

Winter 2012 Eye on China Newsletter

Legal News: China Quarterly Newsletter, *Eye on China*, offers companies helpful insight as they successfully navigate China's complex and ever-changing legal and regulatory environment. In this issue, we focus on the following topics:

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Watching Cartier: Lessons on Trademark Protection and Enforcement in China

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Introduction

In September 2011, Cartier, the famous luxury jeweler and watch manufacturer, won a trademark infringement and unfair competition lawsuit in Shanghai Intermediate People's Court (Court) against three ceramics manufacturers, Foshan Mingkun Ceramics Co., Ltd., Kingsyoma Decoration Materials Co., Ltd., and the Shanghai Chapter of Individual Business Households Cloud Tree Ceramic (collectively, ceramics manufacturers).

Owners of famous brands can obtain well-known mark protection in China provided they can demonstrate that their trademark is widely known by and enjoys a relatively high reputation in the relevant Chinese marketplace.

As demonstrated in the following two cases involving the Cartier trademark, well-known mark status affords a brand owner broad protection that can prevent a third party from using an identical or similar mark on goods that are similar, or even unrelated, to those that bear the mark of the brand owner.

Watch Out: A Tale of Two Cartier Trademark Cases

In 2003, Kentier applied to register the mark "Cartier Ken Di Ya" for use in connection with wood flooring. "Ken Di Ya" appeared in Chinese characters and is recognized as the Chinese equivalent of the term Cartier. Cartier opposed registration of the mark, arguing that the marks were highly similar and confusion in the marketplace was likely.

The China Trademark Office (CTMO) found that the goods of the parties were dissimilar and, notwithstanding the similarities in the marks, that the Cartier trademark was recognized as a well-known mark prior to Kentier's filing of its trademark application with the CTMO. Accordingly, Cartier's trademark rights extended only to the goods to which its mark was registered, and Kentier's mark proceeded to registration. Cartier then sued Kentier for trademark infringement and unfair competition in Beijing. During the course of litigation, Cartier's trademark was recognized as a well-known mark by the CTMO, but years later in 2008, Kentier again prevailed in the civil suit by demonstrating that it had acquired a trademark registration before Cartier had achieved well-known mark recognition. To date, Kentier continues to use the Cartier mark in connection with its wood flooring products.

Time for a Change

Interestingly, just one year later, in 2009, Cartier challenged use of the Cartier mark by a Guangdong-province-based company that was manufacturing ceramics products and selling them in Shanghai. Advertising and marketing brochures for the products boldly featured the Cartier mark as part of the name for a product line. Cartier accused the ceramics manufacturers of trademark infringement, arguing that use of the Cartier mark was intended to mislead the customer and give the impression of a connection between their products and genuine Cartier goods. The ceramics manufacturers countered that the Cartier mark is not registered for use on ceramic products, is not a well-known trademark in China, and accordingly is only entitled to the protection that extends to the class in which it is registered.

Even though the mark was previously recognized in 2004 by the CTMO as well known, under Chinese law, because the defendant objected to this designation, the Court was required to review the mark's current status. Cartier, having the burden of proof, provided

evidence that the mark was “still” well known in China. The Court, persuaded by the evidence, found that the Cartier trademark was still well known in the relevant Chinese marketplace and should be afforded a broad scope of protection. Accordingly, the Court ruled that the defendants deliberately infringed Cartier’s trademark even though the defendants’ ceramic products were significantly different from, and did not share the same international classification with, the Cartier goods (jewelry and watches). Accordingly, the Court awarded Cartier damages of RMB 500,000 (approximately U.S. \$78,000).

