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1. Introduction

The food and beverage industry (F&B industry) includes the research and development, processing, production, wholesale and distribution and retailing (including branding) of a wide range of food products. Recent market research from the EU SME Centre shows that a large number of European SMEs have made significant international investments, such as new product development, pricing strategies and geographic expansion into new markets. Significant changes in the F&B industry are redefining how companies grow, operate, and manage risk in this sector and since these changes often involve intellectual property rights (IPR), the need to protect IPR in several countries is stronger than ever.

The rapid economic growth of countries such as China has created more consumers with the purchasing power needed to enjoy imported food and beverage products. This has consequently expanded opportunities for European SMEs. However, laws and regulations relating to this sector are rarely straightforward.

The F&B industry is a highly regulated sector in China. Foreign companies need to apply for a food production license to ensure that they meet the requirements for manufacturing capabilities and environmental regulations. Foreign products need to conform to specific standards and

protocols depending on the type of goods. Chinese labels need to be applied to the products to complete Customs clearance and enter the country. In addition, a separate food and beverage distribution license is required for engaging in sales in China.

Such mandatory legal requirements for production in or importing to China do not, however, directly involve protecting IPR and companies need to ensure their rights are protected by taking proactive measures. There are several types of IP that are relevant to the F&B industry. This guide provides an overview of the relevant IP registration options and issues within the industry.

2. Trade marks

Concerns about product quality and safety in China and the high number of counterfeit or fake goods on the market mean that Chinese consumers tend to rely heavily on brands and brand reputation to decide on their purchases. A trustworthy brand and good business reputation are critical to success in the F&B market in China. Obtaining and protecting trade marks in China is therefore essential to the success of your business in the country. Trade marks can convey quality which will enable your company to win new customers and ensure customer loyalty in the long term.

China uses the 'first-to-file' system for trade mark registration, meaning that

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you may not be able to register your mark if the same or a similar mark has already been registered within China. It is therefore essential to register your trade marks in China as early as possible before entering into the market so as to lower the risk of trade marks being registered by someone else first.

Trade marks can be filed through a domestic registration with the China Trademark Office (CTMO) which takes approximately nine to 12 months to complete. Alternatively, trade mark applications can be made via international registration as China is a member of the Madrid System. China generally applies the Nice Classification system for defining types of goods to be registered, where food and beverage goods generally fall under Classes 29, 30, 31, 32 and 33.

Please note China has an additional sub-class system which should be taken into account during the registration. A registered trade mark is valid for ten years and the registration can be renewed for a small fee.

Since trade mark registration in China of a western language logo and name does not automatically protect a Chinese version of it, it is also recommended that European SMEs file a separate registration for the Chinese trade mark. Be advised that cultural adaptation is very important when translating your trade mark into Chinese. You have to be aware of the message you want to convey in the brand instead of just translating word-for-word. Consult with a native speaker for advice about choosing an effective China trade mark.

F&B trade fairs are a good opportunity for European SMEs and Chinese distributors and customers to meet and establish business relationships. It is recommended that EU SMEs register both their western trade mark and a Chinese language trade mark before participating in such a trade fair to avoid exposing their brand to the risk of 'bad faith' registration, even if their products have not been imported into China yet.



For more information and for details on trade mark protection and enforcement, please see the Helpdesk's "Guide to Trade Mark Protection in China".

3-D marks

The Chinese Trademark Law also allows registration of 3-D trade marks. A 3-D trade mark is a three-dimensional sign, or a combination of three-dimensional signs, colours, words and symbols. It may be the shape of a product or its container or packaging. However, few product or packaging shapes can be registered as a 3-D trade mark, as they have to be distinctive from common shapes or packaging. Although there are various other forms of protection available for shapes under copyright or design patents, the rights granted by trade mark registration are very strong as they can be renewed every 10 years. It is therefore recommended to consult with a China IP expert to seek the registration of 3-D marks where possible. For more options for protecting packaging see section 3 below.

Geographical Indications

For EU SMEs intending to export products with a specific national or regional origin, a geographical indication (GI) certification can play an important role in your branding strategy.

GIs cannot be registered by individual companies but by collective organisations representing a group of producers, e.g. the Scotch Whiskey Association. There are two ways your GI organisation can register your GI in China:

- a. As a certification mark or a collective mark at the CTMO.
- b. As a GI with the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ).

For more information on Geographical Indications protection in China see the Helpdesk's GIs Guide.

3. Packaging

In the food and beverage sector, the way companies package their goods plays a crucial role in customers' purchasing decisions. As a result of the increasing importance accorded to distinctive packaging and the relative ease of copying packaging, food and beverage producers report an increasing volume of copied branding and packaging on the Chinese market. Foreign brand owners should take preventative action to avoid losing market share to poor copies of their products wrapped in good copies of their packaging.

