

China IP Legal Update – China Anti-Unfair Competition Law Amended

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by Lilian Shi



On November 4, 2017, the Amended Anti-Unfair Competition Law was passed by the Standing Committee of the Chinese People's Congress and promulgated on the same day. The new law became effective on January 1, 2018.

The new law has brought some significant changes relevant to trademark lawyers, including amendments to the definitions of acts to mislead or confuse and acts of false or misleading commercial representations. The TMCA presents highlights of these changes:

1. Acts to mislead or confuse (Article 6 of the new law) – This new provision, which replaces Article 5 of the old law, gives a more detailed definition of acts of unfair competition that intend to mislead or confuse others into believing the existence of an association/connection between goods/services, similar to the concept of “passing off” under common law. Specifically,
 - Unauthorized use of trade indicia such as a product/service name, packaging or trade dress that is identical or similar to that of another party which has gained a *certain degree of influence*. The word “famous” used under the old law has been replaced by the phrase “certain degree of influence, which may indicate a lower burden on IP rights owners to prove the reputation of their products and services;
 - Unauthorized use of another's enterprise name (including an abbreviation or trade name), another's organization name (including an abbreviation), natural name (including a pseudonym/pen name, stage name, corresponding Chinese/English name, etc.) which has gained a certain degree of influence. This new definition identifies more specific types of names to be protected, as compared with the old law, which only mentioned the enterprise name and natural name;
 - Unauthorized use of the distinctive part of another's domain name, website name or webpage which has gained a certain degree of influence. This is a new provision under the new law.
2. Acts of counterfeiting are excluded from Article 6 since it should be and has been governed by the PRC Trademark Law;

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3. Acts of making various false representations as to the quality, certification, place of origin, etc. of goods or services are excluded from Article 6 and incorporated into new Article 8 of the new law (see 5 below);
4. A “catch-all” provision is added to Article 6 of the new law to encompass other “acts to mislead or confuse” that do not fall within the above specific provisions.
5. Acts of false or misleading commercial representations as to the use, function, quality, sales, customer feedback and awards, etc. of goods/services and acts of creating false transactions to aid others’ false or misleading commercial representations (Article 8 of the new law). The first clause replaces the corresponding part of Article 9 of the old law as well as “acts of false representations” under Article 5 of the old law (see 3 above). It removes the reference of “by way of advertisement or other means” under the old law by which the false or misleading commercial representation had to be made. The second clause is new, and aims to tackle acts of unfair competition such as click farming.

In addition to the changes highlighted above, the new law also introduces changes to: (a) prohibit business operators from abusing their technology to commit acts of unfair competition by interfering with or sabotaging the normal operations of internet sites that are legally providing goods or services by such acts as inserting a link or forcing a URL redirection in an online product or service; misleading or forcing users to shut down or uninstall an online product or service; or creating incompatibility with an online product or service in bad faith (Article 12 of the new law); (b) give more powers to the relevant governmental bodies to investigate unfair competition complaints; and (c) increase the maximum amount of statutory damages that can be awarded by a Chinese court to RMB 3M (~US\$460K) . The amount of administrative fines or penalties that can be imposed under the new law is also significantly higher than under the old law.