Keep Watch on a Mark’s Well-Known Trademark Status

In the two Cartier cases, the defendants used the Cartier trademark on products classified in different categories than the goods for which Cartier owns trademark registrations (jewelry and watches). The scope of protection that was afforded the Cartier trademark was influenced by the status of the Cartier trademark. Cartier sought trademark protection for the “Cartier Ken Di Ya” mark before Cartier was recognized as a well-known mark, and therefore the scope of protection was narrow. In the ceramics case, the watchmaker prevailed, mainly because the Cartier mark was recognized as a well-known mark on or before the ceramics manufacturers began using it. The different outcomes demonstrate that obtaining well-known mark recognition plays an important role in trademark enforcement in China.

China Trademark Law bars a third party from using or registering a copy, translation, or imitation of a well-known trademark on identical or similar goods. Compared with a traditional trademark, a broader scope of protection is afforded so-called well-known trademarks because protection is not limited to the category in which the mark is registered. Well-known mark status can be recognized by administrative determination or by a judicial finding. For an administrative determination, the applicant must submit evidence to the CTMO during examination or the Trademark Review and Adjudication Board (TRAB) during a trademark opposition proceeding. During a trademark infringement or unfair competition case, a trademark owner also may present evidence that a mark is well known.

In practice, the trademark owner must present sufficient evidence to the CTMO, TRAB, or the courts to prove a trademark’s well-known status in the China market. This evidence may include promotional materials and advertisements made in China in the past five years; media reports and press releases regarding the trademark; marketing and advertising spending; brand protection activities; brand survey results; entry, expansion, and investment in the Chinese market; trademark registration in China; and prior administrative or judicial findings involving the status of the mark.

In asserting a claim for well-known mark status, trademark owners should bear in mind three principles recognized by the courts: passive, necessity, and case-by-case. The CTMO, TRAB, or the courts do not recognize well-known mark status voluntarily. The courts act “passively,” meaning the judge will not grant well-known mark status when the status of the mark is immaterial to the outcome of the case. If the traditional trademark protection suffices to resolve the dispute, TRAB or the courts will not consider the applicability of the well-known trademark doctrine, because it is unnecessary to do so. Finally, even if the trademark was previously recognized as a well-known mark, one cannot obtain permanent well-known mark status. The courts will determine, on a case-by-case basis, whether the trademark is still well known.

According to the PRC Supreme People’s Court (SPC) Judicial Interpretation of Several Issues Regarding Application of Laws in Well-Known Trademark-Protection-Related Civil Disputes, only certain courts at the intermediate level or above located in provincial capitals or other designated cities have jurisdiction over cases to determine well-known mark status. One court is not bound by a well-known mark finding of another court; however, in practice, a well-known mark status recognition found in a Beijing or Shanghai court will strongly influence decisions by other courts.

High Time for Trademark Vigilance

Where appropriate, trademark owners should be vigilant in seeking and maintaining well-known mark status. Keeping trademark-usage evidence as part of a routine brand protection strategy protects brand owners should the status of their well-known mark recognition be challenged. Having a strategy in place to monitor and safeguard this evidence of use is equally important because according to the Third Draft of the new China Trademark Law, evidence of three years of trademark use in the Chinese territory is required for a brand owner to receive damages in trademark infringement litigation.

Clean Technology Innovation in China: Trends and Challenges

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During the past 20 years, China’s role in the global economy has been undeniable. Today, China’s climb as an economic power has made it the envy of the world — a strong manufacturing base, high exports, a new, burgeoning consumer society, robust stock markets, little debt, and easy access to technology and financial instruments that can be scaled quickly and cheaply.

Managing this spectacular growth has been a challenge. Even though Beijing had invested a total of 120 billion RMB between 1998 to 2008 for large-scale environmental protection initiatives, some visible repercussions of China’s spectacular growth surfaced during

China's hosting of the Olympic Games in Beijing in 2008. In preparation for the Olympics, more than 40 billion RMB were invested by the government to construct roads, hotels, water and road infrastructure, and massive stadiums. This build-out demanded a massive workforce comprising Chinese workers, international subject-matter experts, construction equipment, heavy vehicles, and unprecedented logistics. While many of the issues that arose were anticipated for a country hosting an international spectacle, some unexpected concerns surprised many. For example, Beijing's poor air quality brought daily smog alerts that left international participants to ponder whether they should even attend. China reacted swiftly by restricting the number of drivers on the road, forcing the shut-down or relocation of coal plants and steel mills, and taking other emergency actions to avoid embarrassment over its high levels of pollution. Since that time, China's leadership has taken a far more aggressive approach to clean technology innovation, implementing and managing clean energy, and fighting its high pollution levels while balancing its energy needs and economic growth.

