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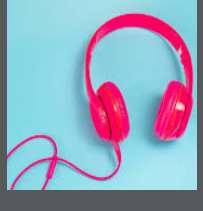

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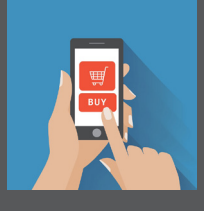

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Dear readers,

2019 has just begun, and we dealt with loads of interesting topics we would like to tell you about.

The first article you find this month in our GossIP mag analyzes the well-known status of the trademark PIRELLI in China in a piece related to the second (and last) instance of the case which involved the famous tire company, represented by HFG, enforcing its trademark right against a company producing energy drinks.

If you are a music lover, maybe you are interested in knowing that a new war for exclusive copyright was launched among online music platforms, causing chaos that spurs copyright licensing fees. Will music be still available to be downloaded for free? Peace is possible? Find it out in the article.

We explore the impact of the E-commerce market on social life and the importance of the new E-commerce Law, which is set to protect legal rights and interests of all parties and maintain the market order, and defines a clear procedure to deal with IP rights infringement on e-commerce platforms.

You maybe already know that the scent of a perfume can be copyright protected, at least in the Netherlands (Lancôme-case). But what about a taste of food? Can you copyright the taste of Spring rolls? Your Chinese New Year flavor could be unique!

At the end a look into the Balenciaga last IP challenge: a pine shaped keyring really similar to the famous car diffuser branded Arbre Magique. Cases like this are not simple to judge and actually it is very likely that the same case will have different outcome in different countries. Read to discover how it will probably end up in China!

Enjoy the reading and Happy Chinese New Year!

Fabio Giacopello
Partner | Counsel

HFG
LAW & INTELLECTUAL PROPERTY

NEWS

PIRELLI and 倍耐力 recognized as well-known trademark in China

November 2018, the Guangdong High Court have just issued a mediation decision that confirms the well-known status of the trademark PIRELLI in China and close the second (and last) instance of the case which involved the famous tyre company enforcing its trademark right against a local company producing and selling an energy drink called "Pirelli+" and later re-branded into "Peineili+".

In November 2017 Guangdong IP Court issued a first instance decision that recognizes PIRELLI and "倍耐力" ("Beinaili" or "Pirelli in Chinese") as well-known trademarks in China. The defendants were in addition ordered to stop infringing these trademarks and compensate damages for 200,000 RMB. A few days before the same Court rendered a decision in the *"sister"* litigation based on unfair competition where the defendants were ordered to stop the commercial use of the contested sign as company name and to compensate damages for 100,000RMB.

The fact tracks back to 2015 when the international tyre company found a Guangdong company selling energy drinks under the brand Pirelli+, Peineili+ and 倍 耐 力 in Guangdong province. Herein the marks how they appeared in use by the Guangdong company.

In planning the actions to take against the infringer Pirelli first thought to contacting the AIC and trying to arrange a raid action. Unfortunately the AIC highlighted that energy drinks fall in class 32 that is not similar to class 12 were tyres are classified and the trademark registered. The action was then qualified as one of those in need of the recognition as well-known trademark and the complainant invited to prepare a file with evidence of such reputation.

The decision from the AIC was surprising especially in consideration of the fact that the trademark PIRELLI had been already recognized as well-known in 2007 into administrative judicial decision. Nevertheless AIC thought that the decision was too old and that the evidence file shall be refreshed to confirm the notoriety of the brand.

Given what above Pirelli collected a new frame of evidence proving the development of the brand in China with special attention to the last 3-5 years before the commencement of the judgment and filed the two civil litigations in front of the Guangdong IP Court.

Above the trademark how used by the Guangdong company.

In the trademark infringement case, the Court first focused on the necessity of recognizing the plaintiff's trademarks as well-known as i) these were registered on goods in class 12 (tyres) and the contested goods were categorized in class 32 (energy drink) so were different and ii) the contested signs showed some graphic differences from the plaintiff's one, so the possible confusion depends on the usage and reputation of the trademarks.

In this regard, the Court considered all the facts and aspects indicated in art. 14 of the Chinese Trademark Law, such as the extent of the relevant public's awareness, the duration of the use and of the extent/scope of any publicizing work and the protection records of the mark as a well-know one.

