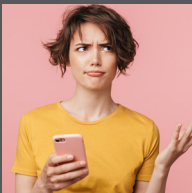


Goss IP

January 2020

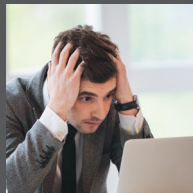


INSIDE



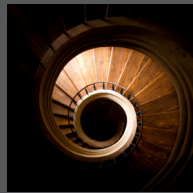
P2 NEWS

Huawei slammed
TRANSSION with
20,000,000 RMB
litigation



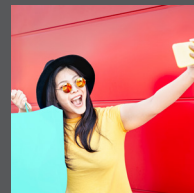
P4 NEW LAW

“No-Unanimity Law”
in force



P6 WATCH OUT

Dante's Hell or WKT
in China



P8 INTERESTING

The Gen Z:
99% of young
Chinese know
about IP



P9 BUSINESS

New food
labeling regulation



Dear readers,

Welcome to the first issue of GossIP 2020!
New year, new decade, new articles.

We start with a litigation between one of the biggest mobile phone vendors, Huawei, and a less known but surprisingly also big competitor, Transsion, which apparently stole a wallpaper copyrighted by the most famous company.

And the request of compensation is 20 million RMB. Is a wallpaper really so valuable?

On the field of new regulations, on January 1, 2020, the old Joint Venture Law and WFOE law have been repealed, and that has a quite big impact on the foreign invested companies. Read and discover how things changed!

In the third article we analyze what is a Well-Known Trademark and why is so important in China, even if sometimes it's difficult to recognize as it doesn't have a precise definition.

What do you know about IP? The International Trademark Association made a survey and discovered that 99% of young Chinese people have knowledge about Intellectual Property (actually the highest percentage within the countries considered). And we think this is very interesting news.

At the end a short but illuminating look into the new regulation of food labeling which is meant to become a cornerstone in this field.

Enjoy the reading and
Happy Year of the Mouse!

Fabio Giacopello

HFG

LAW &
INTELLECTUAL
PROPERTY



NEWS

Huawei slammed TRANSSION with 20,000,000 RMB litigation



Have you ever thought about the value of a default wallpaper on your mobile phone?

Well, let me tell you: the figure may rank top of the modern artworks. In September 2019, Huawei Technologies sued a less known mobile phone vendor for remedies of 20,000,000 RMB (≈2.8 million USD) for copyright infringement of its wallpaper.

On September 29, 2019, just one day before its IPO, TRANSSION Holdings received the notice from the Shenzhen Intermediate People's Court.

Although TRANSSION stated that the litigation would not have a material adverse impact on the company's future production and operations, the fact that a picture claims such high amount remedies is so rare that it has caused great concern in the industry.

The "Pearl Aurora Theme Wallpaper", to which Huawei claimed copyright, is presumed to be a theme wallpaper launched by Huawei in 2018.



The theme, which has been removed from the Huawei theme store, pictures a layer of aurora clusters in the pink-blue gradient background.

In the introduction page of TRANSSION's HiOS4.1 operating system, the background image of the mobile phone introduction page is a similar orange-blue gradient background with a bright color rising in the middle.



Huawei claimed that TRANSSION had been using a modified version of the "Pearl Aurora Theme Wallpaper" in the latter's two operating systems and in publicity activities such as press conferences, web page display, and commercials, which violated Huawei's rights of authorship and modification.

While the media was still talking about whether Visual China's 20,000 RMB claim was "blatant extortion", now everyone is astonished by the new record set by Huawei.

Indeed, what makes Huawei's picture so valuable?

The reasons may be evident. In Visual China's case, most of the defendants are ordinary business operators or individuals.

Compared with Visual China, these defendants have very little knowledge of the laws and weak economic strength.

Therefore, the court must consider the influence of its judgment on the whole society as well as the life of the accused.

Based in Shenzhen, TRANSSION is a top-seller of smartphones in Africa under its brands TECNO, ITEL and INFINIX.

According to the statics of Canalys, in the 1st quarter of 2018, the sales volume of both TECNO and ITEL has surpassed HUAWEI in the African market.

The timing of this lawsuit is also intriguing. Assuming the lawsuit is part of Huawei's attack on TRANSSION, we can imagine that Huawei would need a figure lethal enough to impact its competitor.