In balancing the country's environmental health with its economic growth, China faces tremendous challenges. Many of these challenges are contained in certain trends; others appear in the context of developing innovation in clean technology. China's ability to successfully meet those challenges will dramatically change the way people in China live and work.

Current World-Wide Trends

Since 2000, the developing Asian economies, led by China and India with more than 2.5 billion people, have contributed 90 percent of the total increase in greenhouse gases (GHG). Meanwhile, the output of GHG in the developed world has increased 50 percent. Estimates are that this dramatic growth in global energy demand will roughly double again by 2050. It is estimated that coal consumption will double by 2030. China and India will represent 80 percent of that increase. Most of the world's most polluted cities are in China. Faced with such prospects, China has designated clean technology as the route to reduce its carbon footprint and lessen the environmental impact of pollution. Notably, China has risen to the forefront as a producer and adaptor of such technologies, surpassing countries such as the United States. Global energy analysts suggest that, although there will still be a major role for hydrocarbons, the share of renewable energy will certainly increase.

Fortunately, world-wide investments in clean technologies continue to grow substantially. According to a new report by the Pew Charitable Trusts, in 2010, China led the world in cleantech investments of \$54.4 billion, followed by Germany at \$41.2 billion and the United States with \$34 billion. Global Trends in Sustainable Energy Investment reports also confirm that China was the world's largest recipient of renewable investment in 2010, while rapidly industrialized economies such as Brazil and India are ranked fifth and eighth, respectively.

Evolution of Clean Technology in China

In an effort to address its pollution, energy shortages, and climate change, the Chinese government has made clean technology expansion a foundation of its energy security and economic development plans and has taken many actions to address this problem.

Green Initiatives — New cities built to support the new burgeoning middle class are built from scratch and designed to utilize from the outset many clean technologies, such as solar, wind, clean coal, and electric cars. During the period between 2006 and 2009, just after gaining notice as host of the Olympics, China shut down the equivalent of seven percent of its power-generating capacity in small and inefficient coal mines. In 2010, China closed more than 1,600 coal mines. During 2007 and 2008, the Beijing government requested that more than 1,000 gas stations reduce gas vapor, which is usually released into the air when cars fuel. Around the same time, Beijing temporarily removed 2,580 buses and more than 5,000 taxis from the roads to reduce traffic and pollution. By June of 2008, there was a nationwide ban on plastic bags. In 2009, as part of an effort to avert the global downturn, Beijing announced its commitment to an additional \$1 billion during the next three years to environmental protection. In August 2010, China designated eight pilot cities as low-carbon cities. Local government officials in these pilot cities are encouraged to search for and deploy technologies to establish low-carbon solutions. In February 2011, Premier Wen Jiabao announced that China was lowering its annual economic growth target from 7.5 percent to 7 percent, in part because of its impact on the environment. Green Gen, which is scheduled to come online in 2015, is a Tianjin coal-fired power plant that will most likely be the world's most advanced (near zero emission) coal-fired power plant.

