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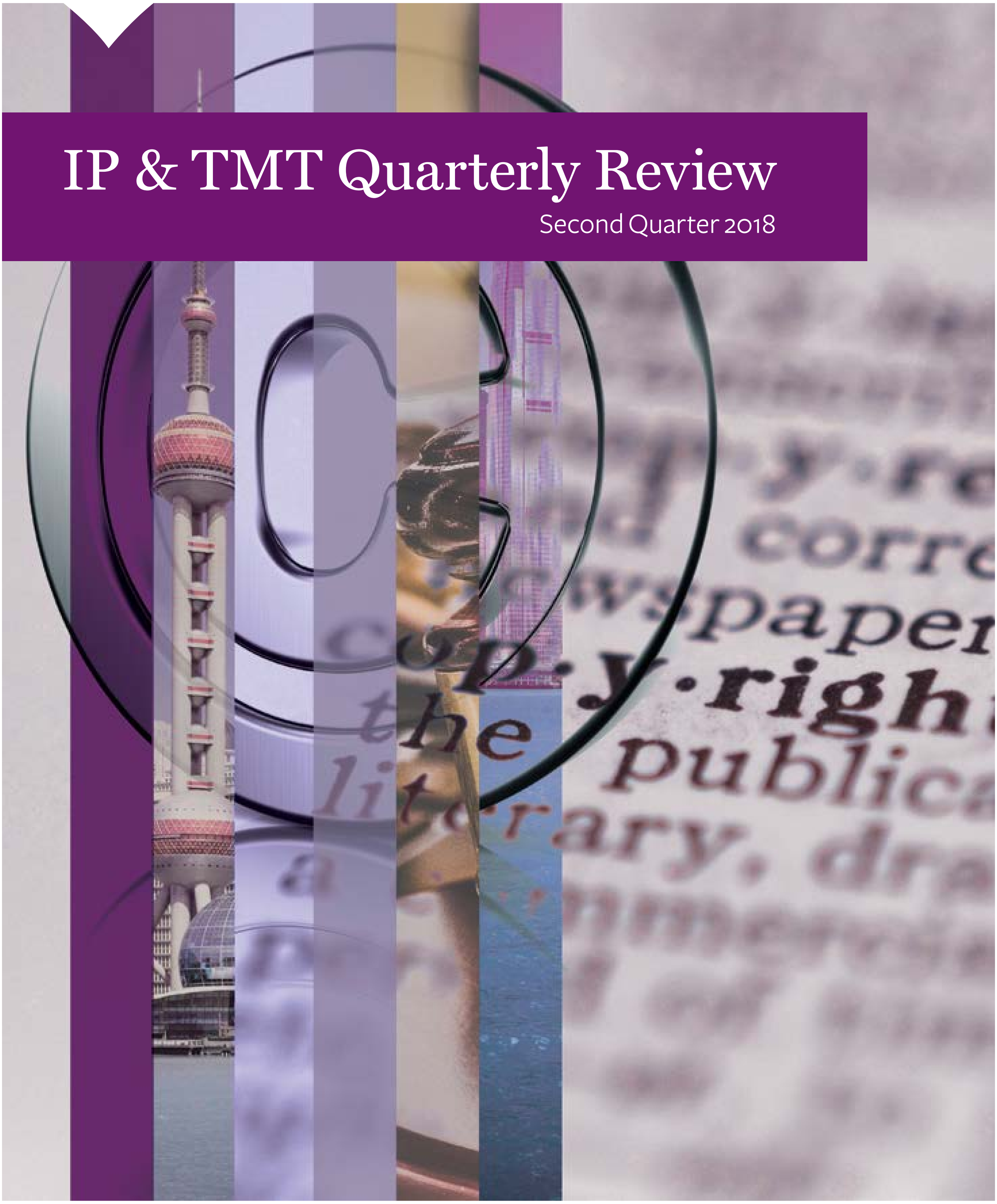

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Contents

Key: Click to Navigate

Intellectual Property

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A Good Sport? – The Latest View on Streaming in China

Introduction

On 30 March 2018, the Beijing IP Court ("**IP Court**") handed down a decision rejecting the claim brought by Beijing Sina Internet Information Services Co., Ltd. for copyright infringement in a case involving the unauthorized online broadcasting of public television signals for live Chinese Super League football matches ("**Continuous Images**") by Beijing Tianying Jiuzhou Network Technology Co., Ltd..

The IP Court overturned the findings of the first instance court and made a surprising decision that the Continuous Images do not constitute "copyright works" under the Copyright Law of the People's Republic of China (the "**Copyright Law**"). In reaching its decision, the IP Court discussed in great detail the requirements for works to be recognised as "cinematographic works and works created by virtue of an analogous method of film production".

Background

Beijing Sina Internet Information Services Co., Ltd. ("**Sina**"), operator of a well-known portal in China, SINA.COM, entered into an agreement with Chinese Super League Co., Ltd. on 7 March 2012 (the "**Agreement**"). Under the Agreement, Sina was granted an exclusive licence to broadcast the Continuous Images on its portal by way of live broadcasts, recorded broadcasts, broadcasts on demand or delayed broadcasts.

Beijing Tianying Jiuzhou Network Technology Co., Ltd. ("**Tianying**") is the owner and operator of another popular portal in China, i.e. IFENG.COM. In 2013, Tianying offered hyperlinks to <www.ifeng.sports.letv.com> where the Continuous Images were broadcast live. Sina initiated civil proceedings against Tianying at

1 The authors would like to thank Angel Shi, trainee solicitor at Mayer Brown JSM, for her assistance with research for this article.

the Beijing Chaoyang District Court ("**District Court**") alleging the following:

i. By setting up a Chinese Super League channel on IFENG.COM and rebroadcasting the Chinese Super League matches live online, Tianying infringed Sina's copyright in the Continuous Images, which are protectable under the Copyright Law as "works created by methods similar to the filming of movies".[2]

ii. Tianying's unauthorized rebroadcasting also constituted an act of unfair competition as it disrupted the orderly competition in the online broadcasting businesses and undermined the legitimate interests of Sina as an exclusive licensee of the Chinese Super League Co. Ltd.

As <www.ifeng.sports.letv.com> was jointly operated by Tianying and Letv Internet Information & Technology Corp. Beijing, Letv Internet Information & Technology Corp. Beijing was later joined as a party to the action at the request of the District Court.

Decision of the District Court

The District Court held on 30 June 2015[3] that the Continuous Images should be regarded as works protected by the Copyright Law ("**Work**") due to the originality involved in the process of producing the same, such as the selection and compilation of the shots and the setting and positioning of the cameras.

Regarding the infringement claim, the Judge first considered whether Tianying's online live broadcast amounted to an infringement of Sina's right to "communicate the works to the public through information networks".[4] However, such right is defined under the Copyright Law to mean "the right to communicate to the public a work, by wire or wireless means, *in such a way that members of the public may access these works from a place and at a time individually chosen by them*" (emphasis added), which is not applicable in respect of online live broadcasts.

The Judge then went on to hold that Article 10(17) of the Copyright Law offered a broader right that could be applied in the present case, namely: "other types of rights enjoyed by a copyright owner". As a result, the District Court accepted Sina's copyright claim and ordered Tianying to pay damages in the sum of RMB 500,000.

The court dismissed the unfair competition claim raised by Sina as Sina's losses had been fully recognized and compensated by the District Court's ruling in Sina's favour on the copyright infringement ground.

Decision of the IP Court

Tianying brought an appeal against the first instance decision before the IP Court and argued that, *inter alia*, the Continuous Images do not constitute Works, due to their lack of originality. The IP Court delivered a long judgment discussing, *inter alia,* (i) the types of works which are protectable under the Copyright Law, (ii) elements of Cinematographic Works and (iii) the interpretation of a "rebroadcast" under Article 45(1) of the Copyright Law.

1. TYPES OF COPYRIGHTABLE WORKS

Article 3 of the Copyright Law defines the categories of works that are copyrightable. The IP Court noted that the District Court did not specify in its judgment which type of work the Continuous Images amounted to and took the opportunity to clarify that only a work falling within any one of the categories of works stipulated under Article 3 of the Copyright Law can enjoy copyright protection in China. In other words, the court cannot decide that a work is protectable by copyright at its own discretion if there is no legal basis under the Copyright Law.