The IP laws relevant to packaging in China are the Trade mark Law, the Patent Law, the Copyright Law and the Anti-Unfair Competition Law. It is

recommended to carefully plan a strategy of combined and layered protection through registration of IP. Depending on your specific business and your specific budget needs, you may choose to opt for only one kind of registration or may choose to combine different registrations into a bundle of rights for more comprehensive protection.

As mentioned above, packaging can be registered as a 3-D trade mark. However, distinctiveness may be difficult to prove for 3-D marks, hence registration has so far only been granted to a few 3-D marks. However recent court decisions in favour of Hennessy protecting their distinctive bottle as a 3-D mark shows a willingness to support such registrations.

In the Shandong Heze Intermediate Court in 2012, Hennessy successfully sued a Chinese infringer for selling bottles that are identical or similar to its bottle which had been registered as a 3D trade mark. The Court found that the Chinese company infringed Hennessy's rights by publicly showing on its company's website bottles that were identical or similar to the Hennessy 3D trade mark, and by displaying in its company's showroom bottles that were identical to Hennessy's 3D trade mark. The Court ordered the Chinese company to stop the infringement and awarded damages to Hennessy of 50,000 RMB.

This case shows the benefits of:

- Registering your 3D trademark in China;
- Collecting evidence of infringement you find online. Especially if it is from the website of the company itself, it can help to prove trademark infringement;
- Actively enforcing your IPR. Chinese Courts are increasingly more willing to enforce 3D trade marks.

3.1 Design patents

More commonly, packaging is protected by seeking a design patent for the external 'look' of the product. Design patents cover any of the following external feature combinations that are visually appealing and are fit for industrial application:

- a. The shape of a product
- b. The pattern of a product
- c. The shape and pattern of a product
- d. The shape and colour of a product
- e. The shape, pattern and colour of a product

The colour of a product alone cannot constitute the design of a product unless the change of colour can be

regarded as a pattern.

To enjoy protection in China, designs must be new and meet the creativity requirement: a design cannot be previously published anywhere in the world before the date of application and must be sufficiently distinguishable from other designs. Registration is relatively inexpensive and can be completed within one year. Once granted, the duration of protection in China is 10 years (while registered designs can be protected in Europe for up to 25 years and unregistered designs for up to 3 years).

European SMEs should note that the requirement that a design should be new ('absolute novelty') is essential and any previous use or publication of a design within or outside of China will destroy its patentability in China. As a consequence, it is strongly recommended to register the design with the patent office in China in advance or use the international Patent Cooperation Treaty system to indicate China among the designated countries of registration. It is crucial to consult with your lawyer to plan a suitable filing strategy before launching a new product.

For more information on design patent protection and enforcement in China, see the Helpdesk's guide to "Patent Protection in China".

3.2 Copyright

Copyright can be also a valuable option for protecting exclusive rights of packaging in China. There are several types of works that can be protected under copyright, including original shapes and ornamental features, or works of applied art or fine art (such as 2-D or 3-D visual works). Examples of copyrightable works that are relevant for the F&B industry are images of each product (including single images of packaging), brochures and catalogues, website content, labels, and various marketing materials. Copyright protects the manifestation and representation of a work but not the work itself, therefore copyright registrations cannot substitute other IP registrations but can provide valuable proof of the creation of the work. In practice, when an infringement occurs, copyright registration of product images, marketing materials, or brochures will enable you to have a concrete proof that your company is the legal owner and creator of those works, which is useful during legal action.

Please note not all works can receive protection under the China Copyright Law as they must meet some minimum requirements. For more information on the legal requirements please see the 'related links' section at the end of this guide.

Copyright is not only one right but a bundle of rights including moral and economic rights. Copyright is an

automatic right that usually arises the moment a work is created meaning that once a work is created, in most cases, the creator will automatically enjoy copyright protection in all 164 member countries of the Berne Convention for the Protection of Literary and Artistic Works including all European Union countries and China. Copyright is generally valid for 50 years from the date of creation or 50 years after the death of the author.

Voluntary registration for copyright is available in China through the Copyright Protection Centre of China (CPCC), which means the copyright owner can apply for a China-issued certificate that confirms the ownership of the work. Although this is not a legal requirement, the voluntary registration provides proof of ownership. This can save you time and money in case of a dispute later on. A registration certificate is generally required by Chinese courts or administrative agencies in enforcement procedures, therefore registration is recommended. Copyright registration can be done at any time, and takes approximately 30 working days. Copyright registration is inexpensive. For example, copyright registration fees for photographs are RMB 300, while registrations for product design are RMB 500 (excluding legal fees or agents fees). It is also possible to add layered protection by registering the brand and/or logo as copyright in addition to registration as a trade mark. Naturally, this can only be done if your brand and/or logo fulfill the legal requirements of a copyright protected work in China. Proper trade mark registration is always recommended as it grants a stronger protection when enforcing your rights, but in certain cases in which trade mark registration may not be available, copyright protection could also be part of a good IP protection strategy.