Research and Development (R&D) — As part of its effort to become a leader in innovation, China is putting substantial funds into R&D. Between 1995 and 2004, China increased its number of researchers by 77 percent, and doubled its R&D expenditures from 0.6 percent to 1.3 percent of its GDP. In 2010, China became the world's second largest R&D investor, right behind the United States, and surpassing Japan. For the past decade, China has increased its R&D spending by at least 10 percent each year. In 2010, China's R&D spending escalated 20 percent, while the R&D in the United States was only increased by five percent. Currently, China has more than 1,160 research institutes, with more than two million engineering and science graduates this year, which is four times as many as China had in 2000, and five times as many as the United States produces. China-based companies Trina Solar (NYSE: TSL) and Goldwind Science & Technology have been at the forefront of China's clean technology R&D efforts. In April 2011, Trina Solar planned to spend \$1.52 billion during the next five years on R&D. This budget is expected to be about 5 percent of Trina Solar's forecasted revenue during that period. Goldwind's recognition in R&D stemmed from its acquisition of majority ownership of German company, VENSYS Energy AG, in 2006. Also in 2006, Goldwind established its own R&D centers and became the first Chinese wind turbine manufacturer to possess its own proprietary technology and independent R&D capabilities. Currently as one of the largest wind turbine manufacturers in the world, Goldwind is leading wind turbine R&D, which includes product development, wind resources evaluation, feasibility studies,

micro-siting calculation, project management, and engineering services.

Clean Technology Investment — Between 2002 and 2005, there was little investment made in the clean technology sector in China. As previously mentioned, in 2010, China attracted \$54.4 billion in private investment in clean technologies. According to The Associated Press, Chinese spending on renewable energy has been growing at 77 percent per year since 2008. In addition, China provides close to 97 percent of the world's supply of rare-earth materials, which are critical for many clean technologies. China has planned to invest \$740 billion in the cleantech sector by 2020. Unlike many other countries, China recognizes that energy security and the stability of energy supplies are the foundation of its economic security.

Manufacturing of Solar Technologies — Throughout the past decade, China has emerged as the world's largest manufacturer of solar energy technologies. In 2003, the country produced less than one percent of the world's solar panels. By the end of 2011, more than half the world's solar panels and solar cells will be made in China. For example, Suntech Power (NYSE: STP) was the world's largest manufacturer of solar panels in 2010; Jinko Solar (NYSE: JKS), which was founded in 2009, is one of the fastest-growing solar panel manufacturers in the world, and is known to have one of the lowest-cost solar production processes in the world; LDK Solar (NYSE: LDK) is one of the largest manufacturers of solar wafers that are used by crystalline solar panels. These China-based companies are leading the manufacturing of solar technologies. The Chinese government recently released its 12th Five-Year Plan, which provides that by 2015, total solar capacity within the country will reach 10 GW, doubling from the original plan of 5 GW. In addition to domestic expansions, Chinese have companies investing in offshore companies. For example, in January 2011, LDK Solar acquired a 70-percent majority stake for \$33 million in a U.S. solar project developer company, Solar Power.

Alternative Energy Production — In 2006, China only had enough renewable energy installations, mostly wind power, to power just one small city. Since then, China has been building large wind farms in inner Mongolia and offshore locations. By the end of 2009, China had more than 20 GW of wind power installed. China is now home to some of the world's largest companies in wind turbine manufacturing and wind farm development. For example, Sinovel Wind Group is China's largest turbine manufacturer and the second-largest turbine manufacturer in the world; China Longyuan Power Group is one of the world's largest wind power operators, which is a subsidiary of a Chinese state-owned enterprise, China Guodian. Many of those companies have already tapped into foreign markets to increase sales of their products and services. In April 2011, Sinovel Wind Group entered into an agreement with Greek company, Public Power Corporation, to develop a 200 megawatt to 300 megawatt offshore wind farm in Greece. In July 2011, Sinovel Wind Group entered into a \$2.1 billion agreement with Mainstream Renewable Power, a European wind farm operator, to jointly develop and construct 1 GW wind farm in Ireland. On July 13, 2011, China Longyuan Power Group secured a 20-year contract to develop a 100 megawatt project for \$260 million in Ontario, Canada.

