Matters Needing Attention When Citing Patent Information in Advertisements

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Both advertising and patenting are part of the development strategies of modern enterprises. For a long time, they are long in different fields that rarely overlap. However, as science and technology develop and people's awareness of intellectual property rights increases, more and more enterprises prefer to advertise that their products use "patented technologies and achieve advanced technical effects" in a bid to demonstrate their scientific and technological capabilities. Citing patent - related information in advertisements has gradually become a common business practice, and the resulting legal issues have emerged as well.

I. Provisions of Advertising Law and Patent Law and related practices

According to the Advertising Law of the People's Republic of China (hereinafter referred to as the Advertising Law), the term "advertisement" refers to activities that publicize, directly or indirectly and through certain media or forms, some kind of commodities or services by the suppliers of the commodities or services". In the broad sense, a company's official website, brochures distributed at exhibitions, print advertisements and video advertisements are all

當認爲屬於廣告,而受到《廣告法》和《專利法》相關條款的約束。《專利法實施細則》第八十三條第一款規定:"專利權人依照專利法第十七條的規定,在其專利產品或者該產品的包裝上標明專利標識的,應當按照國務院專利行政部門規定的方式予以標明"。 我國國務院專利行政部門即國家知識産權局頒佈的《專利標識標註辦法》第五條規定:"標註專利標識的,應當標明下述內容:(一)採用中文標明專利權的類別,例如中國發明專利、中國實用新型專利、中國外觀設計專利;(二)國家知識産權局授予專利權的專利號"。這表明根據立法精神,我國法律包括《廣告法》第十二條中規定的專利類型和專利號主要是指由我國專利行政部門依法規定的專利類型和依法授予的專利號,這不僅體現國家對專利的管理、對專利權的確認,同時便於消費者查驗該專利的有效性、真實性、新穎性、創造性和專利產品的實用性,也可避免購入侵權產品影響自身權益。反觀,外國專利的信息,由於其授權國家的語言、法律環境、查驗渠道和我國不同,使得中國消費者客觀上很難查驗上述信息。

因此,在中國境內發佈的商業廣告中,雖然目前法律並未禁止宣傳已取得的境外專利,但即使如實標明了境外專利號、專利種類及授予專利權的國別地域,也可能和立法精神相抵觸。所以如無特別必要,應儘量避免在廣告中使用中國以外的外國專利信息。同時呼吁相關立法機關儘快立法規範在中國境內廣告中出現外國專利宣傳的行爲。

綜上所述,在廣告宣傳中引述專利可以起到提昇在同類產品中的競爭力的效果,但是更要注意對於相關專利信息的標註方法和真實有效性問題,以降低法律風險,避免承擔違規造成的法律責任。■

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subjected to the Advertising Law. Patent refers to an exclusive right granted by a state for an invention within a particular country or region, for the purpose of encouraging the society and industries to make technological innovations by protecting the interests of the inventor. The Patent Law of the People's Republic of China (hereinafter referred to as the Patent Law) stipulates that subject matters of patent right are invention-creations, and there are three types of patents: inventions, utility models and designs.

Therefore, citing patent-related information in advertisements can not only demonstrate the scientific and technological capabilities of an enterprise, attract customers, gain higher market bargaining power and product reputation, but also enhance the competitiveness of related products. This explains why it is common to see such expressions as "the product uses a number of patents" or "the patent number of this product is XXX" in advertisements in China.

In face of practical demands, corresponding provisions have been provided in various laws of China.

From the perspective of the Advertising Law, Article 12 of the Advertising Law reads "[i]f an advertisement involves patented products or patented methods, the patent number and patent category should also be clearly defined. An advertisement should not lie about the patent right of any product that has not factually obtained the patent right. It is prohibited to advertise any patent applications that have not been granted, or the patents that have been terminated, cancelled or invalidated." It means that the patent information appearing on packages or in advertisements must be true information of granted and valid patents. Meanwhile, the Advertising Law also requires that the patent and related product in the advertisement should correspond to each other, i.e., the product is the corresponding patented product or the product uses the corresponding patented process. Therefore, the Advertising Law constrains the effect of patents and product orientation so as to prevent merchants from deceiving ordinary consumers with false and irrelevant patents in advertisements and further help to maintain the normal market order.

