

Plain Packaging Questionnaire

National Group: Chinese Group

Title: Plain Packaging

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Reporter within

Working Committee: [please insert name]

Date: 8 August 2013

Questions

Please answer the following questions. For each of questions 1) – 10) below, please answer in relation to your country's national laws including any constitutional law.

1) If the general conditions of registrability are met, does the product or service in relation to which a trade mark is used or proposed to be used have any affect on the ability to:

- (a) register the trademark; and **No.**
(b) use it once so registered? **No.**

2) What rights are derived from trademark registration?

An exclusive right to use the trademark is derived from trademark registration in China.

Article 52 of China Trademark Law: A person infringes the exclusive right to use a registered trademark if he:

- (1) uses a trademark that is identical with or similar to a registered trademark in relation to identical or similar goods without the consent of the owner of the registered trademark;
(2) offers for sale goods that are in infringement of the exclusive right to use a registered trademark;
(3) counterfeits, or makes without authorization, representations of a registered trademark of another person, or offers for sale such representations;

(4) changes a registered trademark and put goods bearing the changed trademark on market without consent of the owner of the registered trademark; or
(5) causes, in other respects, prejudice to the exclusive right of another person to use a registered trademark.

3) What rights exist in relation to a sign used as a trademark but not registered?
What is the basis of any such right?

An unregistered trademark is not to be protected by law until it has been extensively used and has certain influence; or it is well-known.

Article 13 (1) of China Trademark Law: In identical or similar goods, an applied-for trademark shall not be registered and its use shall be prohibited, if it is a reproduction, imitation or translation of a well-known mark which is not yet registered in China and it is liable to create confusion.

Article 31 of China Trademark Law: Nor shall an applicant register, in unfair means, a mark that is already in use by another party and has certain influence.

In addition, Articles 5 and 21 of China's Anti Unfair Competition Law provides protection for unregistered trademark (in the nature of trade name, trade dress, packaging) which is already in extensive use.

4) Is it possible to:

(a) obtain; or Yes.

(b) maintain; Yes.

registration for a trademark that is not:

(i) used; or Yes.

(ii) intended to be used? Yes.

There is no use requirement in the procedures of trademark application for registration or renewal in China. It is possible to obtain registration for a trademark that is not used or intended to be used. However, a trademark registration is vulnerable to non-use cancellation if the mark is not in use for three consecutive years.

5) If yes to 4) above, are the rights derived from such trademark registration the same or different to registered trademarks that are used?

Not the same. Normally, a registered trademark which is not used is not entitled of damages caused by infringement.

6) Are rights in unregistered trademarks dependent on use? Whether yes or no, please explain the basis for your answer. **Yes.**

Article 13 (1) of China Trademark Law: In identical or similar goods, an applied-for trademark shall not be registered and its use shall be prohibited, if it is a reproduction, imitation or translation of a well-known mark which is not yet registered in China and it is liable to create confusion.

Article 31 of China Trademark Law: Nor shall an applicant register, in unfair means, a mark that is already in use by another party and has certain influence.

7) Is there any basis to restrict the use of:

(a) a registered trademark; or **No.**

(b) a sign used as a trademark? **No, as long as it is registered.**

If yes, please explain any relevant laws or precedents.

8) Is there any basis for the state or any state-controlled body to expropriate?

(a) a registered trademark; **No.**

(b) a sign used as a trademark; or **No.**

(c) the rights deriving from either (a) or (b)? **No.**

If yes, please explain any relevant laws or precedents.

9) If yes to 7) or 8) above, do public interest considerations provide any basis for such restriction or expropriation ("Restriction/Expropriation")? If yes, please explain any applicable public interest considerations, and any relevant laws or precedents.

10) If yes to 7) or 8) above, are trademarks different from other intellectual property rights in this regard?

11) If yes to 7) or 8) above, are any treaty or other international obligations relied on to provide a basis for such Restriction/Expropriation (as applicable)? If yes, please explain the international obligations, and how those obligations are reflected in or received into your country's law.

12) Is your country a signatory to the WHO Framework Convention on Tobacco Control ("FCTC")? If yes, has your country ratified the FCTC?

Yes. China joined FCTC in 2003 and ratified the FCTC in 2005. FCTC is formally effective in China as of January 2006.

13) If yes to 12) above, has the FCTC been implemented in your country? If yes, please

explain its legal impact, if any, including by reference to the Guidelines for Implementation of Articles 11 and 13 of the FCTC.

No. No special implementing regulation for FCTC has ever come into force.

In respect to Article 11 of FCTC, several competent authorities have jointly issued a decision regulating the packaging of tobacco.

In respect to Article 13 of FCTC, at provincial level, some provincial authorities except where tobacco is the major industry, tobacco advertisement has been totally banned.

14) Is the FCTC received directly into your country's domestic law or is domestic legislation required to give it effect in your country's law?

The FCTC was received directly into China as domestic law.

15) If there is presently a legal basis in your country for permitting any Restriction/Expropriation, please answer the following questions in relation to both registered trademarks and unregistered trademarks (if your country recognizes/protects the latter).

(a) What are the parameters for such Restriction/Expropriation? For example, the nature of any stated public interest considerations, the proportionality of the proposed measure to the Restriction/Expropriation.

(b) Is it relevant that such Restriction/Expropriation only applies in relation to a particular class of products, eg tobacco products, foods deemed to be unhealthy or alcohol?

(c) What are the financial consequences for the state and the trademark rights holder

respectively? For example, is a rights holder entitled to or eligible for any compensation in respect of the Restriction/Expropriation? If yes, what type of rights holders are so entitled or eligible? If not, why is no compensation available?

(d) If compensation is available, how is it calculated?

(e) Does a trademark rights holder affected by Restriction/Expropriation have any other claims or remedies against the state? If yes, please explain the basis and nature of any claims or remedies.

(f) In the event of Restriction/Expropriation, could a trademark remain registered?

(g) If yes, what is the consequence of any Restriction/Expropriation on a well known

trademark that was registered prior to the Restriction/Expropriation?

16) If there is presently no legal framework in your country permitting Restriction/Expropriation, please answer the following questions in relation to both registered trademarks and unregistered trademarks (if your country recognizes/protects the latter).

(a) What legislative changes would be necessary in your country to implement a plain packaging regime for a specific class or classes of products such as those previously mentioned? For example, amendments to existing domestic trademark legislation, changes to your country's constitution, multilateral or supranational treaty obligations.

Not possible in the foreseeable near future.

(b) Could a plain packaging regime be implemented in your country without providing compensation to affected trademark rights holders? If no, what type of rights holders would be entitled to or eligible for compensation? If yes, why would no compensation be payable? N/A

(c) Would a trademark rights holder affected by Restriction/Expropriation have any other claims or remedies against the state? If yes, please explain the basis and nature of any claims or remedies. N/A