Recognized both the Pirelli's marks in Latin and Chinese characters as well-known, the defendants were ordered to stop infringing these trademark and to compensate damages for 200,000 RMB.

HFG represented Pirelli in the case.

HIGHLIGHT

Copyright War of Chinese Music App

Back to July 2015, the PRC National Copyright Administration released a notice ordering online music service providers to cease unauthorized distribution of music works, marking one of the greatest changes in the digital music market. Then, in just three months, users of various music APPs including QQ Music, Netease Cloud Music, Kugou Music, etc. began to notice that many of their favorite songs were no longer accessible due to copyright issues.

This potent injection from the National Copyright Administration was so effective against piracy that its side effects emerged just as quickly - a new war for exclusive copyright was launched among online music platforms, causing chaos that spurs copyright licensing fees.

For a time, the licensing from Universal Music Group (UMG), one of the world's largest music catalogues, became the Holy Grail for Tencent Music, Baidu Music, Alibaba Music and Netease Cloud Music. Initially, UMG's licensing fee was estimated to worth $30 to 40 million. However, during the fiercest phase, the highest bid surged to $350 million, plus $100 million in equity.

Eventually, it was Tencent who closed the deal, which enables Tencent to distribute UMG's music via its streaming platforms QQ Music, KuGou and Kuwo as well as exclusively sub-license UMG's content to any third parties in China. The two parties further agreed to cooperate to *"accelerate the development of the country's entire music ecosystem"* as the UMG chairman and CEO Lucian Grainge said.

After a series intensive integration of copyright and capital, Tencent has collected the exclusive licensing of all the three major record labels, Universal, Sony and Warner. According to DCCI, the Chinese internet giant now controls around 76% of the domestic music streaming market with over 600 million monthly active users, leaving only a small share for its rivals.

To no one's surprise, Tencent's dominant position once again caught the vigilance of the National Copyright Administration. This time in 2017, the Big Fours (Tecent Music, Alibaba Music, Netease Cloud Music and Baidu Music), along with more than 20 record labels, were warned to avoid signing exclusive copyright licensing agreements.

Indeed, the protection for copyright does facilitate the development of local artists and innovation of music industry, yet exclusive copyright licensing may be disadvantageous for the dissemination of music itself.

"Internet music service providers scrambled exclusive copyrights and promoted licensing prices, which is not conducive to the widespread dissemination of music works, which is not conducive to the use of music by the majority of Internet users and listeners, is not conducive to the innovative creation of local music, and is not conducive to the healthy development of the online music industry."

Duan Yuping, Deputy Director, Copyright Management Department, National Copyright Administration

"Exclusive copyright licensing has even replaced product innovation and user experience, and has become the main competitive barrier of the industry."

Ding Lei, NetEase CEO

And numerous users are facing this trouble: in order to hear their favorite music, they often have to allow several music APPs to take up room on their phones.

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Thanks to the warnings from the National Copyright Administration, Tencent and Alibaba soon reached a music licensing agreement in a manner of friendly collaboration. Under the said agreement, Tencent will sub-license the music of Universal, Sony and Warner to Alibaba, while Alibaba will share its exclusive content purchased from Rock Records with Tencent. It is believed that the mess of exclusive copyrights scrambling has been quelled in this regard.

Peace has finally arrived in the digital music industry, and Tencent Music was undoubtedly the biggest winner of the copyright war. Although at the end, it was almost forced to share its music with its rivals, the users accumulated and the influence obtained have become its most valuable trophies.

Meanwhile, credits should be given to those internet giants for their contributions to the protection of music copyright in China. After all, it turns out that corporations like Tencent can really make a difference by affecting a country's copyright awareness and legislative trends.

For today's Chinese internet users, they may still miss the time when they could listen to and download music for free.

Nevertheless, monthly subscription is no longer a rare thing. That means, from another perspective, the potential of the Chinese digital content market will be further explored in the near future.

Emma Qi
HFG Law&Intellectual Property

NEW LAW

New China E-Commerce Law

China is by far the world's largest e-commerce market in the world. In 2017 it saw its online retail sales grow 32 % to reach 7.18 trillion Yuan (Aprox. 90,300 Billion USD).
The impact of the E-commerce market on social life and the current economy cannot be denied. Its own nature makes it to be constantly in change and it seems that the agents taking part in this market are always ready to go one step forward.

