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Guide to Trade Mark Protection in China

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1. Introduction

A strong trade mark can be instrumental in winning new customers when establishing a brand in China. Because you invest time and money into building the reputation of your company, it would be very damaging to your own business if someone else began using your name to sell their own products or services.

It is important to note that China uses the 'first-to-file' system, meaning that you may lose legal protection in China if a similar mark has already been registered within China. Therefore it is essential for you to register your trade marks in China before entering into the market so as to diminish the risk of trade marks being registered by someone else first, or in other words 'hijacked'. It is equally important to register early, as this process can take up to 18 months and a trade mark can only be protected in China once the registration has been completed. China is a member of the Paris Convention and the World Trade Organization (WTO), so European businesses need to file in China within six months of filing of the same mark in Europe in order to keep the original application date, so called "priority date".

What is a trade mark?
A trade mark is a sign that serves the specific and primary purpose of identifying the goods or services of a producer, thus allowing the consumers to distinguish goods or services of one producer from those of another. The sign may be composed of words, devices, letters, numerals, three-dimensional signs (shapes), combinations of colours or any combinations of the above.

In order to be eligible for registration, the following points must be adhered to:

- It must be **legal** - it must not be identical or similar to the name or flag of a State, the Red Cross or other international organisations, have discriminative content against a nationality, or consist of exaggerated and fraudulent advertising etc.;
- It must be **distinctive** - the signs must be easy to distinguish and be capable of distinguishing the goods/ services of one person from those of another person;
- It must **not be functional** - this requirement applies, in particular, to three-dimensional shapes that cannot be registered as trade marks if they:
  - Originate only from the nature of the goods/services, i.e. a trade mark that is simply a model of the product itself; the shape of an apple cannot be used as a mark for a company selling apples because generic names need to be free for all to use.
  - Exist in order to achieve a certain technical effect, which would prevent a competitor from producing a product that achieved the same technical effect. For example, the

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Müller yoghurt pot containing two separate compartments could not be registered as the design served a practical function.
    - Enable the goods to acquire their substantive value; i.e. the design of the trade mark, rather than the product itself, adds value because it is so well designed.
- It must be **available for registration**: The China Trade Mark Office's (CTMO) official trade mark database is available online (see related links section) and can be used to search existing trade marks. The database includes preliminary approvals, approvals, renewals, modifications etc. of all trade marks and is available in Chinese and in English. For more information on conducting a trade mark search, please see the 'Related Links' section of the Helpdesk website.

2. How to register your trade mark

A trade mark can be registered through the 'national' or 'international' system and can only be effectively protected in China once it has been registered. China has a centralised registration system, the assessment and registration process is outlined below.

National Registration System

Foreign applicants without residency or place of business in China are required to submit trade mark applications through a local Chinese trade mark agent who will deal directly with the CTMO. A list of the qualified trade mark agents can be found on the CTMO's official website (see the 'Related Links' section). China uses the International Classification of Goods and Services under the Nice Agreement. A separate trade mark application must be filed for each class in which the applicant wishes to obtain protection. The cost for registration excluding legal representation fees is RMB 1,000 (excluding lawyer fees) for one class, and includes 10 items of goods/services. An extra RMB 100 is charged per additional item. Trade mark classes and sub-classes in China are explained in more detail later on in this guide.

International Registration System

Trade marks registered in European countries are not protected in China unless they have also been registered in China. The international registration system is available under the Madrid Protocol through the World Intellectual Property Organisation (WIPO). China and Member States of the European Union are party to the Madrid Protocol[1].

Trade mark certificates:

It is recommended to request the CTMO to issue a certificate of an international trade mark registration valid in China. Such certificate is a necessary evidence of your right for the purpose of enforcement actions.

Under the Madrid Protocol, the application for extension to China is based either on the trade mark application or registration. Your trade mark agent will file your applications with the national trade mark office in the home country of the applicant, which then passes the application to WIPO. The international application should be filed in English, French or Spanish. Upon receipt of the application, WIPO will conduct a formality examination* and will notify all Madrid Protocol members in which the applicant wishes to obtain protection. If, within eighteen months from the notification made by WIPO to China, no objection is made; your trade mark is registered. But please note: if there are objections concerning the registration of your trade mark you will need to mandate a local Chinese trade mark agent to handle the case. Renewals and modifications will also be handled through the international system.