From the perspective of the Patent Law, the legislative purpose of the Patent Law lies in "protecting the legitimate rights and interests of patentees, encouraging invention-creations, promoting the application of invention-creations, enhancing innovation capability, promoting the advancement of science and technology and the economic and social development". Thus, the Patent Law also prohibits infringing and illegal acts such as exploiting others' patents without authorization, passing off patents, fabricating patent-related information and so on. The related provisions of the Patent Law have a legislative purpose similar to that of Article 12 of the Advertising Law, that is, they both require the right holders to provide true, valid and complete patent-related information in order to protect the rights and interests of consumers and maintain the normal order of the market.

In business operations, if an advertisement does not provide the patent-related information as required or even fails to indicate the type and number of the patent, it may be considered as false advertising, which will not only blemish the enterprise's image, but also result in economic losses or even legal liabilities. Therefore, if it is desired to cite a patent in an advertisement, its information must be indicated correctly according to the Advertising Law and the Patent Law. That the patent has been granted and is still valid is the prerequisite for citing it. On the contrary, a rejected or pending patent application or an expired or invalidated patent shall not appear in an advertisement.

To be specific, as required by the Advertising Law and the Patent Law, once a patent is cited in an advertisement for marketing, the territory in which the patent is granted, patent type and patent number must be indicated. The following is a correct example:

Rigga Yun, a mathematician, has made a huge breakthrough in the development of a lens for Company A, and a patent (Chinese invention patent No. ZLXXXXXXXXXXXX.X) relating to the optical design of the lens with a type of surface was granted to Company A, which marks an important milestone made by Company A for creating personalized lenses.

It is not allowed to generally state that multiple patents have been granted for the product or the product adopts some patented technology without specifying the patent-related information as mentioned above.

II. Similarities and differences between the requirements for patent markings in product packages and advertisements

In practice, TV, Internet and print media advertisements are generally well-known advertising forms to the public. However, there are controversies over whether prod-

uct packages (including labels on the products) can be identified as advertising or an advertising medium.

Generally speaking, commodity traders will also publicize and introduce products on product packages in an effort to attract consumers to choose products on shelves. From this perspective, product packaging is also an advertising activity for commodity traders to introduce their products by such a medium as packaging. Meanwhile, the Reply to the Application of Provisions on the Passing Off of Patents in the Patent Law and Accused Patent Violations in the Advertising Law (hereinafter referred to as the Reply) issued by the China National Intellectual Property Administration (CNIPA) (No.Guozhifabaohanzi 61/2021) stipulates that "I. Acts of continuing to affix patent markings on products or packages thereof after patent rights were declared invalid or terminated---According to Rule 84 of the Implementing Regulations of the Patent Law, 'continuing to affix the patent marking on the product or the package of the product after the patent right concerned was declared invalid or terminated' is an act of passing off a patent as provided for in Article 68 of the Patent Law. Meanwhile, in addition to words, graphics, pictures, etc. required to be affixed by laws, regulations or relevant requirements, anything on product packages that conforms to the characteristics of commercial advertisements shall also be subjected to the Advertising Law." It means that the Reply also recognizes that the contents on the product packages that conform to the characteristics of commercial advertisements, including patent markings affixed on the product packages also pertain to a type of "advertising" and shall be subjected to the Advertising Law.

However, different from common media advertisements (such as TV, Internet and print media advertisements) which are independent of products, product packages and products are usually bound together and enter into the market simultaneously. Therefore, there are often discrepancies in the management of patent markings for terminated, revoked or invalidated patents.

For TV, Internet and print media advertisements which are independent of products, advertisement providers (usually sellers) often have a higher duty of care. When a patent used for publicity or advertising is terminated, revoked or invalidated, the advertisement provider shall timely modify the advertisement to remove the patent marking or replace the patent with a valid counterpart in the advertisement, thereby avoiding the violation of Article 12 of the Advertising Law. Advertising materials, like product brochures, that have already been printed, but not distributed, shall not be distributed.