As far as the litigation is concerned, Huawei must prove to the court the rationality of the 20 million claims: whether it is the other party's illegal gains or its actual loss, including the scope of the infringement, the amount of commercial interests gained through the infringement, the cost of litigation and so on.

Article 49 of the PRC Copyright Law provides three methods of calculating compensation:

- ✓ actual losses,
- ✓ illegal gains,
- ✓ statutory compensation.

Continue reading

Among these three methods, the method of actual loss shall prevail. If the actual loss cannot be proved or cannot be determined, the illegal income comes second; only when the illegal income cannot be calculated, the statutory compensation will be applied.

In judicial practice, the courts exercise a large discretion in determining the amount of infringement compensation.

For instance, the judges often refer to reasonable royalties, license or transfer fees when determining the amount of compensation.

In addition, the judges will also take into account the goodwill of the infringer, the reputation of the infringed party, the state of the local economy and so on.

In its complaint, Huawei claimed that the picture involved was modified by TRANSSION. The latter then used the modified version as a built-in wallpaper in various mobile phones and even used it as boot screens and on the packaging boxes.

Accordingly, the 20 million RMB could be the accumulation of the amount of each infringement.



That being said, the extent to which wallpaper affects the user's decision to purchase a mobile phone is open to question.

Apparently, most people will not choose to buy a phone just because of the wallpaper it uses.

It would be difficult for Huawei to prove the existence of a direct link between the sales revenue of the mobile phones and the wallpaper involved. Therefore, the court will hardly support the 20 million claims.

Emma Qian
HFG Law&Intellectual Property

NEW LAW

“No-Unanimity Law” in force



The Joint Venture Law and the WFOE Law have been repealed since January 1, 2020. This marks the end of an era, when foreign invested companies were subject to a specific set of rules significantly different from those of domestic Chinese companies.

Although foreign investments still undergo specific regulation for market access in China, we can now say that – at least from corporate law and corporate governance perspective – the very notions of Foreign-Invested company, Joint Venture and of WFOE lost their distinctive function.

What – in practice – the impact for foreign invested companies? Here a short summary, based on our experience.

✓ IMPACT ON JOINT VENTURES

First of all, joint ventures shall have a shareholder meeting as supreme company organ – under previous regulation, JV had no such organ.

In practical terms, maybe the most important impact of the new corporate governance is that unanimity of decision is no more required by law for the so-called “*mandatory reserved matters*”:

- ✓ capital increase,
- ✓ capital reduction,
- ✓ amendment of AOA,
- ✓ liquidation/dissolution.

Instead, these decisions can now be approved by the shareholders within the assembly with a majority of 2/3 of the shares (unless more protective thresholds for minority shareholders are set in the AOA and JV contract).

Also transfer of participation by a shareholder to a third party now is less restricted, as it does not require unanimous approval by all other shareholder, but rather just requires approval by the majority of the other shareholders.

Moreover, in case that half or more of the other shareholders disagree to the transfer, the shareholders who disagree to the transfer have then the obligation to purchase the shares.

The maximum duration of directors of Joint Ventures changes from four (4) years to three (3) years.

✓ IMPACT ON WFOEs

WFOEs are also – by default – subject to the same provisions applicable for domestic companies in China.

For example, WFOEs with more than one shareholder shall also have a shareholder meeting. Mandatory reserved matters can be approved by the shareholders within the assembly with a majority of 2/3 of the shares (unless more protective thresholds for minority shareholders are set in the AOA and JV contract).

✓ OTHER CHANGES APPLICABLE TO BOTH WFOEs and JOINT VENTURES

It appears that the notion of total investment (i.e. sum of register capital and allowed funding gap in foreign exchange) has been abolished; this should mean that funding in forex is no more quantitatively limited for foreign invested companies – although still subject to stringent SAFE regulations.

The new Foreign Investment Law and its implementing regulation de-facto give a five-year term to all foreign invested companies to update their article of associations in order to reflect the new corporate structure and governance.

In fact, starting from January 2025 companies that have failed to meet such deadline will not be able to carry on any further change of registration (for example, change of business scope, change of address, change of directors, etc..) until they will have changed their AOA.

Continue reading



IN CAUDA VENENUM?

In theory, this new scenario gives to majority shareholders of JV (at least, to those having more than 66% of the shareholding) a tremendous opportunity to get control of the decision-making process in the above mentioned reserved matters.