For those reasons among others, it seems to be necessary to provide a legal framework to tackle most of the ongoing and upcoming issues within the scope of e-commerce.

Thus, on 31 August 2018, the Standing Committee of the National People's Congress of the PRC published the long-awaited PRC E-Commerce Law (**"E-commerce Law"**). The law entered into force on January 1st, 2019.

The E-commerce Law is set to *"protect legal rights and interests of all parties"* and *"maintain the market order,"* declared Yin Zhongqing, one of the lawmakers of this new law. Its scope of application covers those operating activities of selling goods or providing services through the internet or other information networks. Therefore, it affects not only famous platforms such as JD.com or Alibaba's Taobao but also those selling products or providing services via social networks such as WeChat.

More specifically, it requires all e-commerce operators to fulfill their obligations to protect consumers' rights and interests as well as personal information, intellectual property rights (IPR), cyberspace security and the environment.

Now, it is on these provisions regarding Intellectual Property (IP) affairs on the e-commerce platforms that we are going to focus our analysis of the E-commerce Law in this article.

IP provisions within the E-commerce Law are mainly included in Section 2 of the Law, which refers to E-commerce Platform Operators' and their main obligations.

The protection of IP rights within the e-commerce market is tackled by this law essentially regulating two main points:

1. Defining a clear procedure to deal with IP rights infringement on e-commerce platforms;
2. Forcing the E-commerce Platforms Operator to carry out certain obligations ("take necessary measures") to prevent IP rights infringements occur on their platforms.

Defining a clear procedure to deal with IP rights infringement on e-commerce platforms

Art. 42 of the E-commerce Law states that "*if an IP right holder believes that an Operator on an E-commerce Platform has infringed its IP rights, the IP right holder can notify and request the Platform Operator to take necessary steps, such as to delete or screen information about the alleged infringement, disconnect the relevant webpages, or end the relevant transactions and services. Such notice should contain the prima facie evidence of said infringement".*

And continues… *"the e-commerce platform operator, upon receiving such notice, shall take necessary measures in a timely manner and transmit the notice to operators on the platform; and failing to do so, it shall be jointly and severally liable for additional damages along with operators on the platform".*

Furthermore, article 43 develops the rest of proceeding stipulating that *"An operator on the platform, upon receiving the transmitted notice, may submit a declaration of non-infringement to the e-commerce platform operator. Such declaration shall contain the prima facie evidence of non-infringement".*

The article finalizes saying *"the e-commerce platform operator, upon receiving such declaration, shall transmit the declaration to the IP right holder and direct it to complain to competent authorities or take its case to the people's court. The e-commerce platform operator shall timely terminate the measures taken if it has not received the notice that the right holder has made a complaint or brought a lawsuit within 15 days after the declaration is transmitted and delivered to the right holder".*

Obviously lacking of any jurisprudence or judgments on the matter at this point a strict interpretation of the letter of these articles may lead to understand that the E-commerce Platform Operator obligation in this proceeding is limited or reduced to merely transmit the information between the parties in the complaint.

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NEW LAW

New China E-Commerce Law

Moreover, it seems that considering that the E-commerce Platform Operator will not be entitled or obliged to analyze or examine the evidences provided by those parties but just transmit them, the potential infringer operator might easily prevent his online store to suffer any effective measure against the infringement (at least temporarily) by providing the e-commerce platform operator with this declaration of non-infringement.

No doubt, whether the role of the E-commerce Platform Operators will be the mere transferor of information in the claim or they will take an active approach to evaluate the information provided by the parties and take measures on that basis, is yet to be determined. Usual practice and Jurisprudence will bring light to this dichotomy once the E-commerce Law comes into force.

We shall highlight that according to article 43 once the E-commerce Platform Operator notifies the IP right holder the declaration of non-infringement submitted by the potential infringer, the first one will have 15 days to file an official administrative complaint or lawsuit reporting the potential infringement to the competent authorities. In the event he does not file such official complaint the E-commerce Platform Operator will be entitled to close the infringement procedure raised against the potential infringer in the platform according to this new Law.

As a result of what explained, from a practical perspective, this new legislation seems to be putting the IP right holders in a situation where they will have to face a significant economic investment any time they want to act against potential infringers of their rights in the E-commerce Platforms without, apparently, having the chance to effectively settle their claims before the IP E-commerce Platform Operators. To the contrary, they will have to necessarily take their complaints before the competent administrative or judicial authorities at all times.