The IP Court then considered the grounds of appeal and decided to proceed on the basis that the relevant question is whether the Continuous Images constitute "cinematographic works and works created by virtue of an analogous method of film production"

2 Article 3(6).

3 (2014) Chao Min (Zhi) Chu Zi No. 40334.

4 Article 10(12) of Copyright Law.

Intellectual Property Cont'd

(collectively, "**Cinematographic Works**") under Article 3(6) of the Copyright Law.

2. ELEMENTS CONSTITUTING CINEMATOGRAPHIC WORKS

i. Fixation

Article 4(11) of the Regulation for the Implementation of the Copyright Law (the "**Regulation**") elaborates that a Cinematographic Work is a work "recorded on certain medium, consisting of a series of images, with or without accompanying sound, and which can be displayed with the aid of suitable devices or communicated by other means". In other words, the series of images recorded need to be fixed in a tangible media failing which, they cannot be categorized as Cinematographic Works in the copyright sense.

ii. Originality

As a starting point, the IP Court considered the difference between Works and their counterparts under the concept of neighbouring rights. Neighbouring rights offer protection to persons/ entities such as performers, producers of the video recordings and broadcasting organizations but the scope of protection is usually more limited compared to the rights enjoyed by a copyright owner.

The equivalent right to Cinematographic Works under the concept of neighboring rights is "video recording". Article 5(3) of the Regulation defines video recording as "recording of a series of images, with or without accompanying sound, which is not a Cinematographic Work". Therefore, if a series of continuous images are not recognized as a Cinematographic Work, logically, they must be a video recording and vice versa.

After comparing and analyzing other types of Works and their counterparts under the system of neighboring rights and looking at some previous court cases, the IP Court came to the conclusion that in China, the key difference between a Work (e.g. a Cinematographic Work) and its neighbouring right counterpart (e.g. a video recording) is the degree of originality.

In order to assess whether a work has the requisite level of originality to be recognized as a Cinematographic Work, the IP Court considered that there are at least 3 factors that should be taken into account:

a. the selection of subject matters included in the work;
b. the method of filming of the subject matter; and
c. the selection and compilation of footage for the work.

3. WHETHER THE CONTINUOUS IMAGES CONSTITUTE A CINEMATOGRAPHIC WORK

The IP Court applied the above criteria to the Continuous Images to determine whether all of the elements are satisfied on the facts.

i. Fixation

As the Continuous Images are broadcast live, the broadcast happens simultaneously with the filming process, and the Continuous Images are not fixed in any form or media until the football match finishes (when it becomes a recording). Thus, the Continuous Images do not fulfill the fixation requirement.

ii. Originality

a. Selection of subject matters to include into the work

   Given the nature of football matches, there is literally no choice over the subject matter–the Continuous Images have to be about the football match, from the very beginning to the very end. Therefore there is no originality in this respect.

b. Method of filming of the subject matters

   For most major sports events, there are detailed manuals in relation to the setting and positioning of the cameras, the contents to be included in the broadcast and the filming techniques to be adopted at different stages of a match.

   In this particular case, there were indeed elaborate production manuals for the football matches in question. Moreover, the filming of football matches is also driven by the needs of the audience and the common techniques employed by the cameramen in live broadcasting. Thus, when viewed objectively, there is very little space, if any, for a cameraperson to improvise at his/her will. The level of intellectual creativity allowed in respect of the method of filming the Continuous Images is low.

c. Selection and compilation of the filmed footages

The essential requirement for live broadcasting of a sports event is to accurately reflect the progress of the event, as such there will only be minimal selection and compilation of filmed footages in a live broadcast of a sports event.

In this case, while the IP Court recognized that different directors or producers may make different choices in selecting what footages to insert in the short "Highlights" segments played during break time, these segments constituted a small part of the whole of the Continuous Images and are not sufficient to render Continuous Images a Cinematographic Work as a whole.

As a result, the IP Court found that the fixation element had not been satisfied and there was very little originality in the Continuous Images as a whole, so they could not be recognized as a Cinematographic Work under the Copyright Law.

4. THE RIGHT INFRINGED IN THE PRESENT CASE IF THE CONTINUOUS IMAGES DO CONSTITUTE A WORK

Although the IP Court came to the conclusion that the Continuous Images do not constitute a Work protectable under the Copyright Law, the IP Court provided guidance in its decision on what type of right would have been infringed if the Continuous Images had been found to constitute a Work under the Copyright Law.

Concurring with the reasons provided by the District Court, the IP Court held that the right to communicate the Works to the public through information networks[5] is not relevant. Article 10 (11) of the Copyright Law provides that a copyright owner enjoys "the right of broadcast", that is, the right to publicly broadcast or communicate to the public a work by wireless, wire or relay means. The IP Court held that online broadcasting falls squarely within the scope of such a right and commented that the District Court's finding that the right at stake is a form of "other rights enjoyed by the copyright owner"[6] was incorrect. Nevertheless, as the IP Court found that the Continuous Images are not Works, Article 10(11) of the Copyright Law does not apply.

5. INTERPRETATION OF "REBROADCAST" IN ARTICLE 45(1) OF THE COPYRIGHT LAW

Article 45(1) of the Copyright Law provides that a broadcasting organization is entitled to prohibit a third party from "rebroadcasting" its programs. The IP Court ruled that it is legally permissible for a broadcasting organization to license or transfer such right to a third party, such as Sina in the present case. The key issue was whether "rebroadcasting" encompasses wired broadcasting such as live online broadcasting by Tianying.

After taking into account the relevant legislative history and previous judgments on this point, the IP Court concluded that the scope of "rebroadcasting" under Article 45(1) of the current Copyright Law did not contemplate online broadcasting, which is a type of wired transmission and a method of transmission which was not common when the provision came into force in 2001. Notably, the Judge went on to comment that widening the scope of "rebroadcasting" in the Copyright Law to include wired transmissions will ensure that stakeholders in the broadcasting industry have an effective recourse against unauthorized online broadcasting and streaming activities.

5 Article 10(12) of the Copyright Law.
6 Article 10(17) of the Copyright Law.

Intellectual Property Cont'd

Final Remarks

Overall, the IP Court's decision was remarkable as it not only discussed what constitute Cinematographic Works in great detail but also took note of the legislative vacuum for unauthorized online steaming under the existing regulatory framework. Leaving aside the fact that the decision suggests a higher test of originality for certain copyright works than is the case in common-law systems, the decision is important as it signals a dissatisfaction of the Chinese judiciary with the current statutory provisions. The decision is a call for a reform of the law, a point that may be taken by stakeholders in the content and broadcasting industry as an invitation to lobby for a broadening of the legal definition of "rebroadcasting" in Article 45(1) of the Copyright Law, in order to provide them with the availability of effective actions and remedies to deal with unauthorized online broadcasts and streaming.

Another important point to note is that the IP Court did not address the unfair competition ground in its judgment as neither Sina nor Tianying appealed on this point. For now, it seems the option is still there for copyright owners or their licensees to rely on the Anti-Unfair Competition Law to seek appropriate remedies in this type of case until the copyright statute is amended to reflect current realities. ◆

Intellectual Property

By Rosita Li, Partner, Mayer Brown JSM, Hong Kong
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China's Latest Position on Original Equipment Manufacturing ("OEM") and Trade Mark Infringement

In our Fourth issue of IP & TMT Quarterly Review in 2016, we discussed the decision of China's Supreme People's Court ("**SPC**") in the case of *Focker Security Products International Limited v. Pujiang Ya Huan Locks Company Limited* (the "**PRETUL case**") and the decision of the Jiangsu High Court ("**High Court**") in relation to the use of "DONG FENG" mark on OEM products (the "**DONG FENG case**").[7] At that time, the SPC had just accepted the OEM manufacturer's application for a retrial of the DONG FENG case.