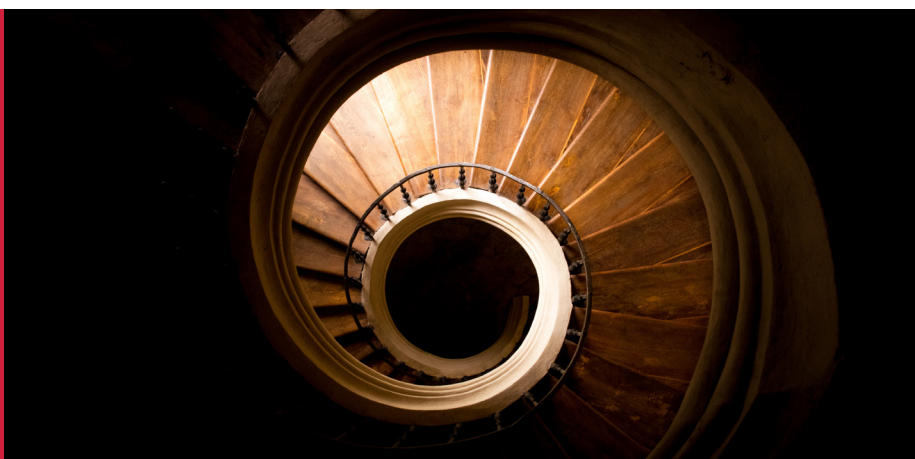
At the same time (at least for Joint Ventures) – in order to modify current AOA's and JV contracts into the new ones – local authorities will still require one last time (in compliance with the provisions of the AOA-to-be-changed) a unanimous vote of the board (in which case the minority shareholder may still have a leverage to try and negotiated more favorable terms in the new AOA).

Negotiations with minority shareholders are therefore not finished yet...

Nicola Aporti
HFG Law&Intellectual Property

WATCH OUT

Dante's Hell or WKTМ in China



What is Well-known Trademark (WKTМ)? In the Chinese Trademark Law (TML) there is not a precise definition, but it can be easily implied from the requirements posed for its recognition. Reading article 14 TML we understand that a WKTМ is a trademark that is extensively used and advertised and enjoys high reputation in its field.

According to Art. 14 TML “A well-known trademark shall, upon the request of the party concerned, be determined as one fact to be cognized in dealing with trademark related matters. The following factors shall be considered in determining a well-known trademark:

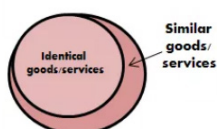
- ✓ reputation of the trademark in the relevant sector of the public;
- ✓ duration of use of the trademark;
- ✓ duration, degree, and geographical scope of any publicity for the trademark;
- ✓ history of protection of the trademark as a well-known trademark;
- ✓ other factors contributing to the reputation of the trademark”.

Why having a well-known trademark is important?

From a merely legal point of view – leaving apart marketing considerations - the well-known trademark is a super hero, in the sense that it has “special powers” that “normal” trademarks don’t have. Such special powers are described in article 13 of TML and are different based on the fact that the WKTМ is already registered or not in China.

Herein we provide also a graphic representation to better explain the statute of rights or scope of protection granted to registered or unregistered WKTМ.

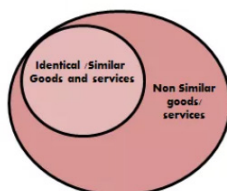
NON-REGISTERED WELL-KNOWN TRADEMARK



ART.13.1 TML2014

(...) A trademark shall not be registered and its use shall not be prohibited where the trademark constitutes a reproduction, and imitation, or a translation of a well-known trademark of another person not registered in China and is likely to create confusion (...)

REGISTERED WELL-KNOWN TRADEMARK



ART.13.2 TML2014

(...) A trademark shall not be registered and its use shall be prohibited where the trademark constitutes a reproduction, an imitation, or a translation of a well-known trademark of another person already registered in China and is likely to mislead the public and damage the interests of the owner of the registered well-known trademark (...)

A Well-Known Trademark that is not registered in China must be protected for the goods that are identical or similar to the goods for which the WKTМ is famous.

The special powers consist in obtaining a protection identical to that granted to a registered trademark in the lack of registration. And this is a big exception, indeed a non-registered and non-WKTМ has almost zero rights. In any case we note that having a non-registered WKTМ is a very rare circumstance: the trademark shall be reputed, widely used and advertised, but its owner has not applied and registered it as trademark.

More interestingly the second part of art.13 takes in consideration the case of a Well-Known Trademark that is already registered. In such case the special power granted is the so called cross-class protection.

