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NEWS ALERT

INTELLECTUAL PROPERTY

How China's Foreign Investment Laws are Expected to Impact U.S. Entities

By John H. Mutchler | June 18, 2021

In 2020, the new Foreign Investment Law ("FIL") was implemented in China. The regulation repealed several existing Foreign Investment Entity ("FIE") laws and has formed a new legal framework for foreign investors. The new framework imposed by the FIL addresses some important intellectual property issues that have previously been a large concern for foreign investors.

One of the biggest changes that has resulted from the implementation of the FIL is that there is no longer a requirement for foreign companies to have a Chinese entity in order to have ownership of Chinese intellectual property. This was previously a condition required for foreign companies who were seeking to invest and collaborate in China. The removal of such a restriction is likely to have a positive impact on foreign companies seeking to do business in the country. The FIL has also resulted in several additional protections being provided to foreign companies. Prior to the FIL, foreign entities were required to share their technology in exchange for market access. According to Article 22(2) of the regulation, the use of these forced technology transfers is now forbidden. While technology cooperation is encouraged, the regulation emphasizes that it should be used based on free will and that use should be determined directly by investment parties. The regulation further provides that in China's effort to protect foreign investors' intellectual property rights, there will be stricter investigations surrounding copyright infringement claims along with a requirement that administrative authorities protect confidential information and trade secrets. See Art. 22(1)(2) and Art. 23. Finally, Art. 21 provides that foreign entities will be permitted to make foreign currency transfers free of charge when exchanging royalties during collaboration with other entities in the country.

Overall, China's new FIL makes clear that the country has strong intentions towards strengthening intellectual property protections for foreign investors. The country's intellectual property courts have noticeably become increasingly more pro-patentee. There has also been an increased level of transparency in the predictability of outcomes and permanent injunctions have been more commonly granted against infringers when sought out. The regulation combined with court trends is likely to have a favorable impact on foreign investors seeking to do business in China.

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PRACTICE POINTS

To comply with the new FIL, newly formed and existing FIEs are expected to amend existing shareholder agreements, joint venture contracts, and other corporate governance documents.

While China's new foreign investment laws have resulted in many broad changes, those with existing foreign investment entities can be put at ease knowing that the new law provides existing entities with a five-year transitional period to assure that its corporate governance structures meet the applicable standards.

The deadline for compliance is December 31, 2024.