European Commission

CHINA IP SME HELPDESK

Case Study: Industrial Design Infringement in China (Agricultural Machinery)

SME details

Location of headquarters: Europe
Industry: R&D of tractors
Status in China: Preparing to enter the market

Case Background

The SME is a European company focused on the development of tractors. While they have not yet entered the China market, recently, one of their dealers informed the SME about a Chinese company selling the tractors which are similar to the design and colour of those of the SME's old model. The SME had stopped selling the old type of tractors years ago and never sold them to China. Besides, the SME has no IP applied or registered in China.

Since the SME is trying to explore business opportunities in China, they wondered whether the counterfeiting incident might somehow hinder their market entry plans. The SME had a consultation with the China IP SME Helpdesk regarding the said infringement.

Actions Taken

To determine the nature of the infringement, the Helpdesk's IP Business Advisor checked with the SME whether the tractor's design contributed to its functionality. The SME confirmed that the original design of the tractor was not functional. The IP Business Advisor explained that in this situation, the SME is experiencing a design infringement.

In China, industrial design is regulated by patent law, meaning that it must be registered to enjoy full protection. Different from the EU, unregistered design is not protected in China. To patent the industrial design in China, it should be unknown to the public in any market, including China and other international markets prior to registration. Since the copied model is an old one and has already been sold by the SME for many years, obtaining patent for it is no longer an option for the SME.

Alternatively, the SME could consider registering the old model as copyright, which could be used as legal basis to seek for remedies in the infringement case. However, the SME would need to provide evidence of use in China to support their copyright claim to enforce their rights. Since currently the SME has no actual business in China, it would be very difficult to take action against the copied products in China based on the copyright.

The IP Business Advisor recommended that the SME should seriously consider pursuing IP protection in China for any future products, especially patent protection (design patent and invention patent if applicable), before launching them on the market.

Outcome

The SME decided not to take any action against the counterfeiting since they don't sell the old model anymore. Instead, they will monitor the Chinese company, in case of any future infringements. Additionally, the SME will consider seeking patent protection in China for their future technologies and designs.

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Lessons Learnt

- In China, industrial design is protected with patents. Without registration, the SME cannot enforce their patent rights in China.
- Absolute novelty is a must to successfully obtain registration, meaning that the new technology should not be known to the public when the application is filed, in China or anywhere else.
- Patent applications can be submitted via the national filing route or the international filing route using the PCT or the Hague System in case of design patents. International filing allows the SME to file one application to apply to different countries at the same time.
- The sketches, photos and drawings of the industrial designs can be protected as copyright. The protection arising from the copyright is weaker than that from a patent, and it requires much more evidence in the enforcement proceedings.

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