The registered well-known trademark can be protected not only against identical or similar goods but also against non-similar goods and services.

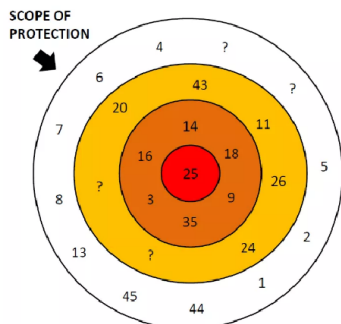
And this is quite simple, but it is not exhaustive. Let us dig a bit deeper.

According to the prevailing jurisprudence, the WKTМ in China is not protected against all the non-identical goods or services but the protection shall be graded. The more the trademark is well-known, the wider shall be the scope of its protection against non-similar goods/services.

Therefore, “for a well-known trademark that has been registered in China, it is needed to pay attention to match with its well-known degree when determining its scope of protection on different or non-similar goods. The extended protection for well-known trademarks does not mean that the protection can be extended to all classes of goods and services. Similarity or relational degree of the related goods or services is still an important factor to determine the extended protection of well-known trademark[i]”.

[i] PRADA SA vs TRAB, Beijing First Intermediate People’s Court, December 28, 2016.

In the figure herein we represent the scope of protection of a hypothetical WKTm in the field of fashion (class 25 as the center). The core represents the class in which the goods for which the trademark is well-known.



- The TM is registered and well-known for clothing (cl 25).
- The TM is not registered but can be protected since WK and since the products are somehow relevant.
- The TM is registered and used.
- The TM is not registered and probably not protected since the products in these classes would be regarded as not relevant.

The second circle (orange color) includes the good/services (classes) in which usually the WKTm is used and registered, but it is not well-known for.

The third circle (yellow color) represents the goods/services in which the WKTm would obtain protection even if not registered.

The last and most external circle represents the good/services(classes) in which the WKTm would not receive protection because they are too far from the core and therefore not relevant.

The circles herein try to explain the scope of protection of WKTm in China: it can extend cross class but cannot extend to all classes. The level of protection is proportionated to the level of well-known-ness and limited by the relevancy of the alleged infringing product.

The judge – when ascertaining the infringement of WKTm in a class in which is not registered - shall evaluate if there is likelihood of confusion and damage to the trademark owner.

Example1: Ferragamo trademark was recognized well-known by TRAB in 2016 in a dispute against an identical trademark filed in 2012 for lighting apparatus in class 11 (No.9372234).

Indeed class 11 it is usually regarded as relevant to class 25. The result of the case would have been probably different if the opposed trademark fell in any of the classes in the white circle usually regarded as not relevant (no confusion / no damage).



Example 2: Beijing High People's Court held that the opposed trademark “LEGO” in class 9 harms LEGO's well-known trademarks "LEGO" and "Lego in Chinese characters" in class 28.

The opposed trademark is designated on “glasses, glasses frames” and other products, while LEGO's "LEGO" and "Lego in Chinese characters" trademarks (“cited trademarks”) are well-known for “toy” products in class 28. If the opposed trademark is used on “glasses, glasses frames”and other products, the relevant public would think that they are to a high extent connected to one another, thus diminishing the distinctiveness of the cited trademarks and damaging the interests of LEGO.(2017)Jing XingZhong No. 875.

Fabio Giacopello
HFG Law&Intellectual Property

INTERESTING

The Gen Z:
99% of young
Chinese know
about IP



How much do you know about Intellectual Property? Are you aware about counterfeited products?

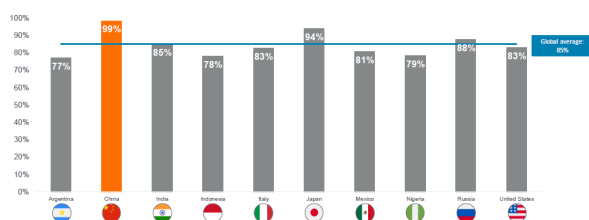
Summarizing, these are the questions asked by the International Trademark Association (also known as (INTA), and showed in their report titled: “Gen Z Insights: Brands and Counterfeit Products”, to a large number of youngsters around China and other 9 different countries.

The main purpose of the INTA report is to acknowledge the relationship between the youngsters (Chinese but not only) Gen Zers and brands, their attitudes towards them and what level of awareness on purchasing counterfeited goods they got.

