

Updates on anti – unfair competition law and new e-commerce law

Philippe Girard Foley

29th of November 2018

Philippe Girard Foley



- [GIRARD – FOLEY & Associates](#)
- pgf@girard-foley.attorney

Over a continuous presence of more than 25 years, Philippe Girard-Foley has helped many European companies protect and defend their IP rights and establish a successful business in Asia, through direct investment, partnership, distributorship, agency, franchising or otherwise. He is a regular speaker at events focusing on China matters, including 'Horizon Chine' with former French PM Jean-Pierre Raffarin, and has authored several publications on China IP laws.

Philippe Girard-Foley has received both a civil law and common law education (Paris Sorbonne, Paris Institute of Political Sciences 'Sciences Po', University of Pennsylvania Law School, CIArb London) and is a member of the Paris Bar from France as well as an associate member of the Victoria Law Institute from Australia. Philippe joined China IPR SME Helpdesk network in 2011.

The E-commerce law in a nutshell

- *Published by the Standing Committee of the National People's Congress on 31st August 2018*
- *Entry into force on 1st January 2019*

Its object - According to lawmaker YIN Zhongqing:

- *"protect the legal rights and interests of all parties"*
- *"maintain the market order"*

The official presentation of the Law

- *The same wording has been used in its press release by Xinhua, the official agency, which adds:*
- *"The law...requires all e-commerce operators to fulfil their obligations to protect consumers' rights and interests as well as personal information, intellectual property rights (IPR), cyberspace security and the environment."*

Another way of saying it

The Law aims at protecting the consumers:

- *against fakes*
- *against the misuse of their personal information*

It protects the IP rights of legitimate manufacturers

It prohibits unfair competition

- *There is a very strong IP/fair competition component in the Law*

The commercial benefits for EU SME's

E-commerce is extremely popular among Chinese customers for several reasons:

- *accessibility: a distribution network far less developed than in Europe*
- *authenticity: products sold via e-commerce are regarded as less likely to be counterfeits*
- *a regulated e-commerce market benefits the genuine players*

A huge market, including for European SME's

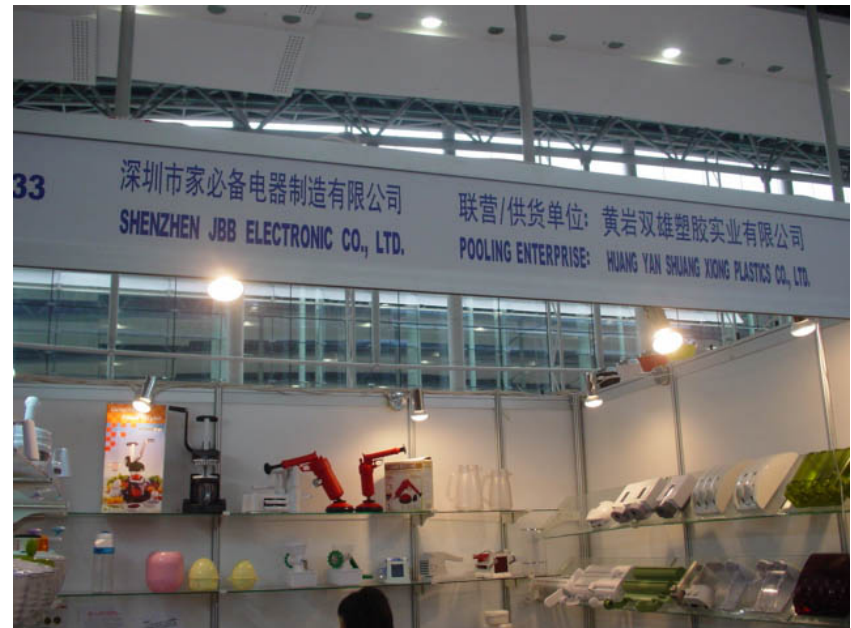
- *An oft quoted illustration of this is the " Singles Day " taking place on 11th November on Alibaba*
- *In 2017, sales on Alibaba made 22 billion €, involving 140,000 brands and 15 million products*
- *Attractive for SME's which don't have to set up a distribution network through traditional channels*
- *but as always, there is a catch...*