On 28 December 2017, the SPC handed down its final decision on the DONG FENG case and the judgment has only recently been published online. In summary, the SPC quashed the decision of the High Court and held that the OEM manufacturer was not liable for trade mark infringement. In reaching its decision, the SPC endorsed that whether an OEM manufacturer has exercised reasonable care in verifying the rights owned by a foreign trade mark owner is a factor that could affect an OEM manufacturer's liability.

A Quick Recap

The SPC's reasoning in the PRETUL case relies on clear-cut principles under the Trade Mark Law in China, that is, a sign on products that will be exported overseas or will not enter into the Chinese market does not perform the function of identifying the source of origin in China. Therefore, the application of a sign on OEM products does not amount to "use" in a trade mark sense and does not infringe a trade mark owner's rights.

In the DONG FENG case, the High Court considered that trade mark infringement should not only be determined in the light of Trade Mark Law, but the wider context of international trade and balancing of rights between domestic and foreign trade mark

7 We have made our Asia IP & TMT Quarterly Review 2016 Q4 available to you. www.mayerbrown.com/Asia-IP--TMT-Quarterly-Review-12-22-2016/

Intellectual Property Cont'd

owners should also be taken into account. While the High Court agreed with the basic principle that OEM export does not infringe a domestic trade mark owner's rights, it added that the principle is subject to the OEM manufacturer exercising a reasonable level of care to verify or investigate the rights of the foreign trade mark owner and to ensure that no damage is caused to the domestic trade mark owner.

The High Court held that the defendant, Suzhou Chang Jia Jin Feng Dong Li Machines Co. Ltd. ("**Chang Jia**"), failed to exercise the requisite level of care and infringed the trade mark rights of Shanghai Diesel Engine Co., Ltd. ("**Shanghai Diesel**"). The High Court appeared to be particularly influenced by the fact that Chang Jia had actual knowledge that "DONG FENG" is a well-known trade mark in China. It also pointed out that Chang Jia should have had reasons to believe that the foreign trade mark owner's mark was not registered in good faith as there were disputes between the foreign trade mark owner (PT ADI PREKASA BUANA , "**PT ADI**") and Shanghai Diesel in respect of the "DONG FENG" mark in Indonesia, notwithstanding a final judgement of the Indonesian court in favour of PT ADI.

SPC DECISION IN THE DONG FENG CASE

In finding that Chang Jia did not infringe the trade mark rights of Shanghai Diesel, the SPC relied on the following principles:

1. Generally, if a sign does not perform the function of the trade mark and it does not cause confusion as to the commercial origin of the products, then the function of a domestic trade mark will not be affected and the use of such a sign does not amount to trade mark infringement.
2. In light of (1) and the fact that OEM is a very common part of international trade, OEM typically does not constitute trade mark infringement, *unless* there is evidence to show that the OEM manufacturer has not fulfilled its obligation to exercise reasonable care and has caused actual damage to the domestic trade mark owner.

Turning to the facts of the DONG FENG case, the SPC found that Chang Jia fulfilled its obligation to exercise reasonable care because it undertook a prior ownership and validity check on the "DONG FENG" mark in Indonesia.[8] Given the Indonesian court's final judgement in favour of PT ADI, Shanghai Diesel could not have sold its products in Indonesia without breaching PT ADI's rights. There is therefore no evidence that actual damage has been suffered by Shanghai Diesel. As a result, the SPC decided to quash the decision of the High Court and held that Chang Jia has not infringed the trade mark rights of Shanghai Diesel.

Conclusion

This SPC decision on the DONG FENG case confirmed the need for OEM manufacturers to exercise reasonable care to verify or investigate the rights of the foreign trade mark if they were to be exempted from trade mark infringement. In this case, the SPC found that the inspection of trade mark certificates and verification of the validity of the trade mark in question was enough to discharge this obligation. As we do not know the exact steps Chang Jia took during the verification process, there remains some uncertainty as to what exactly an OEM manufacturer needs to do in order to avoid trade mark infringement. However, an OEM manufacturer should at the very least conduct an online check against the relevant trade mark registry records.

Overall, this decision will have the effect of encouraging more overseas brand owners to have their goods manufactured in China without having to worry about third party registrations in China, or securing trade mark registrations in China. However, at the same time, legitimate trade mark owners in China could potentially find their marks, if registered overseas by a third-party in bad faith, to be applied on OEM products without consent. Trade mark owners should be vigilant about bad faith applications or registrations in different countries and should take immediate steps to oppose or invalidate those marks in order to avoid unauthorised OEM activities. ◆

8 Details of how Chang Jia verified such information is not provided in the judgment.

Intellectual Property

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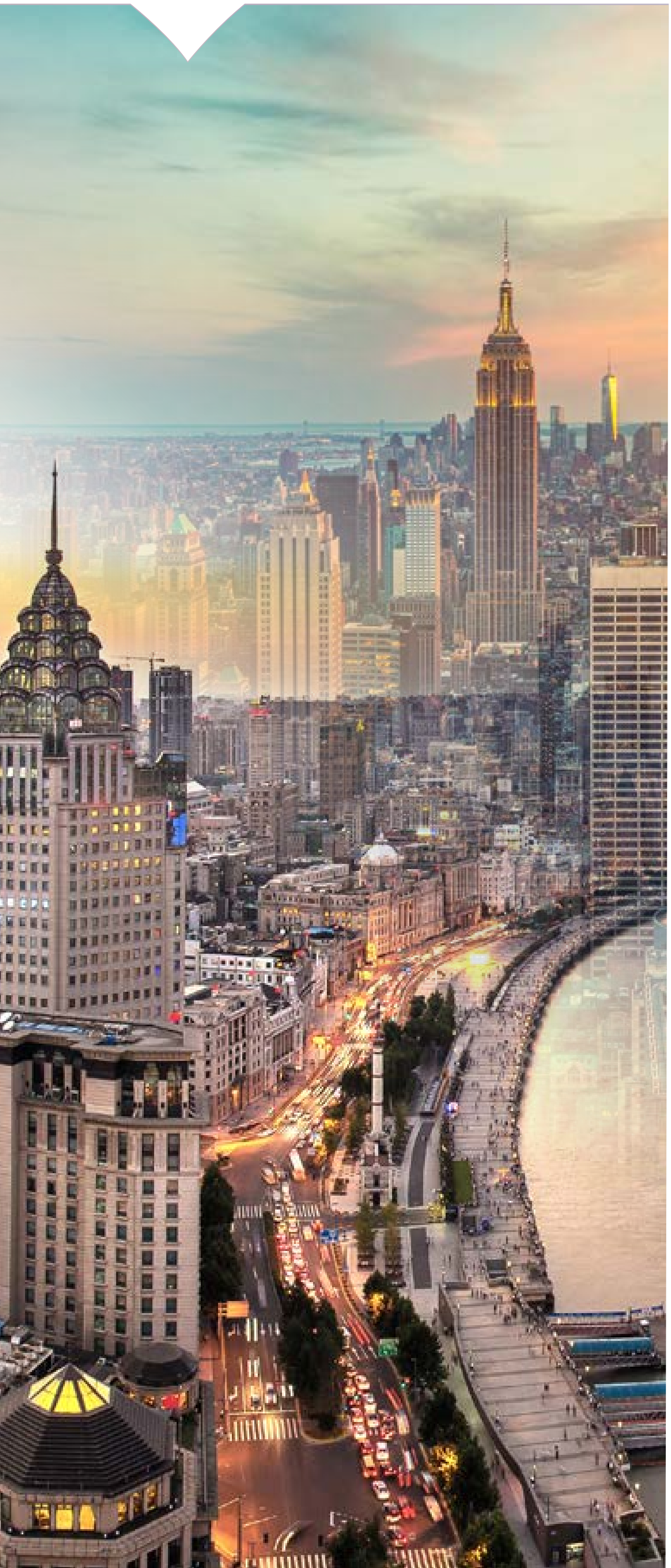

China on United States Intellectual Property Protection and Enforcement Priority Watch List Again

Introduction

For the 14th consecutive year, China appears on the Priority Watch List set out in the Office of the United States Trade Representative's Special 301 Report (the "**Report**"). Issued in April 2018, the annual report reviews the intellectual property rights ("**IPR**") protection policies and enforcement measures of the United States' 100 or so trading partners, including China.

