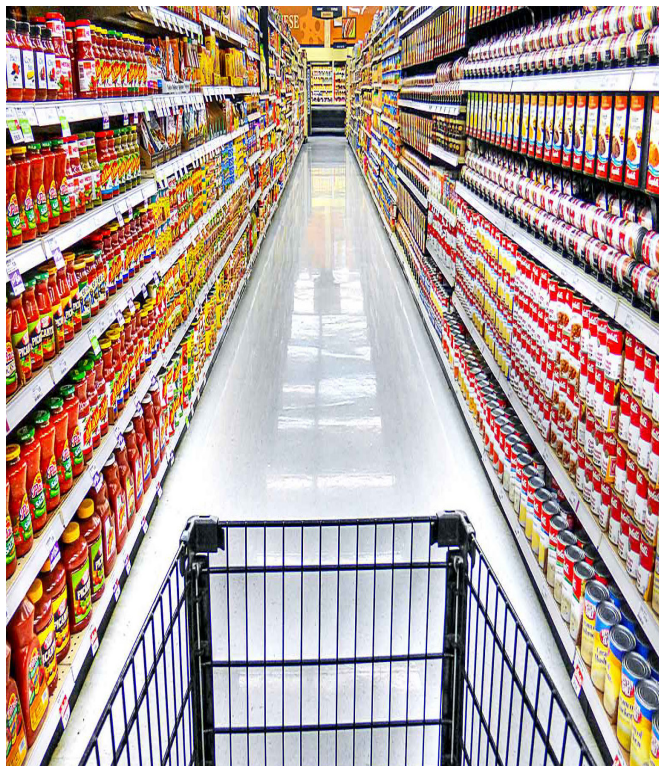
In general, terms such as “*without addition of*”, “*without use of*”, and synonyms are not allowed.

Negative claims such as “*without*”, “*does not contain*” and other synonyms are not allowed for:

- ✓ food additives;
- ✓ contaminant;
- ✓ substance not allowed to be added according to relevant regulation or standard;
- ✓ substance ought not to exist in food product.

“*Non-GMO*” claim is forbidden.

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3 Other changes

Country of origin

When two or more countries are involved in the production of food products, the country where substantial changes are finally completed is the country of origin.

It is allowed to also indicate the country/region of origin of the raw materials or ingredients.

Fonts

Minimum font for mandatory labeling items is 1.8mm for food products with maximum surface area larger than 60cm² (until now, such requirement applied only for food products with largest package larger than 35 cm²).

Simplified ingredient labeling

Starches and bacteria are added to the list of ingredients whose declaration can be simplified in the ingredient list.

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