The researchers reached 4,500 youngsters from 18 to 23 years old, males and females, to complete a 25-minute online survey. The answers found in the survey gave surprising numbers in matter of Intellectual Property and awareness regarding fake products.

For example, the survey revealed that the 99% of Chinese Gen Zers achieve a knowledge about Intellectual Property, reaching the highest percentage within the 10 countries. Japan is the only other group, with 94%, declaring awareness of IPR.

Knowledge of intellectual property rights

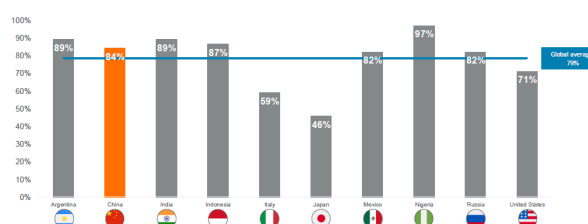


Still having numbers in our hands, the 94% of the Chinese Gen Zers deems that the IP rights are equally important as a matter of fact than the physical property rights.

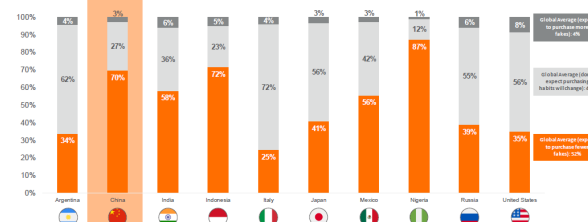
The results prove that the high numbers of fake products in the Chinese market shaped within the young generation this type of awareness driven by morality more than financial considerations.

If you go likelihood of purchasing fake products the Chinese youngsters are the fifth -most- likely consumers to purchase fake products, 84% of them admitted that have done it “over the past year”, and over the 70% of them declared that will buy some counterfeits goods in the future.

Purchased counterfeits in the past year



Future expectation of purchasing counterfeits



According to the report, the Chinese Gen Z believe and consider a brand name as “somewhat important” or “very important” since very famous and luxury’s brands are struggling to adapt their standards and marketing plans to reach a younger public. On the same opinion is INTA President, David Lossignol, Head of Trademarks, Domain Names and Copyrights at Novartis Pharma AG in Switzerland who declares that the aim of the study alerts brand owners that they need to pay attention and adapt marketing strategies.

In November 2019, the new Chinese Trademark Law amendments, that target bad-faith trademark registrations, finally came into force and are intended to prevent individuals from seeking to register and hold trademarks with no intention of using the trademark.

This event can be considered as a further step on the fight that China is constantly seeking to stop counterfeiting and trademark squatting.

BUSINESS

New food labeling regulation



On November 21, 2019, SAMR released the draft version of “*Food Labeling Supervision Administrative Measures*” for public comments (to be submitted until December 20, 2019).

This regulation is to become the new cornerstone of Chinese food labeling, thus in theory replacing GB 7718. It has a broader scope than GB 7718, as it also includes provisions about non-pre packed foods, and health foods.

Main news appear to be.

① **Imported food** shall have label in Chinese directly pasted, printed or marked on the smallest sales unit during production; Chinese label therefore cannot be added at any later stage. This is a very important change, as now Chinese stickers can be printed and stuck on food package at entry port in China.

② **New graphic and new labeling requirements for:**

- ✓ prepackaged food products,
- ✓ small-package simplified labels,
- ✓ health-foods label.

③ **New provisions for naming of:**

- ✓ foods that are the result of physically mixed of ingredients which are difficult to identify separately in the final product,
- ✓ some additives (sweeteners, preservatives, colorings, emulsifiers, thickeners).

④ **For foods with shelf life** not longer than 72 hours, the production date shall indicate the hour (in a 24-h format).

The draft also has provisions applicable for naming of meat-substitute ingredients: in fact it is required that foods that use plants as raw materials to imitate the characteristics of organs and tissues of other organisms should be preceded by the words “imitation”, “artificial” or “vegetable”, and labeled with the true attributes of the food classification name.

For the first time (and differently from GB 7718, which only refers to pre-packaged food), labeling of bulk food as well as of made-and-sold-onsite food is also clearly specified (before, relevant provisions were scattered through various pieces of regulation).

Additives input into meals prepared by food-service providers shall be declared into the menu.

Interestingly, food manufacturers and operators are expressly encouraged to carry out clean label operation, using as little or no food additives as possible.

Nicola Aporti
HFG Law&Intellectual Property