Comparisons: National vs. International Registration System

- **Validity**: The national Chinese trade mark registration and the international trade mark registration are both valid for ten years and can be prolonged for subsequent 10-year protection periods. However, application for renewal must be made within 6 months before the expiration. If the owner fails to do so within that period of time, an extension period of 6 months may be granted. If no application is filed before the extension period expires, the registered trademark will be cancelled.
- **Language of application:** If you use the international system, you can make your application in English, French or Spanish, however, if you follow the national system the application can only be made in Chinese. As a foreign company, you will have to use a Chinese trade mark agent, unless you have a Chinese office and therefore your own Chinese company name and address.
- **Coverage**: The basic fee for the international system covers more than one country at the same time and up to three classes of goods or services. Under the Chinese national system a separate application must be filled per class.
- **Certificates**: In theory there is no difference in scope of protection between the international and national trade mark registration, however, for practical reasons you may wish to apply through the national system in China. By doing so you will also obtain a Chinese language certificate which can be used when undertaking any enforcement action in China and will help speed up proceedings when dealing with local authorities. If you use the international system you will need to request a Chinese language certificate from the CTMO to certify an international trade mark, which can take up to three months following the request.
- **Classifications**: Both the Chinese and the European trade mark registration systems use the International Classification of Goods and Services under the Nice Agreement, however Chinese classes also include sub-classes which are not used in Europe.

[1] *NB. Malta is not part of the Madrid Protocol, however Maltese companies can extend the application through the Office for Harmonization in the Internal Market (OHIM). A full list of members of the Madrid Protocol can be found on WIPO's official website (see the 'Related Links' section).*

- **Cost**: Under the Chinese National Registration System the cost of registration is RMB 1,000 + lawyer's fees including up to 10 items, then RMB 100 per additional item. For the schedule of fees for International Registrations, please see: http://www.wipo.int/madrid/en/fees/.

For more information on the differences between the European and Chinese IP legal systems please consult our guide: Intellectual Property Systems China Europe Comparison, available for download from the 'publications' section of the Helpdesk website.

File in all product and service classes and sub-classes

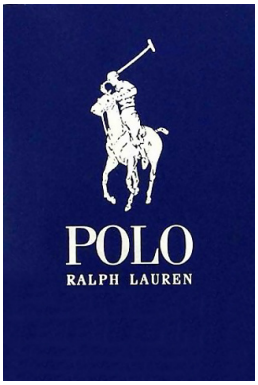
The exclusive right to use a trade mark is limited in scope to identical and similar goods or services. For convenience, products and services are classified into 45 product and service classes. China is unique in further dividing these classes into sub-classes. Products in the same sub-class are often treated as identical or similar. It is important when registering a trade mark that the registration covers products and services in each of the sub-classes containing products and services that may be relevant to your business. It is good practice to register products and services in each sub-class that makes up a class, even if the products and services in a sub-class are only marginally related to your business. This will prevent competitors or infringers from registering an identical or similar mark in the sub-class and using the mark to undermine the brand.

'Well-known' trade marks

In specific circumstances it is also possible to apply for the 'well-known' status of a trade mark (within China) in trade mark infringement and opposition cases. However, there is no official registry of well-known trade marks, and recognition of the well-known status of a trade mark is made on a case-by-case basis, by the administrative or judicial authorities. There are only two specific cases in which this status can be applied for, and the eligibility requirement focuses on the likelihood of confusion, or the misleading of customers. Once an administrative or judicial decision has been made, stating that the trade mark is well-known and ruling in favour of its owner, a record is kept and the owner may use such decision(s) in future cases in order to enjoy additional advantages, such as receiving higher levels of damages and more easily preventing the registration of similar trade marks. Although this status exists, in practice it is very difficult to gain, especially for the European companies. For example, while L'Oreal and Gillette hold this status, Louis Vuitton were unsuccessful in their application in China. For more information on well-known trade marks, please see the 'Related Links' section of the Helpdesk website.