The vulnerability of IPR's starts when the product is exposed to the public

- *Used to be trade fairs: here in Guangzhou*



Also seen at Guangzhou Trade Fair (patent)



Up to now, a situation out of control

- *Not just fake products on genuine websites but fake websites !*



The Chinese authorities have put in place a mechanism to combat counterfeit at trade fairs

- This is the usual way: complaint with the Industrial Property Office*

专利行政执法专用表格

专利侵权纠纷处理请求书

专利号	ZL 98 3 29359.7		
发明创造名称	手动播种器		
专利权人	SEB 公司		
姓名或名称	SEB 公司	法定代表人	JEAN-CHRISTIAN M GROS
地 址	法国瑟维热		
邮政编码	21260	电 话	
代理人姓名	张树华 张一军	机构名称	北京万慧达知识产权代理有限公司
地 址	北京市海淀区中关村南大街一号楼首层西侧写字楼二层		
邮政编码	100873	电 话	010-68948018
姓名或名称	黄岩双雄塑胶实业有限公司		
地 址	浙江台州市黄岩区经济开发区龙浦路12号		
邮政编码	318020	电 话	0576-4111799

请求处理的事项(请求理由附后):

1. 责令被请求人立即停止生产、销售“F-1079”型食物加工机, 包括从市场上回收所有的“F-1079”型食物加工机;
2. 在执法部门和当事人的现场监督下, 销毁库存的“F-1079”型食物加工机、销毁与制造“F-1079”型食物加工机相关的模具;
3. 责令销毁印有“F-1079”型食物加工机的宣传资料;
4. 责令被请求人书写不再生产、销售“F-1079”型食物加工机的承诺书;
5. 赔偿请求人的经济损失, 并支付本案立案费、调查取证费。

国家知识产权局专利行政执法司编印 ZLZF2001-001

A specific mechanism at trade fairs which has inspired the E-commerce Law

- *If a trade fair lasts for more than three days (or if required by the officials) the organisers must set up a "Complaint's Centre"*
- *The Centre may decide that the counterfeited goods be removed from the fair, and they must forward the complaint to the competent authorities within 24 hours*

The AIC officers (Administration for Industry and Commerce) are on site

- *They collect evidence*



A complaint can be filed quite simply

提请投诉书

广交会投诉站:

本人现就第 96 届广交会第 三 期 25-11 展位的参展单位
大连金翔进出口贸易有限公司

展出、经营的名称为 马利牌 的物品，涉嫌侵犯本人
(或权利人代表) 的 科华股份 的 2196305870.3 知识
产权。向广交会正式提请投诉。本人对以上的投诉，承诺认可大
会投诉站按照《中国出口商品交易会保护知识产权的投诉及处理
办法》的规定进行处理，同意支付广交会各相关单位处理本投诉
而导致的费用；并同意赔偿因投诉不当对被投诉方造成的损失。

提请投诉人 科华股份有限公司
单位名称 _____
代表人 张树华
联系电话 1380515201
2004 年 10 月 27 日

A fine can be imposed on the spot

广州市工商行政管理局海珠分局
当场处罚决定书

穗工商海分局处罚字(2004)第018号

当事人姓名或名称: 广州市新铁基有限公司
法定代表人(负责人): 莫德
住 所: 广州市海珠区滨江东路109号银中大厦西座25A店

你(单位)于 2004 年 11 月 15 日, 在 212 B店 从事
原案违法“Malibon”注册商标侵权活动, 违反了
《中华人民共和国商标法》第三十九条规定, 但根据《广东省商标管理条例》第二十条的规
定, 现责令你(单位)改正上述违法行为, 并处罚如下:

1. 警告;
2. 罚款 1000 元。

罚款按下列第 1 项规定方式缴纳:

1. 当场缴清。
2. 自即日起 15 日内将罚款交到 建设银行 (地址:)。

到期不缴清罚款的, 每日按罚款数额的 3% 加处罚款。

如你(单位)不服本处罚决定, 可以按下列第 1 项规定的方式提出异议:

