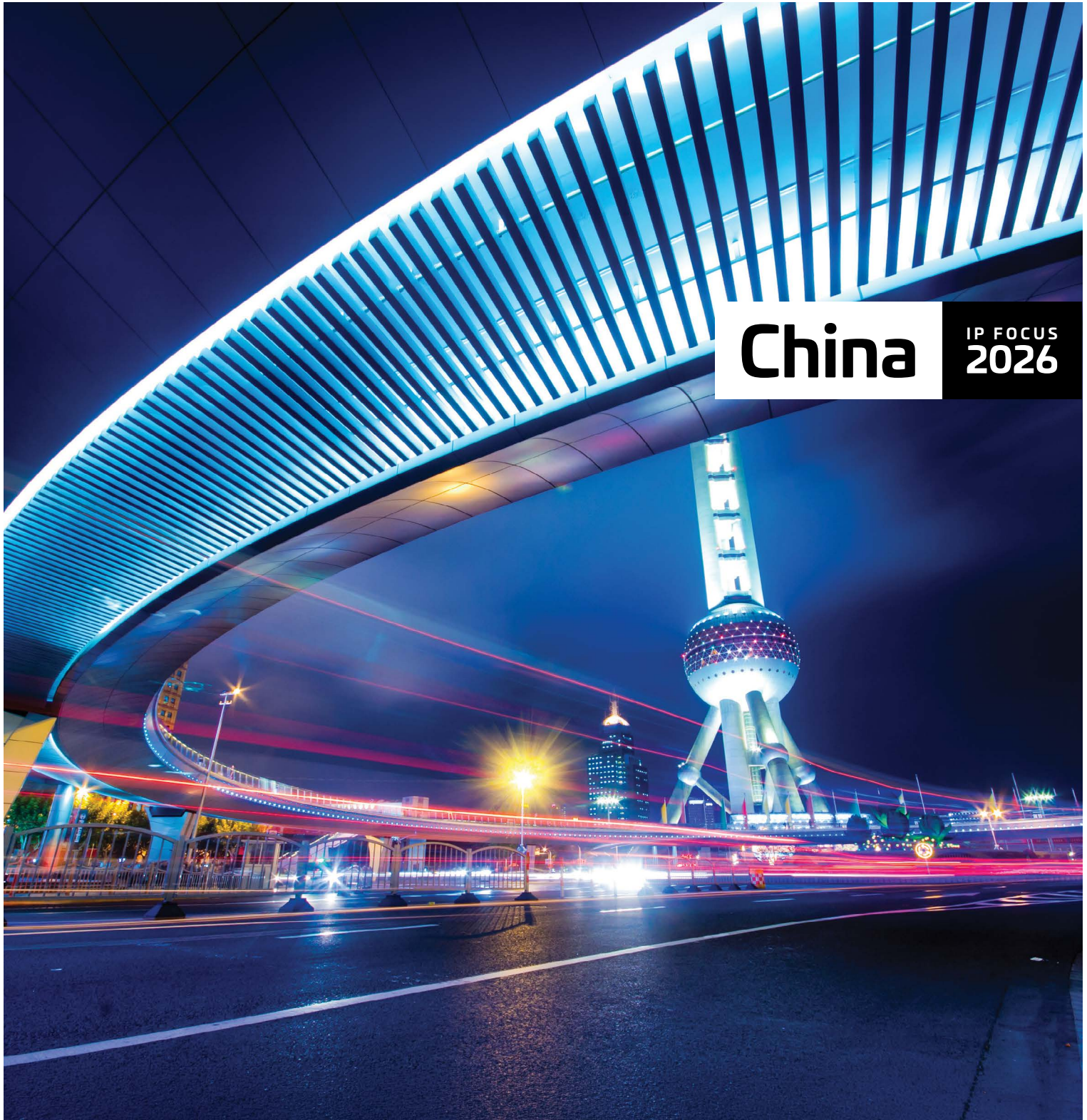




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# Putting the draft revision of China's Trademark Law under the spotlight