3. Register trade marks in Chinese

Because the registration of a trade mark in roman characters does not automatically protect the trade mark against the use or registration of the same or similar trade mark written in Chinese, it is highly advisable to register a Chinese version of a foreign trade mark. Furthermore, if there is no existing Chinese character name for a foreign brand, it is very likely that one will be adopted by local consumers either by way of translation or by transliteration, and not necessarily with the right connotations or image that the foreign company would wish to convey.



Chinese consumers and foreign trade marks

One quarter of the world's consumers is Chinese, and therefore foreign trade mark owners should give their Chinese character trade marks thought. When choosing a Chinese name, it is a good idea to enlist the help of trade mark attorneys, marketing managers, as well as local, native-Chinese staff in order to give your brand the right image in China and avoid costly mistakes from the start.

Choosing a Chinese trade mark equivalent is particularly important because not only the meaning, but also the sound, tone and even look of the Chinese characters chosen for a trade mark name can affect the brand's reputation. For example, Quaker Oatmeal and Ralph Lauren are two well-known brands that did not create a Chinese trade mark when entering the Chinese market. Therefore, the general public created their own names for the two brands, based on their logos. Quaker Oatmeal gained the nickname 'Lao Ren Pai' (老人牌) which literally translates to 'old man brand'; while Ralph Lauren discovered that their brand was known as 'San Jiao Ma' (三脚马) in China, which translates as 'three legged horse'. The Chinese language has unique characteristics, and therefore your Chinese equivalent trade mark should be carefully developed with the help and guidance of trade mark, marketing and PR experts, as well as native speakers and translators.

Three ways to choose a Chinese trade mark name

a) Create a literal translation

A literal translation works when the trade mark has a distinctive meaning. For example, Apple Computers chose the brand name 'Ping Guo' (苹果), which is Chinese for 'apple'. Similarly, Palmolive is known as 'Zong Lan' (棕榄), a combination of the exact translation of 'palm' and 'olive'. The disadvantage of this method is that the Chinese characters will sound different from the original trade mark. This means that marketing time and money will need to be spent on building the association between the Roman character trade mark and the Chinese character trade mark.

b) Create a phonetic translation

A phonetic translation involves creating a Chinese character name that sounds like the trade mark. Pinyin is the official Chinese phonetic alphabet that uses Roman characters, which can be used to create the transliteration. For example, 'McDonald's' is known as 'Mai Dang Lao' (麦当劳), to local Chinese consumers. 'Siemens' goes by the name of 'Xi Men Zi' (西门子), 'KFC' is known as 'Ken De Ji' (肯德鸡) to locals, and 'Audi' is known as 'Ao Di' (奥迪). This method is preferable when the trade mark already has a reputation amongst Chinese speaking consumers. However, care must be taken when choosing a phonetic version of a foreign mark, because the Chinese characters may have an undesirable meaning in one or more of the six major Chinese dialects.

c) Combine a literal and phonetic translation

The best trade marks are those that sound the same and also make reference to a defining characteristic of the brand or have a positive meaning in Chinese culture. For example, after considering hundreds of combinations of the four syllables that make up its name, Coca-Cola finally settled with 'Ke Kou Ke Le' (可口可乐), which means 'taste and be happy'. The German brand 'Fuchs' which in German means 'fox' is translated into 'Fu Si' (福斯) which translates to 'good luck and blessing'.

4. Bad-faith trade mark registrations in China: Be aware!

As China uses a first-to-file system, many SMEs are caught out because they fail to register their trade mark in China, and then at the time they want to do business there, they find out that their trade mark has already been granted to a Chinese company. Very often the Chinese company in these cases registers the mark with the express intention of selling it back to the foreign company at an inflated price. These prior trade mark registrations are called 'bad-faith registrations', and are a significant problem that many European companies encounter in China. They can limit the foreign company's freedom to operate by restricting its ability to enter the China market, or even to source goods from China, by means of the Chinese trade mark holder engaging China's customs to intercept goods bearing the trademark.