Therefore, it is undeniable this new regulation has implemented a clear procedure to deal with IP infringements in the E-commerce Platforms. However, it seems such procedure does not offer or include more efficient tools to prevent counterfeit goods being sold in these platforms or stop those acts of infringement from happening.

In addition, it is important to note for its novelty and potential consequences that the Law also stipulates certain limitations for the IP rights holders by imposing legal consequences in case the complaints filed before the E-commerce Platforms Operators lack of legal basis. Thus, article 42 states that *"the IP right holder shall be held liable if it causes any damage to the Operator on Platform by its wrongful notice".* Moreover, if the IP right holder submits a notice with malice, the liability will be doubled.

Forcing the E-commerce Platforms Operator to carry out certain obligations ("take necessary measures") to prevent IP rights infringements occur on their platforms.

Contrary to what explained above about the ineffectiveness of the new procedure to prevent infringements in the online environment happening, there seems to be further regulation which states the liability the E-commerce Platform Operators they may incur in case they do not act against infringement of Intellectual Property on their platforms.

In particular, art. 44 stipulates that *"were an e/commerce platform operator know or should have known that any operator on the platform infringes upon intellectual property, it shall take necessary measures, for example, to delete, screen, disconnect or end transactions and services, and failing to do so, it shall be jointly and severally liable along with the infringer".*

However, the vagueness of the wording of this article makes hard its current analysis lacking of any jurisprudence or practice application at the moment. The article states as a premise for the E-commerce Platform Operators to be held liable that they *"knew or should have known"* about the infringement.

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The formula *"knew or should have known"*, frequently used in different legislations, requires of precise interpretation based on specific premises in order to define its scope of application and determine whether the E-commerce Platform Operator knew or should have known about the infringement and consider its liability.

It is likely that further regulations developing this new E-commerce law together with administrative and judicial decisions will bring light and certainty to precise the how and the when the liability of the E-commerce Platform Operators in these cases may be claimed.

It is also relevant to point out that the E-commerce Law regulates in his article 82 the specific consequences for the E-commerce Platform Operators in case they do not perform their obligations provided by articles 41-44 analyzed above and fail to take the necessary measures against the IP infringements on their platforms.

Thus, fines amounting from 50,000 to 2,000,000 RMB may be imposed to them depending on the circumstances of the infringement and the damages caused.

Daniel de Prado Escudero
HFG Law&Intellectual Property

INTERESTING

Tongue vs. Nose: Can You Copyright Taste or Scent?

In China and in the EU, the moment a work of copyright is created, the maker receives decades of protection for that work. The question is if taste of food or the fragrance of a scent is also protected by copyright law. If taste of a food product is considered a copyright protected work, nobody can market a copyright protected food product without consent of the maker.

Would it be justifiable to give such protection to the taste of food products?

The EU Court of Justice answered on 13 November 2018 the question whether the taste of food products are eligible for copyright protection. The case was between two Dutch makers of cheese, Levola and Smilde. Heksenkaas (as produced by the company Levola) is a spreadable dip containing cream cheese and fresh herbs, and was first produced in 2007. In 2014 the company Smilde started manufacturing Witte Wievenkaas, a cream cheese with a very similar recipe for a Dutch supermarket chain. Levola brought the case to court, claiming that by copying the product, which tastes the same, Smilde had infringed the reproduction right under copyright law.

The EU Court of Justice ruled that the taste of food cannot be protected by copyright. It decided that the taste of a food produced cannot be pinned down with precision and objectivity. Interestingly enough, it left open the possibility of copyright protection for the taste of food, if in the future this can be pinned down with precision and objectivity through technical means.

Say cheese: differences between the EU Member States

So, for now, there is no copyright on the taste of food products possible in the EU. No protection for the tongue thus. What about protection for the nose? Can a scent of a perfume be protected by copyright in the EU?

It is Important to note is that there is no such thing as an EU Copyright Law. Copyright law in Europe is protected through directives of the EU, meaning that the EU guides countries with regard to copyright law, but the member states still need to have their own law to interpret these directives in. As a result all the 28 EU member states have different copyright laws. Only when a national court asks questions about interpretation of these directives to the European Union Court of Justice, and the European Union Court of Justice answers these questions, then it becomes clear what the EU considers to be protected under copyright law.