1. 自收到本处罚决定书之日起 60 日内向 工商局 工商行政管理局
2. 自收到本处罚决定书之日起三个月内向人民法院提起诉讼。

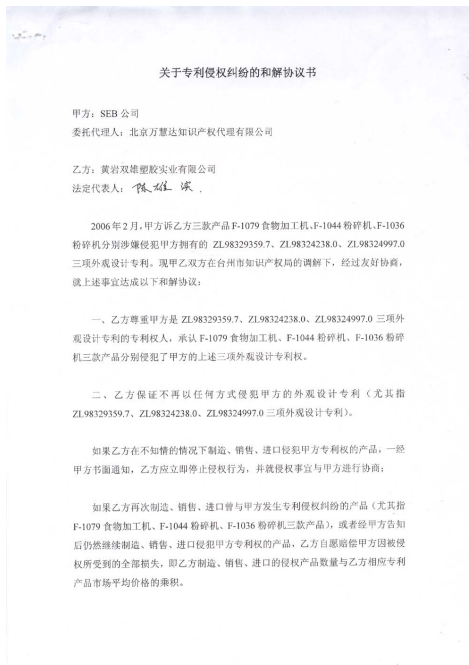
本处罚决定书作出前已依法告知你(单位)作出本处罚决定的事实、理由及依据, 并听取了你(单位)的陈述和申辩。

广州市工商行政管理局海珠分局
2004 年 11 月 15 日

当事人: 莫德 执法人员: 李锐 李锐

本文书一式二份, 一份送达, 一份归档。
No 0005793

or there can be a “cease and desist agreement” with the counterfeiter



Now, the new face of commerce is e-commerce

- *The authorities have stepped up to regulate*
- *this is typical Chinese: they take time, but when they do, they hit hard*
- *because they are fully aware that it is in their interest*
- *counterfeit may have been a step in the development of China but that is long gone*
- *now it stands in the way of China becoming n°1 world-wide power nation*

The E-commerce law is the same principle applied to an emerging reality

- *Is it genuine or a disingenuous way of keeping foreign sellers away?*
- *Keep on reading...*

The reality is...

That e-commerce does not just attract counterfeit, it creates it (or makes it worse) because:

- it flags up the genuine products with counterfeiters who otherwise would not have known about them or known enough about them to copy*
- it "solves" a big issue for counterfeiters which is mass distribution - the one that really earns money*

But it works both ways: risk and opportunity

This is another similarity with the trade fairs:

- *it attracts the attention of counterfeiters, which is a negative*
- *but it is also an "easy" way to spot who are the counterfeiters for your products*

Why easy ?

- because the counterfeiters do not hide (at a trade fair they may even file a complaint for infringement !)*



Much easier than from retail level

- *On a e-commerce platform, the counterfeiters disclose who they are*
- *that makes them much easier to track all the way up to the manufacturer than from a dirty shop in a dark alley*
- *and it makes the collection of evidence much easier*

and another side of the reality is...

...that behind the suits...



...there is still this



The questions to ask

- *Does multimillionaire Mr Jack Ma want this?*
- *Do the Chinese authorities want this ?*
- *Answer is no, and it is a combination of self-interest and genuine concern for the people*
- *so, my point here is that the new Law will be enforced, will hit real hard, and mostly Chinese (not foreigners !) operators*
- *and my further point to European SME's is: do not fall under the hammer out of ignorance of the rules!!!*

The “private” sector

As far as Jack Ma is concerned, the commitment against counterfeit should be pretty obvious: he may loose “stores” but will gain more

A quote from Forbes Magazine:

Jack Ma, the founder and CEO of Alibaba, has entrenched himself in the position that he is an avid fighter of counterfeits and has repeatedly demanded Beijing to take a hard line towards fakes, even going as far as to recommend [throwing counterfeiters in jail](#) in early 2017. Despite this, Alibaba's Taobao marketplace has once again been classified by the Office of the United

States Trade Representative as a “[Notorious Market](#),” a designation for the world's biggest

violators of IP, trademark, and copyright law, sitting on the list right next to [thepiratebay.org](#)



European
Commission

But about the Chinese authorities ? Are they sincere when they claim to wish protecting IPR's ?

10 years ago already, June 2008 in Beijing



Opinion of the State Council on “Strategy for PR China in relation to Intellectual Property”

- *“Intellectual Property is the basic principle on which to base the development and use of knowledge resources”*
- *“Developed countries rely on innovation as the main engine of their economic development and use Intellectual Property to protect their competitive edge”*
- *“Developing countries should embrace strategic policies and measures adapted to their own situation in order to promote their own development”*

Having established...