More information on copyright registration and enforcement in China is available in the Helpdesk's guide to "Copyright Protection in China".

4. Trade secrets

A trade secret is defined as non-public information with actual or potential commercial value that is guarded by confidentiality measures. Particularly in the F&B industry, European SMEs may have trade secrets that are critical to the taste, composition, appearance, or other aspects of their goods (a famous example is the Coca-Cola formula). Additional examples of trade secrets in this industry could be manufacturing techniques and know-how, quality control or testing methods, or pricing strategies and client information. Unlike other forms of IP rights that are subject to registrations, trade secrets do not have a set term of protection and therefore may be protected for an infinite amount of time. However, legal protection of trade secrets will be lost if your company does not take active steps to protect your trade secrets, using physical, technical and contractual barriers.

When production takes place in China and if it is feasible, a good way of preventing IP leakage is to import all the ingredients or other parts of your products that already incorporate the trade secret from Europe. This would make it much harder to discover the valuable details in China.

Moreover, if you have China-based employees, you should require them to sign agreements to keep all trade secrets confidential and provide that all trade secret documentation (for instance a recipe or formula) be clearly marked with a notice such as 'CONFIDENTIAL – DO NOT DISCLOSE TO UNAUTHORISED PARTIES'. Also, do not forget to insert specific confidentiality clauses in their employment contracts. A typical theft of trade secrets case generally involves an employee leaving the company to work for a competitor, shortly after which the company discovers that its competitor is selling a product that looks suspiciously familiar.



It is also recommended to require any potential partner in China to sign a Non-Disclosure Agreement (NDA) before revealing any commercial or technical information.

For more information about trade secret protection and enforcement, see the Helpdesk's "Guide to Protecting your Trade Secrets in China".

Trade secrets, product registration and labelling in China

European SMEs who import food and beverage products into China, often fear they have to give away their trade secrets in form of the product formula when going through the product registration process in China. The situation implies that the full list of ingredients needs to be disclosed to Chinese authorities in order to obtain the approval for the goods to enter the Chinese market and printing the Chinese labels. It is however to be noted that although the list of ingredients has to be disclosed to the China Food and Drug Administration (CFDA), a ministerial-level agency, the exact formula does not have to be submitted as this is considered to be a trade secret and therefore protected. European SMEs should be careful in selecting accredited and trustworthy Chinese agents to conduct the mandatory product registration in China on their behalf.

5. Patents

It is possible to apply for patent registrations for specific food and beverage products, as well as for certain processing methods that meet the requirements of patentability. Processing in the F&B industry is dedicated to converting raw material food stuffs into forms that may be more easily distributed and sold to consumers.

In order to be registered as patents, inventions must be:

- novel: they cannot be known to the public within or outside China before the date the patent application is filed;
- inventive: they must involve an inventive step that is not obvious to a person skilled in the art; and,
- have practical applicability: they can be made or used, and can produce effective results.

As the novelty requirement is essential for invention patents and utility model registrations (sometimes referred to as a mini-patent), patent registration should be always considered in advance and taken into account at the beginning of the planning of IP protection strategy for China. For more information on patent registration in China, see the Helpdesk guide on "Patent Protection in China".

6. Other IP related issues

Protect your IP under Unfair Competition

The Anti-Unfair Competition Law can be used to protect business operators' rights in the areas of trade secrets, trade dress/product packaging, business reputation, fair trading practices and related issues in China. However, products must be well established in the market to qualify for trade dress and packaging protection; if you have not been selling your goods in China for a significant period of time, enforcement may be difficult.

Licensing

European SMEs in the food and beverage sector interested in entering the Chinese market but not willing to engage in direct operations in the country, may also consider having an exclusive distributor to whom they authorise the use of their intellectual property and who manages their China operations on their behalf. This allows the SME to generate revenue through licensing.

With regard to licensing, it is important that all IP is registered in the name of the European SME in China and, only after registration, is licensed to the Chinese party. An exclusive Chinese licensee is entitled to sue an infringer in its own name. It will be in the licensee's interest to prevent loss of your IP, whilst they have a better knowledge and understanding of the local market.

