

China's IP in foreign eyes



China would do more to protect IPR and combat piracy by promoting the use of legal software, China's Commerce Minister Chen Deming told reporters. American officials at the U.S.-China Joint Commission on Commerce and Trade meeting promised to address China's demands for greater exports of U.S. high-technology products and to facilitate more Chinese investment in the U.S. (China tells U.S. it will improve IP protection, by Reuters)

中国商务部部长陈德铭日前表示,中国将进一步保护知识产权,打击盗版,积极推进软件正版化工作。在中美商贸联合委员会上,美国官员也承诺,将更大程度开放美国高科技产品对华出口,促进中国在美国投资。(《中国表示将进一步保护知识产权》,路透社)

Comment:

IPR has been an important issue in Sino-US trade. In recent years, China has made great efforts in IPR protection. China is steadfast for IPR protection, which is not forced by pressure from outside, but for its own needs.

点评:

知识产权是中美贸易中一个重要话题。近年来,中国已在知识产权保护等方面取得明显进展。中国保护知识产权的坚定态度有目共睹,这不是迫于外来的压力,而是出于自身发展的需要。

(by Correspondent Wang Weiwei from Canada)

(本报通讯员汪玮玮发自加拿大)

Taiwan "旺旺" fails to curb trademark registration 两“旺”商标之争一审见分晓

The case lodged by I Lan Foods Industrial Co., Ltd (I Lan) challenging the Trademark Review and Adjudication Board (TRAB) under the State Administration for Industry and Commerce was rejected by Beijing No.1 Intermediate People's Court on December 11. The court ruled in favor of Taobao, China's largest internet retail platform run by Alibaba, over the trademark dispute case.

The plaintiff claimed that I Lan has owned over 2,100 registered trademarks in China's mainland, 417 of which relate to the Chinese character "旺". Taobao filed "淘宝旺旺" and its figures for registered trademark and acquired the registration approved by TRAB in 2004. I Lan maintained that "淘宝旺旺" and its figures were similar with their registered trademark "旺旺" and used in the same service which would mislead the public and injure its trade name right. Then I Lan requested the TRAB to revoke the registration of the trademark.

The court held that the trademark "淘宝旺旺" was not similar with I Lan's registered trademark "旺旺". Although the trademark in question includes the registered trademark "旺旺", Taobao and Alibaba have enjoyed high reputations in the public and there is an exclusive correspondence between Taobao and Alibaba. As a common expression, "旺旺" has lower distinctiveness than that of Taobao. Public would not be led to believe there is a certain association between "淘宝旺旺"

and the plaintiff's registered trademark "旺旺". The court rejected the appeal and sustained the TRAB's original judgment. The disgruntled I Lan then made clear that it would continue its appeal.

The battle for the trademarks dated back to five years ago when Alibaba's another trademark "阿里旺旺" acquired the registration in Taiwan in 2007. In 2009, I Lan challenged the trademark on the ground of similarity with their registered trademark "旺旺" and sought rejection of registration. Then the trademark "阿里旺旺" was revoked in Taiwan.

The two trademarks owned by Alibaba had different judgements attributed to the different jurisdictions between Taiwan and the mainland. The word "淘宝" constituted the main part of "淘宝旺旺". In that case, when the public saw the trademark "淘宝旺旺", the first thought brought to mind was Taobao's website. The key point to define the trademark infringement was whether the trademark in question caused the confusion in the public or not. To judge trademark infringement was to judge misidentification. From the perspective of the purpose of legislation, no trademark should be revoked as long as it did not mislead the public, as some experts noted. (by Li Qun)

本报记者 李 群

日前,宜兰食品工业股份有限公司(下称宜兰公司)和阿里巴巴集团控股有限公司(下称阿里巴巴公

司)因"旺旺"商标诉诸法庭,成为备受社会关注的焦点。12月11日,北京市第一中级人民法院开庭审理"旺旺"商标之争并当庭判决:两个"旺旺"大不同,阿里巴巴公司经营的淘宝网可以继续使用"淘宝旺旺"商标。