Register trade marks in China if manufacturing in China (OEM)

The phenomenon of contracted manufacturers registering client trade marks is a growing problem facing many foreign businesses manufacturing products in China. This is the case even for manufacturing done exclusively for export. In the event of a dispute, or if the contract manufacturer decides to compete in China, the contract manufacturer may register the trade mark with customs and use it to block export shipments. This can be avoided by registering your own trade marks in China when manufacturing in China.

Trade mark trading

It is important to note that it is legal for the owner of a registered trade mark to sell it. In fact, in China there is an internet-based platform for selling trade marks, a so-called 'trade mark supermarket' (see the 'Related Links' section), which is affiliated to the China Technology Exchange and is approved by the State Council.

But what happens if a European company finds its trade mark on the 'trade mark supermarket' website in China? Selling a trade mark is legal, but what about selling one that has originally been 'hijacked' from its owner? The Trade Mark Law of China outlines what action to take concerning the revocation of disputed trade marks. If any of the trade marks on the mentioned website are found to be sold in violation of the law, action can be taken to have those trade marks cancelled. The company operating the website may be selling trade marks that are valid, but it is highly possible that they were bought and/or registered in bad-faith in order to profit from selling them. Obtaining evidence will provide grounds for invalidating those trade marks.

Invalidating bad-faith trade marks

Another very basic rule of the trade mark law in many countries is its use. This implies that a registered trade mark must be used after a certain 'starting period', otherwise it can be revoked (for example this period is five years in Germany, and 3 years in China following its registration). Use of a trade mark is defined as 'use on goods, packages or containers, or on trading documents, in advertising, an exhibition or any other business activities' to avoid a request for cancellation of the trade mark due to non-use from a third party. One can assume that a significant portion of 'hijacked trade marks' are revoked in China because they are not used during three consecutive years. Furthermore, 'well-known' trade marks in China might be given protection even if they have not been registered in other countries.

Important Note:

In the case of 'trade mark supermarkets', defending a trade mark in the end always depends on the very specific case/trade mark in question. The third party buying a trade mark from such a 'supermarket' should carefully check its legal background; otherwise they might buy a trade mark that cannot be used. The seller of these trade marks should also carefully verify the legal situation of the trade marks sold, as he/she might face high compensation claims.

In China trade marks (except well-known trade marks) practically have no protection if they are not registered, and it is difficult to object to an already registered trade mark because it is a formal, legal process. Nevertheless, companies should at least try to defend their rights against such 'hijacked trade marks' in China instead of simply accepting the infringement. It will be necessary to collect evidence specific to each case and compile a dossier detailing:

- Information gathered on each infringing trade mark, including details of the company's trade mark such as its current registration status, whether it is registered in China, the extent to which the trade mark is used in China (if it is used on goods or products manufactured or sold there)
- Information on the channels of distribution
- Information on the scope of the infringement (items sold)
- All information gathered should be legalised/ notarised and original copies provided

In all such cases where a specific trade mark right is obviously infringed) there is always the possibility that the 'bad-faith' argument can be raised in court. Obvious cases may take less than 6 months to be resolved.

It is important for European SMEs to be aware of bad-faith registrations, because trade mark hijacking is a growing concern. Currently, if a company succeeds in registering these trade marks to offer them for sale, they can make a lot of money; but on the other hand, if such registrations are invalidated they will lose nothing more than the cost of the trade mark. Trade mark agents usually provide a 'watch service' for their clients whereby they monitor attempted registrations of trade marks similar to their clients'. Because some infringing trade marks may be filed in Chinese, it is highly recommended that this service, as well as the assessment and advice regarding the possibility to oppose a trade mark, be entrusted to Chinese speaking professionals and conducted in Chinese. SMEs that encounter bad-faith registrations of their trade marks should seek the advice of a lawyer who will be able to assess each trade mark and the strength of the case for each. A request for revocation must be filed with the Trade Mark Review and Adjudication Board (TRAB). This procedure can also be handled by a registered trade mark agent.

SME Case Study

Background:
In 2009 there was a major trade mark infringement case in China where a European company was sued for RMB 40 million (about EUR 4.5 million) compensation. The European company had been using a worldwide brand which it tried to register in China in 2003, but found that a Shenzhen based company already owned this trade mark. An application for cancellation of the Chinese trade mark based on non-use failed because the Shenzhen company had used the trade mark and had stores in Shenzhen with similar products.