- *...that the law on E-commerce is not a mere "gimmick" to fool the West but a real piece of legislation that will be enforced...*
- *It is worth taking a look at its content isn't it ?*

Going straight to the points that matter

Point N°1

- *EU SME's (as well as any other "e-commerce operators") fall within the scope of the Law.*
- *Whether they sell in China as "Operators on Platform" ie they sell goods or provide services through "Platform Operators" eg Taobao owned by Alibaba*
- *or they sell or provide through their own website or other channels which may be social media and message services eg WeChat and streaming sites eg Douyin*

Point N°2

- *As a vendor, you will have to convince the platform operators that your goods or services comply with local requirements for personal or property security, and do not violate the lawful rights and interests of consumers*
- *that is because unless they take “necessary measures” the platform operator will be jointly and severally liable vis-a-vis the consumer*

Point N°3

- *Conversely, this is also good news for the legitimate producer and IP owner*
- *the platform operator that knows or should know that a vendor violates the IPR's of another's yet does not take appropriate measures (deleting the links, stopping transactions) it is jointly and severally liable with the infringing vendor*
- *Note: IPR's of another vendor on the platform not any IPR owner*

Point N°4

As an operator under the Law you must be prepared:

- to provide "preliminary evidence" to be included in a "notice and take-down" notice to the platform operator*
- in the event of counter-notice and request for reinstatement (which may be false) to take administrative or court action within 15 days*

Point N°5

Under the new Law, you must:

- *obtain a business licence*
- *register with the tax authorities*
- *display online the business licence and related information*

The upside of this: discovery of suspicious vendor information made easier

Point N°6 - Cybersecurity Law

Article 41, effective since 1st June 2017

Network operators shall abide by the principles of “lawful, justifiable and necessary” when relating rules for the collection and use of such personal information, expressly notifying the purpose, methods and scope of such collection and use and obtaining the consent of the person whose information is to be collected

Cybersecurity Law continued

Article 37

The operator of a key information infrastructure shall store personal information and important data wherever collected or generated in the People's Republic of China, within the territory of the People's Republic of China

To be taken seriously: non compliance is a crime

Ninth Amendment to the Criminal Law - new article 286(a)

It is a crime for network service providers not to perform their duties relating to the safety of personal information

...and not just under the Criminal Law

General Rules of the Civil Law (effective since 1st October 2017)


Natural persons enjoy the right to privacy (article 110)


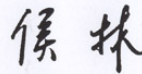
Any organisations and individuals who need to obtain personal information of others shall obtain the information according to the Law and shall ensure the information safety. It is not allowed to illegally collect, use, process or transfer the personal information of others. It is illegal to buy and sell, supply or publish the personal information of others

Do your homework !

- *None of the above means that you should not allow the basic rules for protection of IPR's in China*
- *With regard to trademark, that means a local TM registration - not to rely on international conventions, especially when it comes to asking the AIC's for help*

In practice, only a document in Chinese language and with “chops” will work

商标注册证	
第 1428878 号	
商	标
	
注册人 穆里内克斯股份有限公司 MOULINEX S.A.	
注册人地址 法国 2 RUE DE L'INDUSTRIE 14123 CORMELLES-LE-ROYAL FRANCE	

核定使用商品 第 21 类	
<p>☆漏斗，非贵重金属过滤器，家用非贵重金属篮，玻璃窗清洁剂（非电动），鞋刷，电动牙刷，非电水壶，家用过滤器，铁丝筛子，手提小型厨房用具，非电动家用磨碎器（擦子），非电动家用小型绞肉设备，非电动家用轧碎机，非电动家用打浆机，非电动家用搅拌机，榨（家用器具），非电动家用压榨水果器，非电动家用水果粉碎机，盐瓶，胡椒粉，色拉排水用篮子，非电咖啡过滤器，盛食物及饮料的非金属容器，杯，罐（非贵重金属），碗，碟，汽水或奶油用虹吸管，炖锅，平底锅，蒸锅，压力锅（非电力），食物屑清洁器（非电动），扫帚，扭绞拖把女</p>	
注册有效期限	自公元 2000 年 8 月 7 日至 2010 年 8 月 7 日
局长签发	 