The Report identified 12 countries–Algeria, Argentina, Canada, Chile, China, Colombia, India, Indonesia, Kuwait, Russia, Ukraine and Venezuela - on the Priority Watch List. These countries are deemed to not provide an adequate level of IPR protection or enforcement.

For China, the Report identifies an urgent need to address a number of new and longstanding IP issues, including:

- inadequate protection from trade secret theft
- enforcement issues online / copyright piracy
- counterfeiting
- a vast amount of manufacture and export of counterfeit goods
- stringent preconditions to access the Chinese market in relation to technology transfer arrangements
- adverse / non-favourable terms being pushed onto foreign IP licensors

According to the Report, IP enforcement in China, whether civil or criminal, is hindered by structural barriers.

Ongoing Challenges

Legal, enforcement, regulatory and governmental issues continue to undermine fairness and

Intellectual Property Cont'd

transparency in the Chinese IP system. As a result, a difficult business environment exists and the interests of United States IP holders remain at risk. Even though amendments have been made to the Chinese legal and regulatory framework, these have not done much to regain the confidence of IP stakeholders.

Issues

Certain issues raised in the Report in relation to China are:

1. TECHNOLOGY TRANSFER, INDIGENOUS INNOVATION, AND LOCALIZATION

Only IP which is developed locally or transferred into China or to a Chinese party can gain proper market access and receive certain preferences or benefits in China. The findings from an investigation conducted in August 2017 into governing Chinese policies and practices in the technology transfer and innovation sectors are set out in the Report, and show that the system is discriminatory and restricts United States commerce. The Report recommends that instead of coercing technology transfers and implementing local policies, the encouragement of voluntary and mutual agreements between commercial parties would promote innovation.

2. TRADE SECRETS

Trade secrets are also problematic. Various sources have reported specific gaps in trade secrets protection and enforcement. China failed to redress critical problems in its 2017 amendments to the Anti-Unfair Competition Law ("**AUCL**"). "*Definitional, conceptual and practical shortcomings*" relating to trade secrets protection continue to be evidenced in the AUCL, and China still refuses to introduce a separate trade secrets law. Guidance should be issued to ensure consistency in judicial interpretations of IP laws and prevent disclosure of trade secrets in the submissions to official channels.

3. E-COMMERCE PIRACY AND COUNTERFEITING

Online piracy and counterfeiting are widespread in China's online markets. They are causing deep losses for United States right-holders in industries such as film, television and publishing. The gravity of the problem escalates when pirated works are exported from China to markets around the globe. Although online systems have been set up to tackle IP infringements, rights-holders complain that the procedures are onerous and penalties fail to deter infringers from re-infringing.

The Report considers that China's E-Commerce Law does not provide a "*predictable legal environment*" or support cooperation between parties to deter online copyright infringement. In addition, recent legal reforms continue to limit foreign companies' access to the Chinese market. This has encouraged pirated foreign content to be fostered and distributed.

Having been the "*leading source and exporter*" of systems that has helped to spread online piracy, China needs to reform its ineffective criminal sanctions. Piracy mobile apps continue to expand and the Chinese enforcement authorities appear reluctant to take action despite the filing of stakeholder complaints.

4 MANUFACTURING, DOMESTIC SALE, AND EXPORT OF COUNTERFEIT GOODS

In a 2017 report by United States Customs and Border Protection, China and Hong Kong accounted for a high percentage of the value and seizures of counterfeit goods. The United States Chambers of Commerce also estimated that counterfeit goods formed around 12% of China's merchandise exports.

China's General Administration of Customs has cooperated with United States officials to stop successful exports of counterfeit goods to the United States and there have been positive results. Despite this, China still needs to take measures to address the widespread availability of counterfeit goods sold both online and in physical markets in China.

What can Brand Owners Operating in China Do?

Even though there are ongoing legal and regulatory reform efforts, such as the amendments to the AUCL and setting up of specialized IP Courts, which hopefully bring a positive change to the IPR landscape in China, there are a number of steps that brand owners should take as part of a well developed and consistent brand enforcement strategy. These include:

- work closely with the Chinese enforcement authorities in tackling infringements;
- be persistent in brand enforcement strategy so as to send a strong message to infringers;
- work with border control/customs in different countries to identify the incoming shipment of counterfeit goods; and
- maintain better control over supply chain of goods manufactured in China (e.g. conducting audits on Chinese manufacturers).

Conclusion

While there has been ongoing legal and regulatory reform to improve China's IP system, the United States' view, set out in the Report, is that China remains a "*hazardous and uncertain environment*" for the United States right-holders.

As the impact of China's reform has still to be felt and further changes to China's IP framework are likely to be introduced over time, brand owners should continue to monitor the situation and pay attention to judicial interpretations of IP laws. Brand owners should also take proactive steps in protecting their rights in China, such as by incorporating suitable terms on IP rights in contracts with suppliers/manufacturers and by cooperating closely with customs and the authorities. ◆

Intellectual Property

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Your Name or Mine? A Case of Withered Romance and Passing Off

In the case *Le'Sean Group Ltd v. Moss McBlack Group Ltd & Anor*[9], Deputy High Court Judge Blair heard the Plaintiff's application for an interlocutory injunction against the Defendants for passing off their business as the Plaintiff's by the use of the name "McBlack" and a similar logo.

The story began like a fairy tale–the protagonists, Sean Lam and Alice Tang, were romantically involved in 2011 and in a live-in relationship. They developed an interest in flowers and opened a small florist shop in San Po Kong in 2013 under the name Le' Sean Seasons–which was adopted after Mr Lam's name.

The couple later opened new florist shops under the name "Moss McBlack". The Plaintiff company was subsequently incorporated with Mr Lam as sole director and shareholder .

The romance between Ms Tang and Mr Lam came to an end in early 2017. Without Mr Lam's knowledge, Ms Tang incorporated the Defendant company Moss McBlack Group Limited. Ms Tang later asked for Mr Lam's permission for her to take over the "Moss McBlack" name. As Mr Lam refused, Ms Tang adopted and applied to register another name "Black McBlack" as a trade mark (this was pending when the case was heard).

The legal battle began when Mr Lam found out that Ms Tang opened a new florist shop in Causeway Bay towards the end of 2017 under another name, "Blake McBlack". Although Ms Tang extended an olive branch by changing the Defendant's name to Black McBLack Group Limited and offered to undertake not to use the name "Moss McBlack", no amicable settlement was reached. In court, the parties gave conflicting accounts of what actually happened. Notably, Mr Lam said the brand name "Moss McBlack" was created by him for the florist shop and that Ms Tang was only an employee. Ms Tang however claimed that she and Mr Lam agreed

9 [2018] HKCFI 861

to use the plant name "Moss" together with her nickname "McBlack" for the new shop as Mr Lam's name had already been used for the first shop and she was the co-owner of the business and the brand.

Applying the *American Cyanamid* test to the interlocutory injunction application, the Judge asked whether there was a serious issue to be tried in respect of the Plaintiff's claim of passing off on the basis of the affidavit evidence. He also asked whether damages would be an adequate remedy; failing which, whether the balance of convenience lied in favour of granting the injunction, and whether it was just and convenient to grant the relief.

To establish passing off, the Plaintiff needed to show that it enjoyed goodwill in its name/mark, that the Defendants (Ms Tang and her company) misrepresented themselves such that the public would be confused into believing that their business was those of the Plaintiff, and that the Plaintiff would likely suffer damage as a result.

The Plaintiff's operation of the business by reference to the name "Moss McBlack" was considered sufficient to give a distinct identity to the brand, giving rise to a serious issue to be tried on the issue of goodwill.

On the issue of misrepresentation, the Judge considered that the fact that Ms Tang's company incorporates "Moss McBlack" to be of significance. The Defendants tried to argue against the Plaintiff's ownership in the name "McBlack" alone and that "Blake McBlack" was very different from "Moss McBlack". The Judge however noted the context in which the names were used: photo evidence showed that both the Moss McBlack and the Blake McBlack brands were represented in similar logo designs. Both logos consisted of the words "McBlack" under the names "Moss" and "Blake" respectively, and were within a simple square. The respective logos were prominently featured on black wrapping paper. The use of the distinctive logo coupled with the distinctive name "McBlack" would result in association by the public between the Plaintiff and the Defendants, thus there was a serious issue to be tried in relation to misrepresentation. The Judge also held that confusion would likely result in damage to the Plaintiff.