In 2010, China installed more wind power, manufactured more solar panels and solar hot water heaters, and spent more money overall on clean technology investments than any other nation. In China's latest Five-Year Plan, the Chinese government plans for at least 11 percent of energy to come from non-fossil fuels by 2015 — at least 70 GW of new wind capacity, 5 GW of new solar capacity, and a 76.7 billion RMB commitment to build new transmission lines to move renewable energy around the country.

Challenges for Emerging Clean Technology Companies

Although China and other countries are promoting clean technology innovation and investment levels are high, emerging companies developing clean technology solutions face unique challenges. These challenges deter the deployment of capital into certain critical areas and cause companies to fail.

Technology Risks — Because clean technology is a “new” industry, developers of clean technology solutions are seeking to solve some of the most difficult scientific challenges, such as energy storage, alternative fuels, and carbon sequestration. There is a substantial risk that the scientific breakthroughs necessary for the financial success of an enterprise will not be forthcoming in a timely manner. One way China is handling this challenge is by cooperating with foreign companies that are leading energy storage solutions. In July 2011, the Chinese government approved a joint venture between Hangzhou-based company Wanxiang Electric Vehicle Company and U.S. company Ener1, Inc. (NASDAQ: HEV), a leader in lithium-ion energy storage. This joint venture is formed to co-manufacture lithium-ion energy storage systems in China.

Weak Protection of Intellectual Property Rights — Even though China is home to some of the largest manufacturers of solar panels and wind turbines, many of the advances in these technologies and the critical manufacturing processes were invented in the United States and Europe. China's history of intellectual property protection has been poor; theft and misappropriation of intellectual property is common. As a result, investors are reluctant to invest in innovative technologies in China. Even the Chinese government has been criticized for its role in deterring innovation. For example, in 2010, China passed an anti-monopoly law that “prohibits” abuses of intellectual property rights by foreign multinationals in China. Many believe the law was passed to force foreign companies to sell their technologies in return for market access to state-directed markets. Shortly after the law was passed, the U.S. National Research Council criticized, “China is also likely to use the standards-setting process to compel multinationals to transfer the technology that is implicated in the standards or face the legal consequences of noncompliance.”

High Capital Requirements — Many sectors in the clean technology industry — from R&D to the construction of manufacturing plants, solar or wind farms, and energy transmissions facilities — require large amounts of capital. Such requirements, combined with the high technology risk, have a significant impact on investor decision-making. Many investors have looked elsewhere for opportunities. In addition, the project finance sector that funds large-scale power plants, solar and wind farms, and alternative fuels has not recovered from the financial downturn of 2008, making capital for these projects scarce.

Nature of the Customers — Many consumers of clean technology products, such as cities and municipalities, utilities, and transportation companies, are risk adverse, and late adopters of technology. This has made it difficult for many innovative companies to find customers for their products. Governments, including China's, have responded to this challenge by establishing incentives, rebates, and other subsidies to encourage customer purchases and adoption. In 2010, the Chinese government announced a trial program in five cities to provide cash credit of up to 60,000 RMB for private purchases of electric vehicles. At the same time, the Chinese government announced an incentive plan to subsidize 50,000 RMB per plug-in hybrid vehicle to automakers to reduce the retail price for potential customers. Despite the attractive price incentives, there are more than 7.7 million more gasoline-powered vehicles than electric vehicles in the United States and 200 million more gasoline-powered vehicles than electric vehicles in China.

The Investment Landscape — Hot Sectors

As stated in a 2010 International Energy Agency report, Chinese energy consumption has doubled during the past decade, and will grow 75 percent by 2035, accounting for more than a third of total global consumption growth. In September 2010, Premier Wen Jiabao announced seven emerging priority industries that will be crucial for China's development. Among these were clean energy technologies and electric vehicles. The GDP share of these seven industries was two percent in 2010, with a goal to increase their share to 15 percent of GDP by 2020.