Action Taken:
The European company took the decision to rebrand – meaning that it abandoned use of the brand on its products worldwide, and introduced a totally new trade mark.

Lesson learnt:
The cost to register is often cited as a reason for not registering IPR in China or for not registering in additional trade mark classes. However, far from saving money, such a strategy has time and again proven to be more costly. The issue is not limited to European companies but is also an issue domestically. For example, Harbin 'Zheng Yang He' Soy Sauce saved RMB 1,000 official fee plus some additional trade mark agent fees by not registering its trade mark, only to lose RMB 500,000 by buying it back later. Foreign companies should think ahead and consider registering trade marks in China even if they don't intend to manufacture goods there or enter that market immediately.

5. Enforce your rights

While there are still challenges, trade mark protection through the Chinese court system is markedly improved, particularly in large cities like Beijing, Shanghai, Guangzhou, and Shenzhen, and relatively inexpensive when compared to litigation costs in other jurisdictions. Administrative enforcement (including customs enforcement) and criminal action is also available. These enforcement routes can also be combined to achieve a successful outcome.

Lodging a Complaint: Administration for Industry and Commerce (AIC)

A complaint can be lodged with the local trade mark bureau of the Administration for Industry and Commerce (AIC), above the local level where the infringement is committed (manufacture, sale, storage, etc.), detailing the trade mark rights owned (with a copy of the trade mark registration certificate), and evidence of the infringement which has been identified (such as samples of the infringing product).

This form of action can very much be considered a practical one, with the goal being the investigation and seizure of infringing products. After the conclusion of the raid, the AIC will evaluate the potential infringement and, if satisfied that an infringement has taken place, will order the infringer to cease these acts and should, in principal, confiscate and destroy all goods and tools specifically used in the production of the infringing articles.

Additionally, as a consequence of an action the AIC may also impose a fine; however the amount of the fine is relative to the illegal business conducted, and cannot be more than three times the amount of the illegal business In cases where no fine can be calculated, a fixed amount will be imposed by the AIC up to a maximum of RMB 100,000.

In the resolution of infringement cases, the AIC is a mediator and cannot grant compensation. Therefore the assessment and granting of compensation is exclusively the domain of the Chinese People's Courts.

Administration of Quality Supervision Inspection and Quarantine (AQSIQ)

The AQSIQ is responsible for the monitoring of the quality of products, development and definition of national standards, certification of product quality, and administration of anti-counterfeit and poor quality goods actions. Since the main issue is a quality issue, and not the protection of an intellectual property right, any person may go to AQSIQ and complain without having to justify a personal interest.

In order to file a complaint one of two conditions must be met:

- Goods are of a sub-standard quality.
- Goods are sold in packaging containing false or misleading names and addresses.

AQSIQ has the same powers as AIC during a raid. The fine for fake and poor quality goods is, in most cases, between 2-5 times the value of the goods. To watch a short Helpdesk video case study documenting a raid carried out by a European SME in China, please see the Helpdesk Youtube channel at http://www.youtube.com/smechinaipr.

Civil procedure

- Protection of trade marks

In order to undertake a civil procedure the following steps must be followed:

- A complaint must be filed with the civil division of the People's Courts.
- The court sets a date for a pre-trial hearing, during which evidence will be examined and discussed by the parties before the court.
- Whilst it is possible that the court may act as fact finder and order inspection, in reality evidence is usually put forward by the parties themselves.
- Before concluding proceedings the court will provide the parties involved with the opportunity to settle the dispute.
- The pronouncement of the judgment can take a few months, however the specific length depends largely on the complexity of the case.

- Remedies as a result of civil procedure

The court may lay down the following actions:

- An injunction to cease the infringements.
- Confiscation of all infringing goods, as well as the machinery and equipment used to produce these.
- Impose damages to be paid by the infringing party to the trade mark owner.

- Damages in trade mark infringement cases are determined in relation to:

- The IP owner's losses.
- The profits gained through the infringement.
- Where calculation of the damages is not possible a maximum amount of RMB 500,000 may be imposed.

