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YOUR GREATER CHINA LAWYERS

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IP UPDATE



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Important Update: China's Anti-Unfair Competition Law

China's new Anti-Unfair Competition Law (the "New Law") has taken effect since 1 January 2018. It is the first major amendment to the former Anti-Unfair Competition Law (the "Old Law"), which was implemented in 1993.

The Anti-Unfair Competition Law has long been relied on by businesses to restrain other parties from free-riding their fame and causing confusion. It is especially useful when the defendant has not, strictly speaking, infringed any registered trade marks or patents owned by the plaintiff, but instead copied the business practices or trade dress of the plaintiff in other different aspects, such as copying the decor of the retail shop, copying the product packaging, making misleading statements, etc.

This article discusses a few key amendments to the definition of unfair competition acts and their implications.

1. ADDITION OF CATCH-ALL PROVISION ON ACTS OF CONFUSION

A catch-all provision has been introduced in Article 6(4) of the New Law, which states that businesses cannot engage in "other acts of confusion sufficient to mislead a person into thinking that the goods of one business (defendant) is that of another business (plaintiff) or has a particular connection with another business (plaintiff)".

This is a welcoming move since unfair competition acts were exhaustively listed and defined rigidly under the Old Law and the court's application of such provision was narrow as well.

Under the Old Law, only unauthorized use of "names, packaging or decor of well-known goods" and "enterprise names or personal names" were prohibited. This additional provision gives broader protection to businesses, and is particularly useful against defendants who imitate part of the business practices of the plaintiff, but not entirely copy the plaintiff's trade dress or decor. However, since the definition of "other acts of confusion" is vague, it would give judges much discretion in finding unfair competition, creating greater uncertainty.

2. UNFAIR COMPETITION ACTS ON THE INTERNET

In light of the prevalence of online transactions in China, the New Law also prohibits business operators from adopting technical measures to disrupt the legitimate operations of other businesses, notable prohibitions include:-

- Inserting a link or forcing redirection of web pages of online products or services legally provided by others without consent (Article 12(1));
- Misleading, defrauding, or compelling users to modify, close, or uninstall online products or services legally provided by others (Article 12(2)); and
- Other acts of interfering or damaging the normal operation of online products or services legally provided by others (Article 12(4)).

3. REMOVING “FORGING OTHERS’ REGISTERED TRADE MARKS”

Where the Old Law included “forging others’ registered trade marks” as one of definitions of unfair competition acts (Article 5(1) of the Old Law), such activity has been removed from the New Law, as this is already covered by the Trade Mark Law.

It is worth noting that defendants, who carry out unfair competition acts, are often engaged in trademark infringement acts as well. This may mean that where the plaintiff brings a law suit against the defendant on both claims, the two claims and corresponding infringing activities may be considered separately by the court, or even in separate cases.

4. FALSE COMMERCIAL PROMOTION

To tackle false commercial promotion including those on e-commerce platforms, the New Law introduces a prohibition on false or misleading commercial advertising in respect of products’ “user reviews” and “honors” that are often relied on by consumers. Business operators are further prohibited from engaging in false transactions with other operators to conduct misleading or false commercial promotion (Article 8).

While the New Law has been modified to keep up with new business activities and unfair competition behavior, it remains to be seen as to how the courts would apply such provisions to protect the rights of business operators and encourage fair competition. We will keep you updated on notable cases in this area!