Paul Ranjard, Huang Hui, and Zhu Zhigang of **Wanhuida Intellectual Property** explain the proposed amendments to China's Trademark Law, their ramifications, and the persisting issue surrounding the 'right to use'

The last revision of the Trademark Law of China dates back to 2019, when the legislature published a new version in which Article 4 prohibited the registration of trademarks filed "in bad faith without intention to use". In 2023, a draft revision was published containing many new propositions, some of which addressed the problem of 'trademark hoarding' in greater detail. The draft introduced an obligation for the trademark applicant to declare its trademark use, with random controls by the CNIPA, every five years. Most stakeholders disagreed with the proposed method.

The legislator published a new draft (the Draft) on December 26 2025, with a call for comments. The Draft addresses bad faith trademark applications and bad faith trademark use. It also aims to improve the protection of trademarks, by expanding their scope of protection, and strengthen the enforcement of trademarks.

This article analyses some of the changes proposed by the Draft, many of which are welcome, even if some modifications would be necessary to improve their efficiency.

Most importantly, the Draft showcases an essential difference between China and the rest of the world concerning the effect of the registration of a trademark, which is the root cause of difficulties faced by trademark holders in China.

## Measures against bad faith

### Bad faith trademark applications

The current Article 4 becomes Article 18 and seems to address the issue of 'defensive trademarks'; i.e., trademarks that are filed in a certain category of goods not for the purpose of use but to prevent others from registering an identical trademark in classes of goods that have a certain proximity to a business. Securing a registration in such 'neighbouring areas' aims to improve the scope of protection of the registered trademark and, as the case may be, prepare the future expansion of business in those areas.

The wording of Article 18 ("Trademark applications that are not filed for the purpose of use and that clearly exceed normal production and business needs shall not be registered") seems to correspond to the above definition of defensive trademarks. However, it would be even more clear if the word "protection" were added, as follows: "exceed normal production, business and protection needs".

Article 40 provides for the possibility to suspend the examination procedure of a new trademark application that

has been refused on account of a prior trademark while the new trademark applicant deals with the obstacle. Article 40, however, adds that the authority "shall generally suspend the examination or adjudication". The word "generally" introduces a certain degree of uncertainty in a process that needs to be clear and foreseeable. It would be better to delete "generally".

In the last paragraph of Article 40, the Draft provides that where a People's court adjudicates an appeal against an administrative decision concerning the registration or invalidation of a trademark, it shall base its decision on the circumstances prevailing at the time when the administrative decision was made, rather than at the time when the court makes its decision. It is hard to agree with this. Indeed, if the obstacle to the registration has vanished for any reason, there is no reason why the court could not take such change of circumstances into consideration.

Article 53 of the Draft provides for sanctions (fines up to RMB 100,000) against those that file trademark applications in violation of several articles of the law (use of prohibited signs, absence of intention to use, or violation of prior rights). These sanctions should serve as a welcome deterrent, but, of course, the effects will be found in the implementation.

In addition, it should be possible to claim compensation against those that file malicious trademark applications, the removal of which needs costly oppositions and/or invalidation procedures. This could easily be accomplished by inserting "a trademark registration is applied for in bad faith" into Article 78 of the Draft before "a trademark lawsuit is maliciously instituted".

### Misleading trademark use

Article 56 deals with a wide range of situations, most of which are listed in the current Article 49. The first paragraph concerns the alteration of a trademark or changes made to the name or address of the registrant: such acts are dealt with by a simple warning, an order to rectify, and a possible fine. In this paragraph, the Draft adds one new situation where the registrant uses the registered trademark in a misleading manner.

The second paragraph concerns two situations:

- Where the trademark becomes the generic name of the goods for which it is approved; and
- Where the trademark has not been used for three consecutive years.