Energy Efficiency — For the past five years, energy efficiency has been one of the fastest-growing clean technology sectors for venture capital investment. In 2009, energy efficiency companies attracted more than \$1 billion of venture capital funding, which was 39 percent higher than 2008. In 2009, \$230 million of the \$1 billion invested into energy efficiency companies was directed to lighting companies. In 2010, lighting companies raised \$350 million in venture capital funding, which accounted for a 52-percent annual increase.

Alternative Energy — Global investment in alternative energy jumped 32 percent in 2010, to a record \$211 billion, boosted in particular by wind farm development in China and small-scale solar photovoltaic installation on rooftops in Europe. The Chinese government has created wind power incentives by reducing the alternative energy cost to be between 0.5 RMB and 0.7 RMB per kilowatt hour. Economists forecast alternative sources of energy to increase dramatically once its cost per kilowatt hour matches those of coal, which is currently at about 0.5 RMB per kilowatt hour.

Energy Products Tied to Data Centers and Computing — During the past decade, clean technology investors have put substantial amounts of capital into the production of physical commodities such as sources of alternative energy. The high-capital requirements and technical failure of such innovations have caused investors to look to other sectors. In addition to considering the energy efficiency sector, many investors are looking at information-based clean technologies as an alternative sector because they require much less capital, can be commercialized more quickly, and can be improved more easily. Information-based clean technologies include cost and performance data compilation services, purchasing platforms, e-commerce commercial sites, and software based products.

Electric Cars — In 2007, China constructed charging stations, battery recycling centers, and subsidies to facilitate the private purchases of electric vehicles in 13 pilot cities. These "enabling" technologies are critical for the widespread use of electric cars. By 2010, China had established electric vehicle bases in 38 different pilot cities. China also has been actively investing in companies in foreign markets that are leading in R&D of electric car components. For example, in June 2009, China-based investment company Shenzhen Goch invested \$2 million into ECOtality, a technology innovator committed to the development and commercialization of clean energy technologies such as electric vehicle chargers. Shortly after, ECOtality acquired a \$114 million stimulus grant from the U.S. Energy Department to supply 15,000 of its Blink chargers for the Nissan Leaf and Chevrolet Volt plug-in vehicles. In 2010, ECOtality secured a \$300 million credit line from Shenzhen Goch to finance sales of ECOtality's electric charging systems. In January 2011, the Chinese government announced a target production of 500,000 electric cars by the end of 2012. In addition, China plans to spend \$1.5 billion per year for the next 10 years to build infrastructure to host the expected growing uses of electric vehicles.

Not only are Chinese companies raising substantial amounts of private capital, they are accessing the public markets as well. The largest clean technology IPO in 2011 was conducted by the China-based company Shinovel Wind Group, which raised \$1.4 billion on the Shanghai Stock Exchange. During the second quarter of 2011, there were 11 clean technology IPOs worldwide, worth \$1.99 billion. More than 40 percent of the \$1.99 billion was raised in an IPO conducted on the Hong Kong Stock Exchange by China-based Huaneng Renewable Energy, which raised \$800 million. Six of the 11 world-wide clean technology IPOs took place in China.

Conclusion

The demand for energy in China will be met only by a diversity of energy sources and will require huge annual investment. As a result of its

sheer size and stage of development, China will continue to experience massive transformative growth. This growth will bring new opportunities to local businesses and will provide for a better lifestyle for individuals in China. According to Mark D. Hill, Principal of Regency Capital Partners, China's growth will bring ever more energy consumption, cars, buildings, need for clean water, and home construction for its burgeoning middle class. This growth will bring never-before-seen challenges as China attempts to manage massive economic-growth needs while quickly transitioning the country to clean energy.

Legal News: China Quarterly Newsletter, *Eye on China* is part of our ongoing commitment to providing legal insight to our clients and our colleagues preparing to do or doing business in China. If you have any questions about this publication or would like to discuss the topics presented here, please contact your Foley attorney or the following:

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