据悉,原告宜兰公司诉称,该公司已在中国大陆获得了超过2100个注册商标,其中以"旺"字为核心的就超过417个,包括"旺旺"、"旺"等。2004年,阿里巴巴公司下属的淘宝网申请注册了"淘宝旺旺及图"商标,并被中国国家工商行政管理总局商标评审委员会(下称商评委)核准注册。宜兰公司认为,"淘宝旺旺及图"和"旺旺"商标构成近似且服务类别相同或近似,并且损害了其商号权,商评委不应裁定予以核准注册,请求法院判令商评委重新作出裁定。

法院审理后认为,"淘宝旺旺"和"旺旺"不构成近似商标。虽然"淘宝旺旺"里包含原告所主张的商标"旺旺",但鉴于淘宝网、阿里巴巴公司具有较高的知名度,淘宝已经与阿里巴巴公司建立了唯一的对应关系。"旺旺"作为日常用语,其显著性相对"淘宝"较低,不会造成相关公众误以为"淘宝旺旺"商标属于原告公司的"旺旺"系列商标,从而对服务的来源产生混淆误认。法院据此判决维持商评委作出的裁定。宣判后,宜兰公司不服,明确表示将提起上诉。

其实,围绕"旺旺"的商标权之争,早在5年前就埋下了伏笔。2007年,阿里巴巴公司另一商标"阿里旺旺"在中国台湾曾经获准注册。然而2009年,当旺旺食品下属的一家公司发现该商标之后,认为"阿里旺旺"商标与"旺旺"商标构成近似,易使消费者混淆,台湾方面随后撤销



了"阿里旺旺"的商标。

同样是阿里巴巴公司的两个商标,"阿里旺旺"在台湾是赢家,"淘宝旺旺"在大陆是赢家,对于这样的结果,有关专家表示,台湾地区关于商标的有关规定和大陆的法律制度存在一定的差异,我们称之为不同的法域。"淘宝旺旺"商标的4个字里,"淘宝"构成了主要部分,相反"旺旺"成了普通的形容词,在这种情况下大家看到"淘宝旺旺"4个字的时候首先想到的是淘宝。该专家表示,近似不一定侵权,关键是看混淆没混淆,混

淆了基本就是近似。只要不被消费者混淆就不应该认为它是侵权,不应该撤销,要允许它存在,这才是立法的本意。

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Development of China's Utility Model Patent System (Part 2)

State Intellectual Property Office of the P. R. China

Subject matter as patentable in China is basically the same with most of the countries. Although countries (regions) give different names to utility model system, they share the objectives of protecting small inventions. Subject matter as patentable in most countries is limited to inventions in shape or structure of a product, device or apparatus, so as to define clearly the extent of protection for utility model and to facilitate infringement judgment and right utilization. China's utility model patent system provides the regulations on subject matter as patentable for the same purpose.

Like most countries, substantive examination is not carried out for utility model in China. Most of the countries adopt formal examination system instead of substantive examination for utility model. Substantive examination is only adopted in limited countries like Korea, Brazil and Poland. China implements preliminary examination system which contains obvious substantive defects examination plus formal defects examination and it is stricter than mere formal examination.

Patent right evaluation report system in China is in conformity with that in most countries. In most countries adopting formal examination to utility model, patentees or other stakeholders may request the patent authority to issue search report, documentation report and etc. China also established the patent

right evaluation report system as an important supplement to the preliminary examination system.

Inventiveness standard in China is in conformity with that in most countries. Most of them apply a lower inventiveness standard for utility model than invention patent, while some countries even do not have any specific inventiveness requirement. The inventiveness standard of the utility model in China is that "...as compared with the prior art, ...the utility model has substantive features and progress". Although it is lower than that of the invention patent, namely "...the invention has prominent substantive features and represents a notable progress...", it still belongs to the common practices taken by most countries in the world.

Avoiding repetitive patenting to utility model in China is in conformity with that in most countries. Invention patent right and utility model patent right are not allowed to be granted to the same invention in most countries. China's patent law clearly defines that "for any identical invention creation, only one patent right shall be granted".

China's novelty standard for utility model is comparatively higher than most countries. Most of the countries adopt relative novelty standard for utility model while China applies absolute novelty standard which is the same as invention patent.