All types of registered IP rights can be licensed in China, however, the most commonly licensed type in the F&B sector are trademarks. In the case of trade mark licensing, the agreement should be submitted to the CTMO to be recorded. You will need to submit the company documents regarding both the licensor and the licensee together with a copy of the trade mark registration certificate in China, therefore make sure that you have your copy available in advance. Also note that an original copy of the trade mark license agreement or a notarised copy of the contract will be needed. It usually takes three months for the CTMO to complete the process.

SME Case Studies

Golden Olive Ltd., a European SME producing olive oil and aromatic olive oil is planning to import its range of products into China. The company has participated in trade fairs in Shanghai and Shenzhen in the past year, where it met a few potential Chinese distributors interested in its products. Before participating in the trade fairs, Golden Olive Ltd. had registered its trade marks in both western letters and Chinese characters as it was warned by its lawyer that trade fairs may bring good business opportunities but also generate risks for unregistered IP.

Golden Olive Ltd. is now negotiating with two potential importers and distributors in China, one appointed for the northern region and the second one for central and south China. The negotiations will lead to written distribution agreements including IP related clauses to regulate the use and obligations of both parties with reference to the IPR involved, especially with regard to the registered trademarks and related marketing activities for the brand. At the same time, the company has started the mandatory product and label registration in China.



While trade mark protection has been taken care of in advance, Golden Olive Ltd.'s products are also characterised by a very distinctive packaging including both the shape and the combination of colours of the containers. The company would like to use the same packaging in China that has been using in Europe for the past five years, and decided to consult with a China IP lawyer in this respect. The patent design was registered in Europe five years earlier. Unfortunately, the company discovered that since the packaging has already been used in Europe, it can no longer be considered 'novel' and is not eligible for design patent protection in China now. Nevertheless, the lawyer suggested that since the current packaging has intrinsic copyright the company can prepare to defend themselves against any future infringement by performing a voluntary copyright registration in China to prove their ownership in the Chinese courts. He also suggested developing a new distinctive packaging specifically for the Chinese market, by using a new shape and new combination of colours which would be more appealing for Chinese consumers. He advised to file the new packaging as patent design in China through domestic registration with the State Intellectual Property Office (SIPO).

As an additional measure, Golden Olive Ltd. is advised to register its brochures and catalogue that will be used by its Chinese distributors as copyright to prevent any IPR theft or misuse afterwards.

Through the protection strategy mentioned above, the European SME succeeded in applying a reasonable budget for its China operations by investing in IP prevention in advance, thus minimising the costs of enforcement afterwards.

Take-Away Messages:

1. Mandatory requirements for product registration and label registrations are different things from IP registration. Always consider registering your trademarks, designs and copyright in order to protect them in China.
2. In China, brands and packaging are often essential to the success of foreign SMEs operating in the F&B industry
3. Registration is key to enforcement for most IPR, so even though you may not have a large budget to obtain a wide spectrum of IP rights, focus on registering at least your core IP in China
4. Choose your Chinese trade mark wisely with help from local staff/counsel
5. Copyright and trade mark protection is likely to be the least expensive and are very useful rights to obtain
6. Design patents are the most common way to protect product packaging
7. Keep your trade secrets secret and do not forget to regulate access to the information with physical, technical and contractual barriers

Related Links

Helpdesk Resources

Guide to Trade Mark Protection in China:
http://www.china-iprhelpdesk.eu/docs/publications/China_IPR_Guide-Guide_to_Trade_Mark_Protection_in_China_EN-2013.pdf

Guide to Geographical Indications in China:

Patent Protection in China:
http://www.china-iprhelpdesk.eu/docs/publications/China_IPR_Guide-Guide_to_Patent_Protection_in_China_EN-2013.pdf

Guide to Copyrights in China:
http://www.china-iprhelpdesk.eu/docs/publications/EN_Copyright_guide_Aug_2010.pdf

Guide to Protecting Your Trade Secrets in China:
http://www.china-iprhelpdesk.eu/docs/publications/EN_Trade_Secrets_Nov_2010.pdf

External Resources

Copyright requirements
http://www.wipo.int/wipolex/en/text.jsp?file_id=125981



The China IPR SME Helpdesk provides free, confidential, business-focused advice relating to China IPR to European Small and Medium Enterprises (SMEs).

Helpdesk Enquiry Service: Submit further questions to the Helpdesk via phone, email (question@china-iprhelpdesk.eu) or in person and receive free and confidential first-line advice within three working days from a China IP expert.

Training: The Helpdesk arranges training on China IPR protection and enforcement across Europe and China, tailored to the needs of SMEs.

Materials: Helpdesk business-focused guides and training materials on China IPR issues are all downloadable from the online portal.

Online Services: Our multi-lingual online portal (www.china-iprhelpdesk.eu) provides easy access to Helpdesk guides, case studies, E-learning modules, event information and webinars.



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