In both cases, Article 49 already provides that any



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Paul moved to Beijing in September 1997 and opened the representative office of the French association Unifab, specialising in the protection of intellectual property (IP). As a result, his practice in China evolved progressively towards IP matters. After the creation of the European Chamber of Commerce in 2000, Paul co-chaired the IP Working Group and has been actively involved in the drafting of the EU Chamber of Commerce in China IP position papers and its comments concerning drafts of IP legislation. Throughout his time in Beijing, he has cooperated with Wanhuida in field actions and academic research.

Paul is an active speaker at academic seminars and international conferences. He is the co-author of “What is fuelling the decline in Chinese trademark filings?”, among other articles, and is a member of the China team of MARQUES.



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Dr Huang holds a JD in trademark law from the Chinese Academy of Social Sciences and another from the University of Strasbourg in France. He is a multifaceted intellectual property (IP) counsel with stellar academic credentials concerning China’s trademark legislation and practice.

Dr Huang has vigorously represented clients’ interests in a wide variety of IP matters, some of which have become landmark cases. Since joining private practice in 2002, he has fought for clients in their most intricate trademark matters.

Dr Huang is a prolific writer. He has authored or co-authored a dozen publications, including *L’impact de l’Usage sur l’Étendue de la Protection des Marques: Étude de Droit Comparé Chine – Union Européenne* (2010–18), *Trademark & Unfair Competition Cases in China*, the trademarks section of *Intellectual Property in the European Union*, *Zheng Chengsi IP Anthology – Trademark & Unfair Competition*, and *Trademark Law*. Dr Huang has been involved in the initial drafting of, and amendments to, China’s major trademark-related laws, regulations, and judicial interpretations.

person may file an application for revocation of the trademark.

The Draft adds a third paragraph, which gives the trademark authority the possibility to revoke a trademark ex officio in the two situations described in the second paragraph (genericide and non-use). This additional ex officio power is very welcome as it might accelerate the ‘cleaning up’ of the trademark registry.

However, something is clearly missing in this Article 56. Firstly, the possibility to file a request for revocation of a trademark used in a misleading way should be available to any person, and not only be an ex officio prerogative of the administrative authority. Secondly, the first paragraph that evokes the change made to the trademark by the registrant does not address the case where, because of such change, the trademark morphs into an infringement of

another trademark. It would only be fair, therefore, to provide that whenever such a confusing change is made, the owner of the infringed trademark shall also have the right to request the revocation of the transformed trademark.

### Expanding protection

Article 14 adds to the list of protectable signs a new type of “motion signs”. This addition is welcome. The revision of the law could also be an opportunity to refine the wording of this article. It would be better to replace the “etc” at the end of the list by something like “including, but not limited to”, as it would clearly mean that the list of protectable signs is not exhaustive and that other types of non-conventional signs (such as a plain colour, or a ‘position trademark’) can also be registered, depending on the circumstances.

Article 20 brings a long-awaited improvement to



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Zhigang's practice primarily covers the judicial and administrative protection of intellectual property (IP) in China. He also advises clients on trademark, copyright, design, and domain name registration and protection matters. Zhigang is exploring innovative solutions in subjects such as parallel imports, trademark fair use, trademark co-existence, cross-border e-commerce, well-known trademarks, conflicts of rights, and enforcement of geographical indications. He has secured favourable results for clients in numerous landmark cases.

Zhigang serves on the INTA China Global Advisory Council, is a member of the College of Experts of the French association Unifab, and is a certified lawyer of oriGIn (the Organization for an International Geographical Indications Network). He holds an LLB degree from the University of Poitiers in France and an MSc from the Paris Graduate School of Management (École Supérieure de Gestion).

the protection of unregistered well-known trademarks. Whether it is registered or unregistered, a well-known trademark shall be protected against the registration or use of an identical or similar sign, not only on the same or similar goods but also on dissimilar goods: the 'cross-class' protection.