Turning to the balance of convenience, the fact that the Plaintiff's business had been operating for three years as opposed to the Defendants' new business and the lack of evidence to show the Defendants' financial viability to make good the Plaintiff's loss tilted the balance in favour of granting an injunction. The scope of the injunction would be limited to the use of the name "McBlack" and a logo similar to the Plaintiff's in respect of the Defendants' floral business to avoid illegitimately curbing the growth of the Defendants' new business.

The Judge considered that it was inappropriate to deal with the Defendants' argument at the interlocutory application that Ms Tang was a co-owner of the Plaintiff's business by virtue of her then "life and business partnership" with Mr Lam. The fact that Ms Tang asked Mr Lam for permission to take over the Moss McBlack name gave rise to an assumption that Ms Tang had no right to use the name without the latter's consent. In any event, the co-ownership argument would not prevent the grant of interlocutory injunction if the elements of passing off have already been satisfied.

Takeaway

Parties to a commercial arrangement who have an existing relationship (be it friendship, blood relations or even romantic) should clearly stipulate in a contract their respective ownership and interests in the business and associated rights, including intellectual property rights. These types of parties can fall into a pitfall of making assumptions without clarifying issues and rights, when the relationship is thriving. Such assumptions can fall apart the moment the relationship turns sour. What is left behind are usually accusations and conflicting claims leading to disputes to be resolved at the hands of third parties: the courts, arbitrators, mediators, etc. It is therefore always in the parties' best interest to have their rights clearly delineated in a written agreements to avoid any dispute in the future. ◆

HONG KONG

Intellectual Property

By Benjamin Choi, Partner, Mayer Brown JSM, Hong Kong

Trade Mark Office Battles

A trade mark which has been accepted for registration is presumed to have satisfied the requirements of registration under the relevant trade mark laws. The trade mark office analyses and decides whether a mark satisfies the registration requirements or fails any of them, and provides mechanisms for the applicant to resolve issues identified by the trade mark office. The trade mark office has to rule within the scope of the relevant trade mark laws.

Intellectual property ("**IP**") is always about creativity and novelty so as to accord the owner with the exclusive right to exploit the IP. A mark which is deemed creative and novel may not necessarily be accepted for registration if it does not satisfy the general requirements under trade mark laws.

What can a brand owner do if the mark gets declined and there is simply no better second choice? Here we are referring to a mark which is inherently problematic and cannot be accepted even with impressive pre-application use to show that it has acquired a distinctive character.

Whilst the brand owner can keep attempting to register the mark, this may not be commercially viable. Basically trade mark laws in most countries do not prevent a brand owner from commencing use of a mark (assuming there is no other infringement risk) even if a mark is not protected by registration or may not even be protected as an unregistered mark. Set out below are a couple of case studies.

Case Study 1

A relatively new brand of consumer goods by the name "BRANDLESS" has emerged in the United States since July 2017. The marks used by this company since launch are testing the limits of the local trade mark laws.

This American e-commerce company is based in San Francisco and sells food, beauty, personal care and household products under the BRANDLESS™ labels.

The social mission of the "BRANDLESS" concept is to give consumers the option of buying food and home products with minimal packaging in reasonably good quality at an affordable price. Every item is priced at US$3. This low pricing is achieved by the elimination of "brand tax" (costs associated with marketing, advertising, distribution and brand cachet) which accounts for the mark-up on most conventional brand-name items (which can range from between 40% to 370%). Earlier this year, BRANDLESS received an award for its innovative business model.

The innovative business model comes with an innovative branding scheme. Characterized by simplicity and minimalism, the company has adopted a catchy design which is not supported and allowed under local trade mark laws. The house label is

which is used for all their products. The space inside the dotted frame is used to fill in the product description (e.g. TOOTHPASTE plus a few lines of the product features). This arrangement nicely blends into the "BRANDLESS" concept. However, under trade mark laws, having the "TM" symbol form part of the mark will most definitely cause the mark to be rejected when examined.

BRANDLESS attempted but failed to overcome the United States Patent and Trade Mark Office's ("**USPTO**")' requirement to delete the TM symbol from the BRANDLESS™ mark.

The USPTO insisted that the "*applicant must submit a new drawing showing the TM symbol deleted from the mark; this matter is not part of the mark and is not registrable*".

For the packaging label, BRANDLESS has applied to register

The description of the mark as filed reads: "[*t*]*he mark consists of a white rectangle with rounded edges. To the outside upper right hand corner of said rectangle reads the terms TM. The broken or dotted lines are not claimed as part of the mark but designate the outer edge or perimeter of the rectangle that forms the mark. The color white is claimed as a feature of the mark.*"

Likewise, the USPTO required BRANDLESS to remove the "TM" symbol.

BRANDLESS has until September 2018 to resolve these issues failing which the application will be declined.

BRANDLESS has however been able to register "BRANDLESS" as a plain word mark in several classes in the United States. A point to query is if "BRANDLESS" on its own qualifies as a trade mark given its descriptive nature. It would be interesting to see if BRANDLESS applies to register its mark in other jurisdictions and how these applications are handled by the relevant trade mark offices.

Case Study 2

The Hong Kong Trade Marks Registry ("**TMR**") successfully defended its decision on registrability of the mark "NAKED" in the Court of Appeal.

In November 2006, Creative Resources LLC of the United States ("**Creative Resources**") applied to register "NAKED" as a trade mark in respect of "condoms" in Class 10 in Hong Kong. The TMR raised objections that the mark may serve to describe and designate the characteristics of the goods and is devoid of any distinctive character. The decision to decline registration was formalized in writing in August 2008 after a formal hearing.

Creative Resources appealed the TMR's decision before the Court of First Instance and received a ruling in its favour. The Judge held that:

- "NAKED" bears no direct objective relation to a condom
- "NAKED" is more suggestive than descriptive;
- "NAKED" suggests different bundles of attributes to different persons, depending on the sensibility of their imaginations; and

Intellectual Property Cont'd

- "NAKED" is capable of bearing a distinctive character.

The TMR decided to appeal and defend its own original assessment on registrability.

The Court of Appeal Judge disagreed with the finding and conclusion of the Court of First Instance. Given the TMR's capability, experience, skill and resources, the TMR's opinion has to be fully and carefully considered, and should not be overruled simply because a court has come to a different conclusion. If the TMR has come to a conclusion which is proper or not defective, it should not constitute a good enough ground to reverse it by a court with reference to the provisions on the appeal process and the a court's function. The mark was therefore not registrable in Hong Kong. ◆