3. China's Utility Model Patent System Made Remarkable Achievements

China's utility model patent system not only gives incentives to the SMEs for creation but also promotes the implementation of the patent system in China. It facilitates the circulation of patented technology, contributes to economic development, science and technology progress. At the same time, it also gives effective protection to foreign patented technologies and interests of foreign enterprises in China. The present utility model patent system in China matches China's national development stage.

3.1 China's Utility Model Patent Applications Experienced Rapid Increase in Recent Years

In 1997, China's utility model patent applications surpassed 50,000, ranking No. 1 in the world for the first time. The utility model applications exceeded 200,000 in 2008, 300,000 in 2009, and 400,000 in 2010. In 2011, its applications reached 585,000, which was 42.9% increase over the previous year.

By 2000, China's applications for utility model patent accounted for 42% of the world's total. With the sharp growth of China's utility model applications, it accounted for 83% of the world's total by 2010.

In 2011, SIPO granted in total 408,000 utility model patents, which were 18.6% growth over the previous year. By the end of 2011, the

valid utility model patents granted by SIPO were 1,121,000.

Despite of the rapid growth and the large quantity of China's utility model patent applications, the per capital number of utility model applications in China is not high. In 2011, China's utility model patent applications per 10,000 persons only reached 4.5, which was much lower than that of Germany, Japan and Korea's historical peak. Germany's utility model patent applications were about 7 per 10,000 persons in the mid 1970s. Japan's utility model patent applications per 10,000 persons were nearly 17 in the mid 1980s. The figure for Korea was about 14 in the mid and late 1990s. It is estimated that in the near future, China's utility model patent applications will still keep a relatively high growth rate.

3.2 China's Utility Model Patents Enjoy Good Stability

According to statistics, the Patent Reexamination Board of SIPO received 10,044 requests for invalidation of utility model patents between 2010 and 2011. In the same time, the number of granted utility model patents was 1,667,000. The requests for invalidation of utility model patents only took 0.60% of the total granted utility model patents. Among 9,532 requests for invalidation of utility model patents closed from 2002 to 2011, complete invalidations and partial invalidations accounted for 35.60% and 11.80% respectively. The invalid u-

tility model patents were only 0.27% of the total granted utility model patents in the same time period. This showed clearly that China's utility model patents have good quality and stability.

In the last ten years, the proportion of the requests for invalidation of utility model patents to the granted utility model patents showed obvious decrease. In 2002, the number of invalidation request for utility model patents was 756, accounting for 1.31% of the year's granted utility model patents (57,484). In 2011, the number of invalidation requests for utility model patents was 1,323, accounting for only 0.32% of the year's granted utility model patents (408,110). The figure indicated that the quality of China's utility model patents was improving and China's utility model patent system was operating soundly.

3.3 China's Utility Model Patent System Effectively Protects Foreign Patented Technologies in China

In recent years, the amount of foreign applications for utility model patents in China is increasing rapidly. There were 4,164 utility model applications in 2011, which was 3.1 times of the year 2007. Those applications were from 58 countries and regions, and the top six countries were Japan, the United States, Germany, Korea, Switzerland and France. Among them, the applications from Japan and the United States made up nearly one-third and

one-fourth of the total respectively. In 2011, the applications for utility model patents from Japan, the United States, Germany, Switzerland and France all experienced an obvious increase, which was 167%, 20.6%, 79.6%, 136.4% and 190.2% respectively comparing with the year 2010.

The top 10 applicants of foreign applications for utility model patents in 2011 in China were all big and famous multinational enterprises, which mainly came from the United States and Japan. In fact, those enterprises not only filed applications in their parent companies' name but also their subsidiaries, independent corporations and joint venture companies. Among these companies, Apple's applications for utility model patents grew by 268% over the same period of last year.

3.4 China's Utility Model Patent System Gives Incentives to the SMEs Creation

China has a large number of SMEs, in which many researchers and even decision makers do not have much knowledge of the complicated patent system. The utility model examination in China adopts preliminary examination system which simplifies the examination procedures, shortens the examination period and reduces the application expenses, and thus introduces patent system to many SMEs.

(to be continued. The Chinese edition seen page 5 published on December 21, 2012.)