The scent of a perfume can be copyright protected in the Netherlands (Lancôme-case). Therefore, if you copy a scent of for example Lancôme, and you reproduce it and put it on the market, you are infringing the copyright of Lancôme. It does not matter that you bottle it in a different bottle, or that you put a different name on it.

The scent itself can be protected by copyright in the Netherlands. Interestingly enough, in France, a major scent perfume powerhouse, the scent of a perfume cannot be protected by copyright.

Thus, different courts of EU member states have different rulings on the protection of the scent of a fragrance. Until a case gets to the European Court of Justice for interpretation, copyright protection for the scent of a fragrance thus depends on each EU Member State individually.

No copyright on taste in the EU, what about China?

In China, there has not been a case of the Supreme People's Court on the taste of a food product or on the scent of perfume. Names and logos of perfume and food can be protected by registering a trademark for it. Geographical indication protection is another possibility for food products. If food or fragrance products are a new invention, then patent protection would be possible.

Finally, as Coca-Cola and many other companies have protected the taste of food/drink, there is the possibility of protecting these as trade secrets under Chinese law. As such they would need to have physical, technological and contractual protection measures. **Therefore, for now there does not seem to be copyright protection in China for food products, nor for the fragrance of perfumes.**

We will keep a look on what the future will have to say about this in China. China has its own legal regime, and the answers of the judiciary might be different from the EU judiciary. After all, in Chinese language you do not say cheese when taking a picture, you say "Qiezi" (eggplant).

Reinout van Malenstein
HFG Law&Intellectual Property

WATCH OUT

Balenciaga did it again!

Balenciaga and its creative director Demna Gvasalia have just launched another intellectual property challenge: a pine shaped keyring really similar – at least in the green color version – to the famous car diffuser branded Arbre Magique.

Balenciaga and its creative director Demna Gvasalia have just launched another intellectual property challenge: a pine shaped keyring really similar – at least in the green color version – to the famous car diffuser branded Arbre Magique.

When I first saw the news, I smiled and thought “He did it again!” *facepalm*

You may know in fact that Balenciaga's creative director Demna Gvasalia is no stranger to, let’s say, taking inspiration from cheap and easy products and adding his own Balenciaga-branded spin.

While the most known case refers to the blue tote bag which was **really similar** to the Ikea bag, one of Gvasalia's latest and egregious *"familiar-looking"* products is Balenciaga's *"Multicoloured New York Bazar Shopper"* tote, which debuted early this year and looks pretty much identical to souvenir totes you can find in most of New York City's tourist-heavy areas and gift shops despite costing 1,950 dollars.

Balenciaga also introduced a Croc-inspired, hot pink stiletto pump that looks straight out of Barbie's Dream House, with ultra-pointy rubber heel, pins and embellishments so kitsch to be even cool.

You can expect them to go for slightly higher price than a pair of 40 dollars Crocs (think upwards of $1,000). It's unclear whether this is collaboration with Crocs, or if Balenciaga just took inspiration from the shoe, but the brand previously sent sky-high platform Crocs as well down its Spring 2018 runway.

In 2017, models paraded "Balenciaga" scarfs, coats and even manicures were created in the same style as Bernie Sanders' blue campaign logo, with "Bernie 2016" replaced by "Balenciaga 2017." The same happened with Ruff Riders: Gvasalia has been accused once again of overstepping the boundaries of copyright infringement, using the Ruff Ryders record label logo on one of the button-down shirts.

Well, let us go back to the beginning: the newly launched pine-shaped keyring. I am really curious about the Intellectual Property side of the story and therefore I have asked an opinion to one of HFG partners, **Fabio Giacopello.**

“First of all cases like this are not simple to judge and actually it is very likely that the same case will have different outcome in different countries. And this will happen not only because laws are different in different countries, but because IP protection shall be applied for, shall be obtained.

Therefore it is possible that the protection of the Arbre Magique will be stronger in certain countries and less strong in others. In addition in this kind of cases reputation (a factual circumstance) also plays an important role. If the product is famous on the market, the protection is extended.

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WATCH OUT

Balenciaga did it again!

I will focus on Chinese law and practice now.

In making an examination of the pine-shaped Balenciaga's key ring in comparison with Arbre Magique under Chinese law the first aspect I would verify is if the Arbre Magique is protected as design **(design patent in China).** My estimation is that the patent for design – if ever existed – will be anyway expired since the Arbre Magique is older than 10 years and this is the maximum time extension a design can enjoy in China. Design patent cleared!