HONG KONG

Telecommunications

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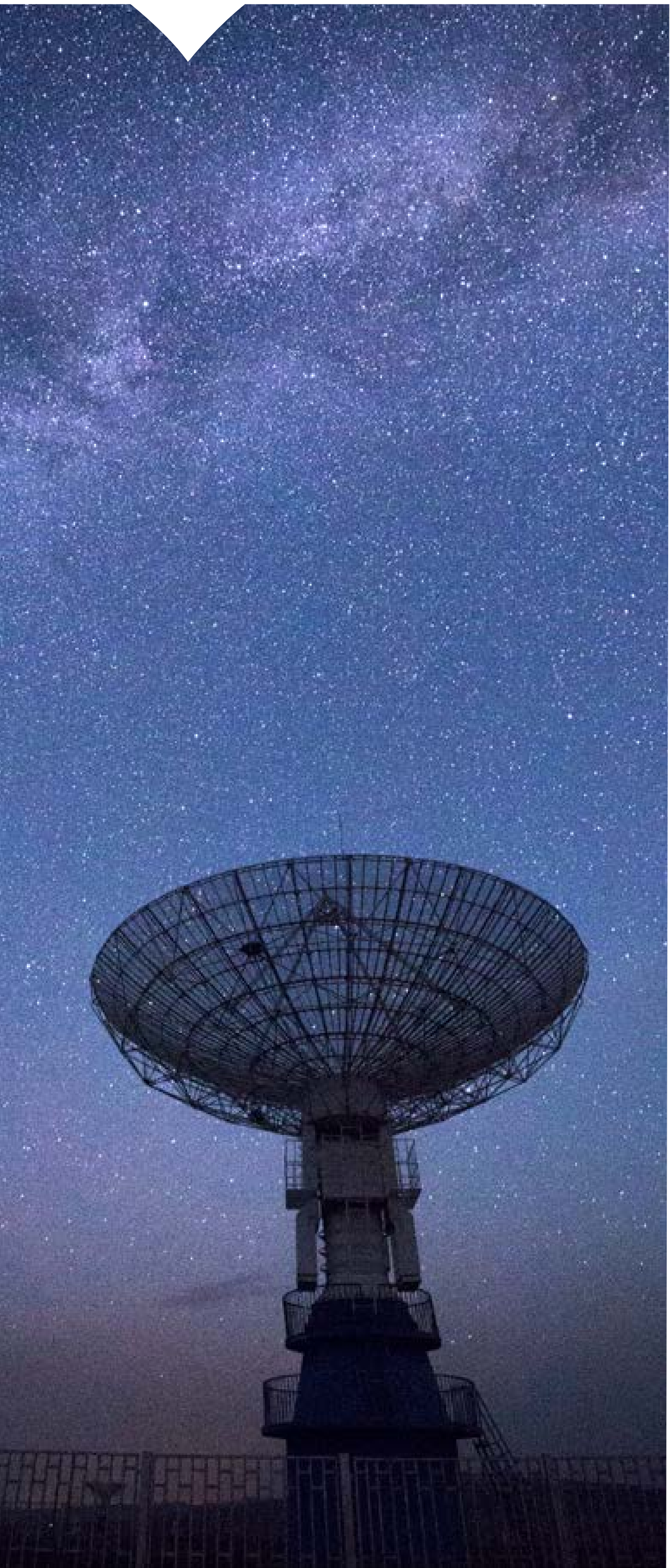

Hong Kong's Telecommunications Regulator Set to Reduce Licence Fees

On 8 June 2018, Hong Kong's Communications Authority ("**CA**") together with the Commerce and Economic Development Bureau ("**CEDB**") launched a public consultation to invite views from the industry and interested parties on the proposed reduction of fees for five types of licences issued under the Telecommunications Ordinance (Cap. 106) (the "**Ordinance**"). Also included in the consultation is the introduction of a new fee component under the unified carrier licence ("**UCL**").

Background

The last consultation carried out by the CA and the CEDB on the issue of licence fees reduction for UCLs was in June 2012, culminating in a decision by the CA and CEDB dated 27 November 2012 to reduce certain UCL fees (the "**Decision**"). The Decision was implemented with effect from 1 March 2013 by the Telecommunications (Carrier Licences) (Amendment) Regulation 2012.

In February 2013, the Decision was challenged under an application for judicial review by PCCW-HKT Telephone Limited and Hong Kong Telecommunications (HKT) Limited. The appellants' main argument was that in budgeting for and determining the licence fees payable, the CA has included profits in that it budgeted for dividends as well as profits tax.

In December 2017,[10] the Court of Final Appeal held that where used in public law, a "*fee*" identifies a payment for or in respect of services rendered or for the administration of a legislatively based licensing scheme to control particular activities by licensees, whereas a "*tax*" is a means of obtaining revenue for governmental purposes. When the power to license is an element in a regulatory scheme, the power does not extend to authorise the imposition of a fee which in substance is a tax.

10 Under FACV 11 of 2017.

Telecommunications Cont'd

The Court of Final Appeal therefore decided in favour of the appellants and issued a declaration that the CA and the CEDB erred in law when construing the relevant provisions of the Ordinance (i.e. including the element of what was in substance a tax upon the licensees when prescribing the relevant licence fees).

New Proposals

It is therefore no surprise that the CA and CEDB have now set in train processes for a fresh proposal relating to UCL fees.

Some of the proposed amendments include reducing the annual fees payable by UCLs from HK$700 for each 100 customer connections to HK$500. Further reductions are also proposed for public radio paging services and service-based operator licences as well as fees payable by holders of mobile radio system and private mobile radio licences.

In December 2017, the CA created a new licence, namely, the Wireless Internet of Things ("**WIoT**") licence for the provision of WIoT platforms and services using the shared frequency band of 920-925 MHz with a view to facilitating the development of WIoT services in Hong Kong. The WioT licence fee consists of a fixed fee of HK$100,000 and variable fees based on the number of base stations and WIoT devices used. The definition of what encompasses a WIoT device will be clearly set out in the Telecommunications (Carrier Licences) (Amendment) Regulation.

Conclusion

The consultation process closes on 9 July 2018 and it is expected that the CA and the CEDB will publish and implement the new licence fees before too long, having regard to the recent Court of Final Appeal judgment. ◆

Patents

By Gary Hnath, Partner, Mayer Brown LLP, Washington DC
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Patent Forward Citations and Patent Quality

Introduction

The number of times a patent is cited by subsequently-issued patents, known as a patent's *forward citation count*, is one of many so called "patent metrics" that researchers have used as a proxy for patent value. The basis for the use of forward citations as a proxy for patent value seems intuitive: the more often a given patent (or "**target patent**") is cited by subsequently-issued patents, the higher one would expect the target patent's technical importance to be. It seems reasonable to assume that inventors and patent examiners who are knowledgeable in their technological field would tend to cite as "prior art" those patents upon which an invention builds. And it seems reasonable to assume that this recognition would imply that patents with a high number of forward citations would be more useful and valuable in the marketplace than those patents that were cited less often.

Thus, the presumption is that forward citations are correlated with patent quality or patent value. (By patent value we refer to direct monetary measures such as royalties associated with a licence to use a patent, whereas patent quality refers to broad qualitative characteristics of a patent such as the likelihood of the patent being renewed, licensed, adopted into an industry standard, or litigated.) However, as discussed below and according to a recent empirical study by one of the authors, these assumptions, while intuitive, are not necessarily correct. The results of the study have important consequences for those who use forward citation counts as a measure of patent value when evaluating the worth of a patent in a corporate transaction, licensing or patent litigation.

Patents Cont'd

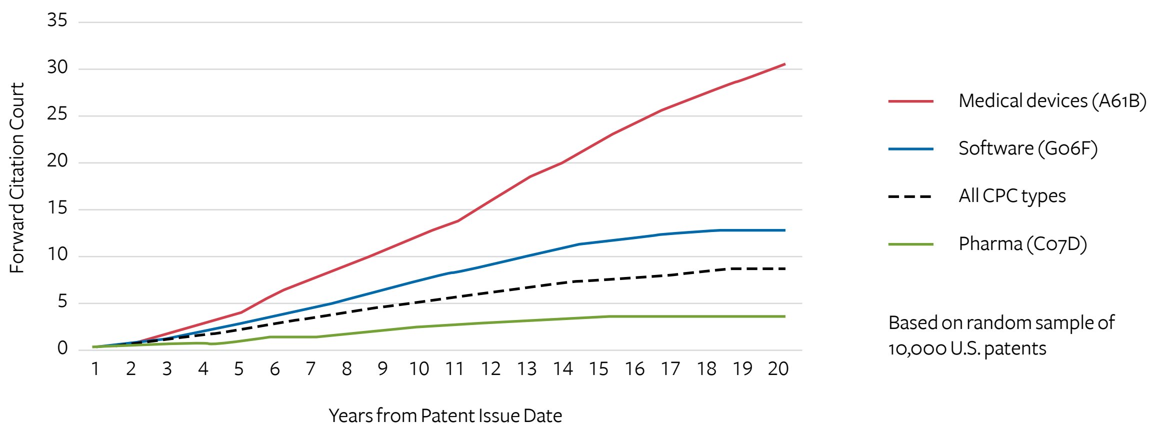
Results and Analysis of the Forward Citation Study

Many academic studies have attempted to determine whether there is empirical evidence to show forward citations and other patent metrics are correlated with patent quality. Initial studies found that forward citations were positively correlated with certain broad measures of patent quality such as patent renewal rates and whether the patent had been licensed; however, later studies found only a weak relationship between forward citations and a patent's monetary value. These equivocal findings might be expected given the idiosyncrasies and complexities of patent licenses, and the lack of publicly available information directly relevant to the economic value of patents.