and of course register a “transliteration” in Chinese

- Quaker Oatmeal did not do it and for the Chinese public it has become “the old man’s brand” ‘Lao Ren Pai’ (老人牌)
 - Ralph Lauren did not do it and has been nicknamed the horse with three legs ‘San Jiao Ma’ (三脚马)»
 - But McDonald’s did it ‘Mai Dang Lao’ (麦当劳),
 - and so did Coca-Cola ‘Ke Kou Ke Le’ (可口可乐)
- It is a marketing as well as a legal necessity: if not done, a counterfeiter can easily rely on the spontaneous or not Chinese name

or a local patent certificate

外观设计专利证书

外观设计名称：手动擦碎器

设计人：N·布莱瑟

专利号：ZL 98 3 29359.7

专利申请日：1998 年 12 月 17 日


专利权人：穆里内克斯股份有限公司


该外观设计已由本局依照中华人民共和国专利法进行初步审查，决定授予专利权。

本外观设计已由本局依照专利法进行审查，决定于 1999 年 8 月 7 日授予专利权，颁发本证书并在专利登记簿上予以登记。专利权自证书颁发之日起生效。

本专利的专利权期限为十年，自申请日起算。专利权人应当依照专利法及其实施细则规定缴纳年费。缴纳本专利年费的期限是每年 12 月 17 日前一个月内。未按照规定缴纳年费的，专利权自应当缴纳年费期满之日起终止。

专利证书记载专利权登记时的法律状况。专利权的转让、继承、撤销、无效、终止和专利权人的姓名或名称、国籍、地址变更等事项记载在专利登记簿上。

证书号 第 126961 号
申请号 

局长 姜颖 

第 1 页 (共 1 页)

...and register with Customs, it's free!

知识产权海关保护备案 核准通知书

SEB股份有限公司：

对你（单位）提出的下列知识产权的海关保护备案申请，我署予以核准：

权利名称：一种电热烹饪装置

注册/授权/登记号：881028975

备案号：P2005-06858

生效日期：2005年6月10日

终止日期：2008年5月12日



Thank you for your attention

谢谢

About us: Helpdesk Free Services

Enquiry Helpline

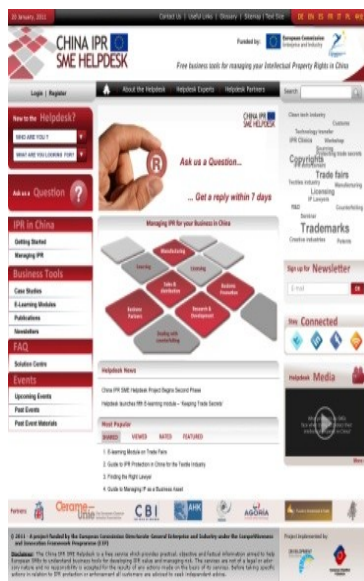


E-learning & Business Tools



**CHINA IPR
SME HELPDESK**

Website & Blog



Training Workshops
& Live Webinars



IP Guides & Newsletters



Enquiry Helpline - Answer in 3 Working Days

- PR **one-to-one** consultations: E-mail, telephone, face-to-face
- **First-line advice** on China and South-East Asia countries IPR matters
- **Confidential**
- Delivered by **China and South-East Asia IPR specialists**
- Available for **EU SMEs and SME intermediaries**



Free Information and Materials Available

- Library of publications:
 - IP** specific guides, incl. patents, trade marks
 - Industry specific guides**, incl. textiles, machinery, creative industries
 - Business guides**, incl. technology transfer
 - Country Factsheets**, incl. Mainland China, Hong Kong, Macao, Taiwan and the 10 South-East Asian countries



- Bi-monthly Helpdesk **Newsletters**
- Article** placement
- Topical **blog** posts
- E-learning** modules
- Infographics**

Follow us in Social Media

For latest:

- News
- Developments
- Projects
- Activities
- Training Materials



www.yourIPinsider.eu



Channel: Helpdesk TV



@iprchina



**China IPR SME
Helpdesk**



**China
IPR SME
Helpdesk**

**CHINA IPR
SME HELPDESK**