What is regrettable is that the Draft did not maintain the proposition made in the previous draft of 2023 about the concepts of 'dilution', 'tarnishment', and 'undue profit', which originate from a judicial interpretation by the Supreme People's Court in 2009. These terms describing the different types of damage caused to a well-known trademark are more accurate than the expression "liable to mislead the public", which is still in the Draft. Furthermore, the concepts of dilution and undue profit should also apply in cases where a well-known trademark needs

to be protected against a similar sign registered for the same category of goods, and not only in cases involving dissimilar goods.

### Strengthening the protection

Article 73 improves the scope and means of investigation available to the trademark enforcement administration, which is welcome. However, Article 71, which enumerates the powers of the administration when enforcing a trademark, omits one important word: "destroy". The administration has no power to destroy infringing goods.

Article 74 brings a most welcome precision regarding the compensation awarded by People's courts in cases of trademark infringement. The amount of compensatory damages shall no longer include the expenses incurred by the plaintiff, and such expenses may be awarded separately.

This article also provides for the possibility to award punitive damages that can be up to five times the losses, illegal gains, or a relevant rate of royalty. The problem is that in most cases, since it is difficult to calculate precisely the losses or illegal gains, or find an adequate royalty rate, the courts apply so-called statutory damages, limited to a maximum of RMB 5 million. It has been suggested, therefore, to add in the law a possibility for the court to award punitive damages by multiplying the statutory damages up to five times.

### The 'right to use': a persisting problem

Since 1982, the year of enactment of the first version of the Trademark Law, China has opted for a definition of the trademark right that is fundamentally different from the rest of the world.

To put it simply, in most jurisdictions, the trademark laws provide for a definition of the rights granted by the registration of a sign as a trademark (prevent others from using the sign). In these jurisdictions, the trademark right is, therefore, a negative right.

The first words of Article 1 of the Chinese law provide a different picture: "This law is enacted for the purpose of protecting the exclusive right to use trademarks" [emphasis added]. Article 69 enumerates the types of use that constitute an infringement of the "exclusive right to use" conferred to the trademark registrant.

One might say that both systems are quasi-identical and that someone that has the exclusive right to use a sign is therefore the only person authorised to use it, which implies that it has the power to prevent others.

The resemblance between the two systems is only apparent. The Chinese concept of "right to use" is fundamentally mistaken. Indeed, there is no need to obtain an authorisation to use a sign to distinguish one's goods or services. Even an unregistered trademark may become well known.

The Draft reiterates this fundamental error by adding, into Article 55, "the trademark registrant has the right to use his own trademark".

What challenges does this misnomer create?

According to an interpretation by the Supreme People's Court in 2008, the registered trademark holder is not allowed to initiate a civil action against the registrant of an infringing registered trademark. An invalidation procedure must be initiated beforehand at the administrative trademark authority and it is only after such invalidation has been obtained that the civil lawsuit can be launched. This is contrary to Article 16 of the TRIPS Agreement, which stipulates: "The rights described above [e.g., exclusive right of trademark] shall not prejudice any existing prior rights [including exclusive right of prior trademark]".



Furthermore, when an infringing trademark is invalidated, this “right to use” becomes an obstacle to the award of damages related to the infringement committed prior to the invalidation. The ex-registrant may claim that it had the right to use the trademark. The previous draft, of 2023, provided that the compensation should only be awarded if bad faith is proven. Even if the proposal is not retained in the Draft, this practice remains as recommended by the CNIPA in 2021.

To avoid such complication, it is better to use the words “trademark right” like “patent right” in the Patent Law and to amend Article 9 of the Draft as: “In applying for registration and using a trademark, and in exercising the trademark right, a person shall abide by the principle of good faith. No person may infringe upon the prior lawful rights and interests of others.”

**“Article 20 brings a long-awaited improvement to the protection of unregistered well-known trademarks”**

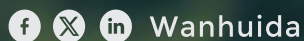
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