A recent study conducted by one of the authors of this article and two colleagues evaluated the relationship between forward citations for US-granted patents and several measures of broad patent quality in addition to monetary measures of patent value inferred from technology licenses.[11] This study calculated forward citation counts for US patents issued from 1975 to 2017. (Subsequently-issued patents that had the same inventor or assignee as a target patent were removed from the citation counts to avoid a self-citation bias in the results.)

Based on this study, several immediate observations can be made about forward citation counts. First, as shown in Figure 1, the number of forward citations can vary considerably by the length of time after a patent issues and by the type of inventive technology (expressed here by a patent's "**Cooperative Patent Classification**" or "**CPC designation**"),[12] neither of which is necessarily reflective of the economic value of a patent. Thus, any analysis of forward citations must account for time effects and industry effects.

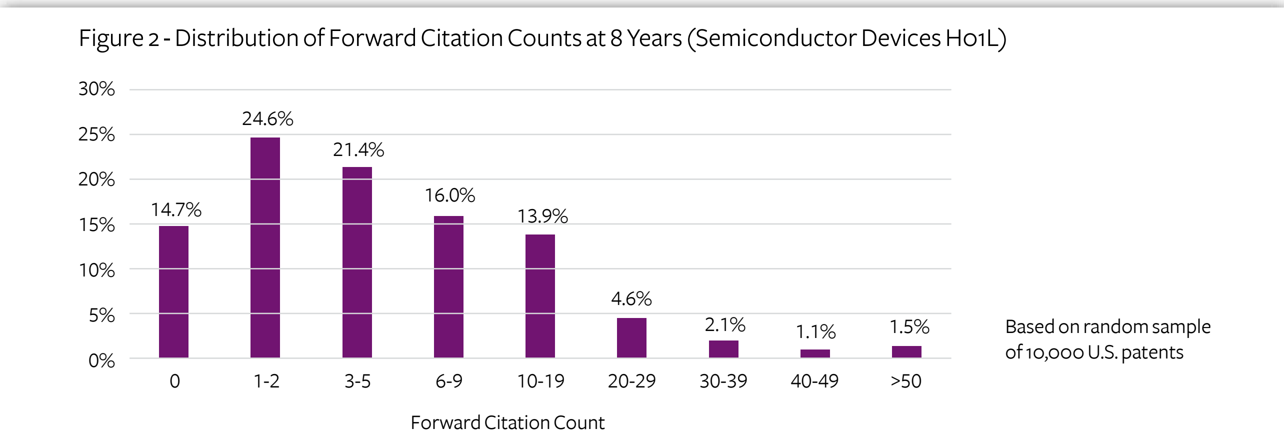
Figure 1 - Average Number of Patent Forward Citations by CPC Class and Years from Issue Date



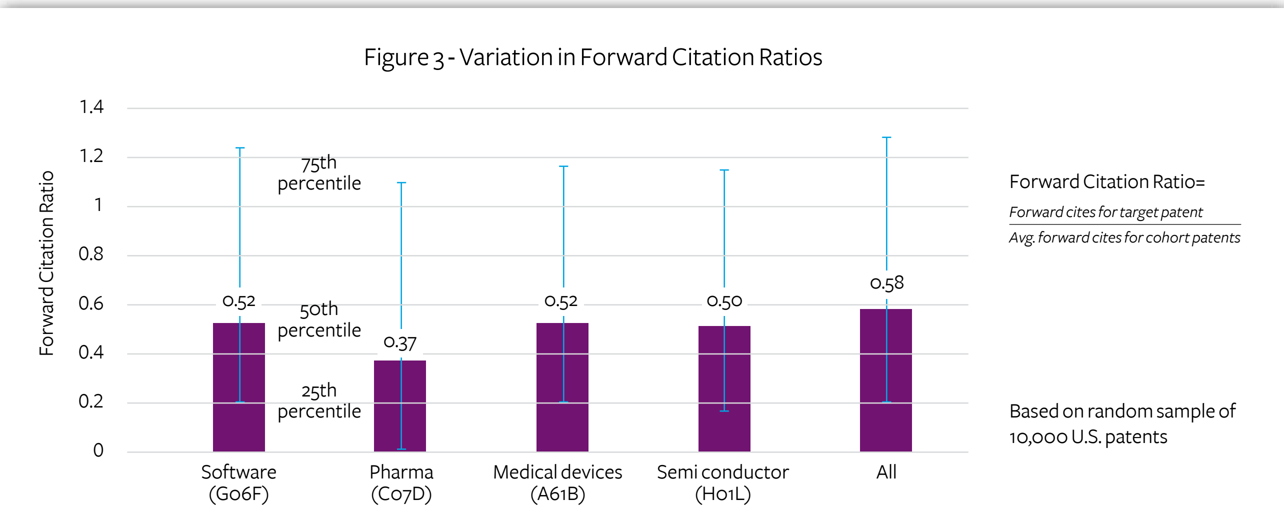
Second, the distribution of the number of forward citations within a given CPC designation are often highly skewed, with a small set of patents having many forward citations and a large proportion of the patents having relatively few forward citations or none at all. This positively skewed distribution is shown in Figure 2 for semiconductor patents.

11 Working Paper, "Forward Citation Ratios and their Relationship to Patent Quality and Value," by Mark Rodini, Thomas Varner, and Glenn Woroch.

12 The Cooperative Patent Classification ("**CPC**") is a patent classification system developed jointly by the United States Patent and Trademark Office ("**USPTO**") and the European Patent Office ("**EPO**"). Both the USPTO and EPO have been using the CPC to classify patent applications since 2013.



The study also defined a *forward citation ratio* as the ratio of a target patent's forward citation count divided by the average number of forward citations for a group of patents that are classified in similar technology classes and that issue in the same year as the target patent. A forward citation ratio greater than 1 occurs for patents that have more forward citations than the average forward citations of patents in their family. Figure 3, which is a box chart of forward citation ratios for patents from several different technology classes, confirms the highly skewed distribution of forward citations.



After calculating forward citation ratios, the researchers then examined if those ratios were correlated with several broad measures of patent quality. The researchers found that forward citation ratios were on average higher for patents that were (i) regularly renewed with the USPTO, (ii) re-examined at the USPTO, (iii) licensed, and (iv) named in litigation in United States District Court or the United States Patent Trial and Appeal Boards ("**PTAB**"). However, the researchers did not find any statistically-significant difference between the forward citation ratios of patents with claims that were ruled patentable before the PTAB and those with challenged patent claims that were ruled unpatentable.

The researchers then tried to determine if forward citations were correlated with monetary measures of

Patents Cont'd

patent value. Their study analyzed the terms of over 500 licenses that granted rights to only one US-patent or one US-patent application. These publicly-available licenses were filed as material agreements with the United States Securities and Exchange Commission ("**SEC**") and included both the financial terms and grant provisions of the licensed technology. The researchers identified three different measures of monetary value from these patent licenses: the percent running royalty rates, the net present value of the specified fixed fees, and the net present value of the specified minimum annual royalties. In addition to calculating the forward citation ratio for each license's patent, the researchers considered more than 20 other factors in each license. These factors included, among other variables, whether the licence granted rights to know-how in addition to the patent, whether the grant was on an exclusive or non-exclusive basis, whether the grant was part of an acquisition, whether the licensor was a commercial entity or not, and the nature of the licensee's industry (*e.g.* electronic components, pharmaceutical, or medical devices).

The researchers then conducted a series of regression analyses to determine which, if any, of the explanatory variables had an effect on the three measures of value (royalty rates, fixed fees, or minimum annual royalties). The results of the analyses showed that a grant of technology know-how, a grant made as part of an acquisition, and a grant in which the licensor was a commercial entity, all had positive and statistically significant effects on the three measures of value. In comparison, the forward citation ratios had little or no statistically-significant effect on these three measures of value.