However, regarding the patent markings on the products or product packages, although the Implementing Regulations of the Patent Law explicitly stipulate that "affixing a patent marking on any product or the package of the product for which no patent right has been granted, continuing to affix the patent marking on the product or the package of the product after the patent right in suit was declared invalid or terminated, or without authorization, indicating the patent number of another person on any product or on any product package belong to acts of passing off patents", and "where the patent marking is legally affixed on any patented product, product directly obtained by any patented process or the package of the product prior to the termination of the patent right, offering for sale or selling the product after the termination of the patent right is not an act of passing off a patent". Both fairness and efficiency are taken into account when judging the validity of the patent by using the production date of the product as the critical point. On the one hand, the product manufacturer is required to have a greater duty of care, i.e., it shall timely modify the corresponding marking on the product or product package in subsequent production after the patent is declared invalid for any reason; and on the other hand, the manufacturer or seller does not have a heavy burden because it does not need to recall the products with "wrong" patent markings from the market or modify the patent marking on the products that have been sold to distributors after the patent becomes invalid, in such a way to maintain the normal market operation.

III. Whether a foreign patent can be cited in advertisements in China

First, patents are territorial rights. A patent granted in a country is only valid within the territory thereof and has no legal effect in other countries. In this sense, a patent granted in a foreign country cannot provide any exclusive right in China and cannot bring any benefits to the patent holder or consumers in the Chinese market. Whether a product sold in China contains a technology patented in a foreign country should not affect the purchasing decisions of Chinese consumers and clients. At the same time, advertisements presented with the help of languages and words are gener-

ally territorial. Marketing within a given territory is usually done only in the local language and according to local laws and regulations. Therefore, it is best to only present the granted Chinese patents in advertisements targeted to China.

As analyzed above, the contents on product packages that meet the requirement of product advertisements shall also be deemed to be advertisements and subjected to the provisions of the Advertising Law and the Patent Law. Rule 83.1 of the Implementing Regulations of the Patent Law reads "where any patentee affixes a patent marking on the patented product or on the package of that product in accordance with the provisions of Article 17 of the Patent Law, he or it shall make the affixation in the manner as prescribed by the Patent Administration Department under the State Council". Article 5 of the Measures for Patent Markings issued by the CNIPA, i.e. the "Patent Administration Department under the State Council" mentioned above, stipulates that "where a patent marking is affixed, the followings shall be indicated: (1) the type of the patent shall be indicated in Chinese, such as Chinese invention patent, Chinese utility model patent, or Chinese design patent; (2) the patent number of the patent granted by the CNIPA". This shows that according to the legislative intent, the "patent category" and "patent number" as stipulated in Chinese laws, including Article 12 of the Advertising Law, mainly refer to the patent type determined and patent number assigned by the Patent Administration Department according to law, which reflects the regulation of patents and conferment of patent rights by China, and meanwhile facilitates consumers in checking the validity, authenticity, novelty and inventive step of the patent and the practical applicability of the patented product, as well as prevent the purchase of infringing products which may impair the rights and interests of consumers. In contrast, it is difficult for Chinese consumers to check the above information on a foreign patent due to the differences in language, legal environment and verifying channels.

Hence, although no law prohibits the marketing with foreign patents in commercial advertisements released in China, even the patent number, patent type and country/region where the patent right is granted, though truthfully marked, may be in conflict with the legislative intent. If not particularly necessary, it is advisable to avoid foreign patents in advertisements released in China. At the same time, we call on the relevant legislature to regulate the acts of publicizing foreign patents in advertisements in China as soon as possible.

To sum up, citing patents in advertisements can boost the competitiveness of products among competitors, but attention shall be paid to the way in which patent-related information is presented and the authenticity and validity thereof in order to lower legal risks and prevent legal liabilities due to non-compliance.

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CNIPA-INPI (France) PPH Pilot Program Launched on 1 June 2023

According to a Patent Prosecution Highway (PPH) acceleration agreement between the China National Intellectual Property Administration (CNIPA) and the National Institute of Industrial Property (INPI), the CNIPA-INPI PPH pilot program has come into effect on 1 June 2023 and would last for five years until 31 May 2028.

PPH is a fast-track way to leverage patent examination procedures of different countries or regions, allowing patent examination authorities to speed up the examination process for patent applications through sharing work. Since the initiation of the first PPH pilot program in November 2011, the CNIPA has built PPH ties with patent examination authorities of 31 countries or regions.

Source: CNIPA