

Intellectual Property in the Food & Beverage Industry in China

The food and beverage (F&B) industry encompasses the formulation, processing, production, distribution in wholesale or retail, and delivery of food products. Recent research shows that an increasing number of European F&B SMEs are making significant investments in emerging East Asian markets, particularly China, with new local product development and national business strategies. While this continues, changes are occurring in the industry that are redefining how companies grow, operate, and manage risk. Intellectual property rights (IPR) are a key component of these developments, thus increasing the need to protect those rights in several countries.

When it comes to Chinese Laws and Regulations, the F&B industry is a highly regulated sector. 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 products. Chinese labels need to be applied to the products to complete the Customs clearance and enter the country. In addition, a separate food and beverage distribution license is required to sell in China.

These mandatory legal requirements for production or importing in China do not directly involve intellectual property rights, however protecting IP has the same importance as complying with other laws and regulations - without officially registered IP rights in China, IP is not protected. Chinese companies have taken advantage of the fact that many F&B producers do not have these rights, resulting in a market rife with counterfeit and infringing products. In light of this fact, it is important to be aware of the IPR issues most relevant to the F&B industry.

Trade marks

Concerns about product quality and safety in China and the high number of counterfeit or fake goods in the market bring Chinese consumers to heavily rely on trusted brands to determine their purchases. A trustworthy brand and good business reputation are critical to success in the F&B market in China.

China uses the 'first-to-file' system, meaning that legal protection cannot be gained if a similar mark has already been registered within China. It is therefore essential to register trade marks before entering. It is also recommended that companies file a separate registration for a Chinese trade mark, keeping in mind the message that is intended to be conveyed by the brand instead of just translating word-for-word.

The Chinese Trademark Law also allows registration of 3-D marks as trade marks. It may be the shape of product or its container or packaging; however, they must be distinctive from common shapes or packaging. Although there are various forms of protection for shapes under copyright or design patents, the rights granted by trade mark registration are very

strong as they can be renewed an indefinite number of times.

Rights relating to packaging

The way companies package their goods plays a crucial role in customers' purchasing decisions in the F&B sector. As a result, an increasing number of copies are emerging in the Chinese market. Foreign brand owners are therefore challenged to take actions if they do not want to lose market share to poor copies of their products wrapped in good copies of their packaging.

Packaging can be protected in China under various types of IP: the Trademark Law, the Patent Law, the Copyright Law and the Anti-unfair Competition Law. While technical features of packaging could be protected as utility models or invention patents, packaging is most commonly protected via design patents. Design patents are defined by the external features of a product that should be visually distinct and appealing, while able to be created through industrial application. This can include the shape or pattern of a product, the shape and colour of a product, or a combination of these (though the colour of a product alone cannot constitute the design of a product).

Copyright can also be a valuable option for protecting packaging in China. As the object of copyright protection is broad it can cover original shapes and ornamental features or works of applied art or fine art (such as 2-D or 3-D visual works), as well as images of each product (including single images of packaging), brochures and catalogues, website content, labels, various marketing material. Although a work is automatically protected by copyright when created, voluntary registration for copyright is available in China with the Copyright Protection Centre of China (CPCC). This can provide strong proof of ownership during an enforcement action.

Trade secrets

A trade secret is non-public information with actual or potential commercial value that is guarded by confidentiality measures. F&B companies 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 recipe). Further kinds of trade secrets in this industry could be quality control methods, production techniques and knowledge relevant to the testing of a product.

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. A good approach to prevent this is to import inseparable ingredient combinations or other semi-finished parts of products. Moreover, China-based employees should sign confidentiality agreements and all trade secret documentation (for instance a recipe or formula) should be clearly marked with a notice of confidentiality. 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.

When foreign companies import F&B products into China, they often fear they have to give away their trade secrets in the form of the product formulas when going through the product registration process in China. However, 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. Despite this, European SMEs have to be careful in selecting accredited and trustworthy Chinese agents to conduct the mandatory product registration in China on their behalf.

Reputation is the key

The food and beverage sector is moving fast in China now, as consumers look for new trustworthy brands. This presents huge opportunities for foreign businesses, particularly in the wake of recent Chinese food safety scandals. However, it should not be underestimated how important brands and packaging are to the success of companies operating in the F&B industry. Mandatory requirements for product and label registrations are very different things from IP registration, and failure to address the latter can result in a completely failed venture. For food and beverages, reputation is almost everything, and reputation is kept safe through registered intellectual property.



The China IPR SME Helpdesk is a European Union co-funded project that provides free, practical, business advice relating to China IPR to European SMEs. To learn about any aspect of intellectual property rights in China, including Hong Kong, Taiwan and Macao, visit our online portal at www.china-iprhelpdesk.eu. For free expert advice on China IPR for your business, e-mail your questions to: question@china-iprhelpdesk.eu. You will receive a reply from one of the Helpdesk experts within three working days. The China IPR SME Helpdesk is jointly implemented by DEVELOPMENT Solutions, the European Union Chamber of Commerce in China and European Business Network (EBN).