Discussion and Conclusions

As this study demonstrates, it can be dangerous to put too much reliance on patent citation ratios. They can provide some insights into broad and descriptive measures of patent quality, at least when those patents are compared to average patents. This insight itself—linking forward citations to measures of patent quality—could be useful for analysis of patent portfolios, especially when the number of patents involved is large or when there is limited additional information about the nature of the patents or their value. Forward citation analysis may also be helpful in the assessment of a merger or an acquisition involving the transfer of many patents, or in antitrust analyses of competitive effects of patent licenses.

However, forward citation ratios contain little predictive information about royalty rates found in the patent licenses and only limited predictive information about fixed fees and minimum annual royalties. This latter finding is consistent with the results of other researchers who have found that forward citations are not strongly related to patent value—at least not without more information about the subject licenses, the licensed technologies, and the parties involved.

Forward citation analysis may be able to supplement an analysis of patents if additional case-specific information is available. That information may include information about the products enabled by the patented technology, records of patent licenses and acquisitions, or technical comparisons of patents by qualified personnel with substitute technologies.

However, as the study shows, empirical analysis does not establish a strong link between forward citations and patent value. Thus, for example, if a party to a licence negotiation makes an argument about value of a patent or portfolio based on forward citations, the claim need not be accepted at face value, but should be considered along with other relevant factors when estimating patent value. Lacking such additional information, both researchers and patent practitioners should be cautious about making strong inferences about patent value based solely on forward citations.◆

HONG KONG

Virtual Banks

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The Future is Here: New Guidelines Issued by the HKMA for Virtual Banks

On 30 May 2018, the Hong Kong Monetary Authority ("**HKMA**") issued a revised Guideline on Authorisation of Virtual Banks ("**Revised Guideline**"), following the public consultation that ended on 15 March 2018.[13] The Guideline will supersede the previous Guideline on Authorization of Virtual Banks issued by the HKMA in 2000 ("**2000 Guideline**"), in which the HKMA had taken a more cautious approach to the authorisation of virtual banks. In particular, under the 2000 Guideline, only banks and other authorised institutions could operate a virtual bank.

The Revised Guideline sets out the principles that the HKMA will take into account in deciding whether to authorise a virtual bank in Hong Kong. A virtual bank is defined as "a company which primarily delivers banking services through the internet or other forms of electronic channels instead of through physical branches".[14] The Revised Guideline now opens the door for technology companies and any other businesses established in Hong Kong to apply for a licence in order to own and operate a virtual bank–such is no longer limited to authorised institutions.

So far, over 50 companies have indicated to the HKMA that they are interested in applying for a virtual banking licence. The HKMA is expecting an influx of applications and has already indicated that applications received after 31 August 2018 may not be processed by the HKMA as part of the first round of applications.

The HKMA intends to grant priority to applicants who can show that they:

a. have the sufficient resources necessary to operate a virtual bank, including financial and technology resources;

b. have a business plan that is both credible and viable,

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13 See our previous article entitled " Virtual Banks – New Reality Welcomed by the Hong Kong Monetary Authority".

14 http://www.hkma.gov.hk/media/eng/doc/key-information/press-release/2018/20180530e3a2.pdf

Virtual Banks Cont'd

and would "provide new customer experience and promote financial inclusion and fintech development"[15];

c. have developed or have the ability to develop an IT platform that can support their business plan; and

d. can commence operations shortly after a virtual banking licence is granted.

Revised Guidelines

Based on the comments received from 25 respondents during the consultation process, the HKMA amended the Revised Guideline released for public consultation on 6 February 2018 ("**Public Consultation Guideline**"). In summary, the main changes introduced by the Revised Guideline to the Public Consultation Guideline are as follows:

1. OWNERSHIP

The Revised Guideline (unlike the 2000 Guideline) does not require a bank or financial institution to own 50% or more of the shares in the virtual bank applicant, so long as the owner is an intermediate holding company incorporated in Hong Kong, with supervisory conditions imposed on them. Under the Public Consultation Guideline the supervisory conditions to be imposed were limited to conditions relation to maintaining adequate capital, risk management and submitting financial and other information the HKMA. The Revised Guideline now sets out a list of further factors that the HKMA may impose in the exercise of its supervisory powers, including conditions relating to liquidity, group structure, fitness and propriety of senior managements etc.

A stronger obligation is also imposed on the parent companies of virtual banks. Rather than merely having to provide managerial, financial and technology support as appropriate–they must now commit to support the virtual bank and be capable of providing "strong" financial, technology and other support, as necessary.

2. SUPERVISION

Virtual banks will be subject to the same supervisory requirements that apply to existing bricks and mortar banks. The HKMA clarified in the Revised Guideline that the supervisory requirements will be determined on a case-by-case basis, adopting a risk-based and technology-neutral approach.

3. TECHNOLOGY RISK AND RISK MANAGEMENT

Virtual banks need to ensure that they have in place a resilient IT system and business continuity plan. In particular, virtual banks must carry out a detailed independent assessment of the design, implementation and effectiveness of their IT systems, including their hardware, and their system security, procedures and controls. The assessment report must then be submitted to the HKMA, prior to the virtual bank commencing their operations.

4. EXIT PLAN

Virtual banks are required to establish an exit plan, which will minimise disruption to their customers. The HKMA emphasised that this is an important requirement, due to the potential risks inherent in virtual banking. Further details have been added in the Revised Guideline on what the exit plan is expected to cover, i.e. the circumstances in which the exit plan should be implemented, who has the authority to trigger the exit plan, the mechanism for repaying depositors and the source of such funds.

Outsourcing

The outsourcing of IT or business functions by a virtual bank to a service provider is permitted. However, any material outsourcing needs to be discussed with the HKMA in advance, and it must comply with the HKMA's Supervisory Policy Manual (SA-2) on Outsourcing ("**SPM Outsourcing**").[16] This includes making sure that the virtual bank maintains adequate security controls over the service provider, that customer information processed by the service provider will

15 http://www.hkma.gov.hk/eng/key-information/press-releases/2018/20180530-3.shtml
16 http://www.hkma.gov.hk/media/eng/doc/key-functions/banking-stability/supervisory-policy-manual/SA-2.pdf

remain secure and confidential, the Personal Data (Privacy) Ordinance (Cap. 486) will be complied with, and the HKMA has the right to carry out any inspections of the service provider's security measures.

One suggestion received during the consultation process was that the HKMA issue a pre-approved "safe" list of service providers that virtual bank applicants can use, without requiring the HKMA's prior consent. The HKMA has not adopted this suggestion on the basis that one size does not fit all. A service provider may not meet the HKMA's supervisory requirements in relation to all of their services, and different virtual banks will have different systems and internal measures. It is therefore necessary to determine whether the outsourcing of any functions to a particular service provider is appropriate, depending on the circumstances.

The HKMA indicated that it may make exceptions to the requirement for virtual banks to fully comply with the SPM Outsourcing, if they can demonstrate that they can achieve the HKMA's supervisory conditions through other alternative means. However, exactly what those alternatives means may be remains unclear.

Takeaway

Applicants for virtual banking licences will need to acquire the necessary IT resources, whether via joint ventures, the hiring of new staff or outsourcing arrangements, before they submit their application for a virtual banking licence. In the rush to get ready and be among the first wave of applicants, potential licensees should take heed and ensure that any joint venture agreements or outsourcing contracts fully protect their interests. With regard to the latter, it is particularly important to ensure that minimum security measures are imposed on the service provider, and appropriate indemnities are included to allow the applicant to recover any losses. Rushing headfirst without having the proper legal contracts and protections in place will inevitably cause problems in the long run, and could even jeopardise the application for a virtual banking licence.

The HKMA has started to accept applications, and will issue the first set of virtual banking licences at the end of 2018, or during the first quarter of 2019. ◆

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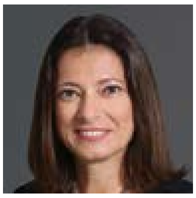

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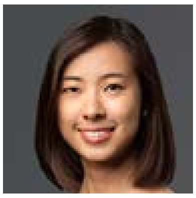

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