

Trump Trademark Registration in China Signals Positive Change In China IP Law

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A short while ago, China finally granted the Trump Organization a trademark registration after a 10-year struggle. The timing of the announcement has fueled concern because just days before, President Trump had a phone call with Mr. Xi Jinping, China's president. During the call the President reportedly told Mr. Xi that he would honor the U.S.'s "One China" policy, and also wished Mr. Xi a happy Chinese New Year.

Despite speculation that the approval was a favor by the Chinese government, offered in light of President Trump's friendliness - after some unflattering comments about China during the Presidential campaign - the timing of the trademark approval was almost certainly a coincidence. The truth is that this particular trademark was provisionally approved on Nov. 14, 2016, and the registration granted after, like any trademark approved for registration in China, it had been published for a three-month opposition period.

More important, though perhaps not as titillating as the conspiratorial speculation, the grant of the TRUMP trademark registration is testimony to a relatively recent, and long overdue, change in China trademark practice. China observes the "first to file" rule, meaning that whoever files for a trademark first will get it. While this is not *per se* unfair or unique, the international norm is to afford "famous" or "well-known" marks strong protection over earlier filed registrations, especially in classes of goods similar or related to the classes in which the famous marks are known. And although China's trademark law purports to grant famous marks similar protections, the ability to exercise those rights proved to be a nearly impossible in practice. Until recently, China's Trade Mark Office (TMO) and its courts recognized very few Western brands as famous or well-known. It was particularly frustrating for Western brand owners because the TMO and the courts demanded evidence of the marks' "famousness" inside China before it could be recognized as famous and entitled to the enhanced protection.

The outcome was disastrous. China saw rampant trademark squatting, which played no small part in contributing to China's reputation of not protecting or respecting IP rights. For example, it was widely reported that Apple, Inc. had to pay a bankrupt Taiwanese company's China subsidiary over \$50 million to wrestle back the "IPAD" trademark.

The recently granted TRUMP trademark was for "Construction and Related Services," not the Trump Organization's core business of "travel, hospitality etc." In 2006, when the Trump Organization first applied for this registration, it found that an individual by the name of DONG Wei had already applied for the trademark just 14 days earlier. Trump's application was rejected in light of the earlier registration. Trump's Chinese trademark lawyers argued that the mark, with its Trump Seal and other graphics, were distinguishable and should be granted in spite of the prior application. For over 10 years, Mr. Trump's efforts to appeal the rejection, including an "administrative litigation" (suing the TMO before the Beijing Intermediate People's Court and a subsequent appeal to the Beijing High People's Court), were to no avail.

During this time, China trademark policy was beginning to change. In 2014, and partly in response to continuing pressure from the international community and numerous domestic companies with famous trademarks being abused by squatters, China modified its trademark law and the TMO's practices. As a result, it became much easier to prove that a trademark is well-known and therefore entitled to cross-class protection. It also became easier to establish that a competing trademark application was based on "unfair practice" and that granting a squatter the trademark

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registration would have inappropriate social effects (akin to being against public interest). Michael Jordan's success against a large Chinese sporting goods company which used the transliteration of "Jordan" is but one high profile example of the impact of this change in Chinese law. It is against this backdrop that the Trump Organization was able to obtain, after over 10 years of struggle, the approval of the TRUMP mark in Class 37.

A number of TRUMP trademark applications remain pending in China. Among them is one registered by a fairly large Chinese toilet manufacturer. Given the high-end nature the TRUMP Organization's goods and services, having TRUMP-branded toilets is certainly not desirable. There are also reportedly a very large number of Chinese applications for the Ivanka or Ivanka Trump marks, whose registration status is unknown.

It remains to be seen if the Trump Organization will push hard for these pending registrations. The awkward timing of the recent approval and the political speculation that followed may dampen the Trump Organization's desire to aggressively pursue its trademark registration or enforcement efforts in China while Mr. Trump is in office. Worse, it may put the Chinese government in a no win situation, where any decision would be viewed either as a personal favor or affront.

For an ordinary trademark applicant, however, it is heartening to see that China is getting ever closer to the accepted international norm when it comes to protecting trademarks.