I would then verify with the Chinese Trademark office if the Pine-Shaped diffusers is protected as trademark, **3D trademark** actually being the shape of a product.

The product is quite old and enjoys certain reputation. It could be eligible for protection at least for the class of perfume diffusers (evidence of use need to get a 3D trademark registered). If the Arbre Magique is protected in the class of perfume diffusers (class 3) I would then check if the product is also protected in class 18 (where key ring belong to). My estimation is that Arbre Magique is not protected in class 18 (no use and probably also no intention to use).

Still in the trademark field I would also verify if a potential protection can be derived as **un-registered well-known trademark.**

According to Chinese Law a un-registered well-known trademark is protected in classes in which is not registered only if registered in the class where it belongs, if there is likelihood of confusion and unjust advantage. I believe the Arbre Magique does not have such level of reputation and use in China to justify the special protection provided for in art. 13.2 Chinese Trademark Law. This protection is reserved to well-known to the largest public and - despite the Arbre Magique is famous in many countries - it looks to me not largely marketed in China. Trademark cleared.

Even if not protectable under Trademark law I shall verify if the Arbre Magique can be protected under **the Anti-Unfair competition Law** in its newly reformed version that states *that using without permission decoration which is confusingly similar to another person's commodity with certain influence is forbidden.*

In this regard I would conclude that it is hard to believe that a consumer can think that the Balenciaga leather accessories are sold or linked to the Arbre Magique. Anti-Unfair Competition cleared.

Lastly I would try the verification under **Copyright Law**. Is the shape of the Arbre Magique creative enough, artistic enough to be protected under copyright law, as a work of art? This is the kind of protection that musicians, painters, sculptors can enjoy for their work of art. I would say that most likely the shape of the Arbre Magique does not reach the minimum threshold of protection.

Final judgement: Balenciaga's keyring does not infringe upon Arbre Magique".

Well, that's quite surprising for me. But you know what? I'm not going to buy it anyway. I will take rather an Arbre Magique, put a ring on the top and use it as a keyring. Someone might notice the difference, but at least I'm going to spend less than 2 dollars instead of $222. And it's original.

Fabio Giacopello
Silvia Marchi
HFG Law&Intellectual Property

HFG INITIATIVES

Events

Meet HFG team at INTA Annual Meeting in Boston

The INTA Annual Meeting is the largest Intellectual Property event. Every year around 10,000 IP professionals, IP counsels and brand owners from all over the world attend INTA Annual Meeting.

This year INTA Annual Meeting will be held in Boston, Massachusetts, USA on May 18th – 22nd.

We are happy to announce that Fabio Giacopello, Daniel de Prado Escudero and Reinout van Malenstein will represent HFG Law&Intellectual Property at INTA AM. If you would like to know about trademark registration and IP rights protection in China, you can contact them directly to set up the meetings or invite to your company events.

Check www.hfgip.com for the contacts.

Insta news

Follow us on Istagram, scan the nametag!

There is a new function for Instagram addicted: you can now just scan the nametag and follow us directly.

You can do the same for yourself: just go to your account, choose Nametag and then edit it the way you prefer, with emoji or even selfie. Send then the nametag to your contact. Easy!

In HFG Ista account we share not only images from IP and Trademark meetings and conferences, but also the most private side of ourselves, like company events, teambuilding trials and company dinners out.

If you've always wondered how we look like when we are out of office, go and check our Instagram!

About

HFG Law&Intellectual Property

HFG is a leading China focused Law Firm and IP Practice uniquely integrated and co-managed by a team of multinational professionals based in Shanghai and Beijing. Since 2003, HFG is proud of delivering the highest standard of quality service rendered with uncompromised understanding of the business interest of clients, from a range of industries all over the world.

Collectively the firm commands a profound and diversified knowledge base and represents clients at various levels before all state-level agencies and administrative and judicial authorities. Going beyond traditional areas of practice, HFG integrates commercial and corporate law services providing a one stop station to companies whose intangible assets out value the tangibles.

HFG services have a special focus on IT and telecom, petrochemical, wine and liquors, fashion, cosmetics, retail and e-commerce, food and pharma regulatory, licensing and monetization of patented technology.

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