Customs enforcement

The General Administration of Customs (GAC) is a centralised authority and apply their control at the border to merchandise coming in but also to merchandise going out. This is very useful for stopping containers of infringing goods from leaving the country. Registration (recordal*) of the trade mark with GAC is not a pre□requisite, but it is highly recommended, and, if in place, the GAC will take the initiative to detain suspicious goods without the need for a specific request from the trade mark holder. For more information on how to use customs for enforcement please consult our guide to using customs to protect your IPR in China.

Criminal procedure

- What acts constitute a trade mark infringement?

The activities concerned are:

- Producing or knowingly selling counterfeit products.
- Producing forged or unauthorised representations of trade marks.

- Criminal enforcement/Penalties for Trade mark crimes

In general it is necessary to report a crime with the People's Procuratorate* in order to bring a criminal case before the court. The public security organs have the power to detain suspects and interrogate them, search and inspect premises without restraint.

The penalties for a trademark crime are fixed term improvement of up to 3 years or detention and or fine where conditions are "serious" or the sales are "large", three to seven years fixed term imprisonment where the conditions are deemed "extremely serious" or the sales are "huge"[2].

For more information on how to enforce your rights in China please consult our guide to IPR Enforcement in China, available for download from the 'publications' section of the Helpdesk website.

Take-Away Messages:

- Take steps to register any key trade marks and logos as soon as possible in China, and seek the advice of a lawyer or trade mark agent to ensure adequate protection in related or other relevant classes.
- Register broadly in China - don't just consider the immediate class for the product to be sold, but consider whether the same trade mark could be used on related items or on packaging, advertising or even merchandising.
- Because the registration of a trade mark in roman characters does not automatically protect the trade mark against the use or registration of the same or similar trade mark written in Chinese, consider registering key trade marks in Chinese to (a) pre-empt unwanted Chinese registrations and (b) to prepare the way for sales in China at a future date. Be sure to think about the Chinese translation of your trade mark carefully, and enlist the help of native speakers and marketing experts.
- Understand that different rights cover different aspects of IPR and that each has its limitations (e.g. design patents have a relatively narrow focus), so try to avoid using only one kind, and instead take a layered approach.
- In the case of 'trade mark hijacking', consider buying back the trade mark using a Chinese law firm to negotiate on your behalf. In some cases using a Chinese lawyer may allow you to buy it back cheaper than by going directly to the seller yourself.
- All types of enforcement actions can be combined to achieve optimal results: an administrative raid can be followed by a civil litigation and a negotiation 'stimulated' by the threat of a criminal action.

Related Links

HD Resources

1. HD Solutions Centre: http://www.china-iprhelpdesk.eu/en/solution-centre/trade marks
2. Helpdesk guide – Using customs to protect your IPR in China: http://www.china-iprhelpdesk.eu/docs/publications/Customs.pdf
3. Helpdesk guide: Intellectual Property Systems China Europe Comparison: http://www.china-iprhelpdesk.eu/docs/publications/Intellectual_Property_Systems_China_Europe_Comparison.pdf
4. Helpdesk E-Learning Module on trade marks: http://www.china-iprhelpdesk.eu/en/e-learning-modules

External Resources

5. List of qualified trade mark agents, from the China Trade Mark Office (CTMO) official website - http://www.saic.gov.cn/sbjEnglish/sbdl_1/zmd/
6. Members of the Madrid Protocol, from the World Intellectual Property Office (WIPO) official website – www.wipo.int/export/sites/www/treaties/en/documents/pdf/madrid_marks.pdf
7. State Administration for Industry and Commerce (SAIC) - http://www.saic.gov.cn
8. Trade Mark Office (TMO) - http://www.ctmo.gov.cn
9. General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) – http://www.aqsiq.gov.cn
10. State Intellectual Property Office (SIPO) - http://www.sipo.gov.cn
11. Trade mark 'supermarket' - http://www.gbicom.cn
12. People's Procuratorate: http://www.china.org.cn/english/features/China2005/142017.htm
13. IPR 2: http://www.ipr2.org/index.php?option=com_content&view=article&id=207&Itemid=52

*Guide Glossary**

Formality examination – see Madrid System for the International Registration of Marks – under Geneal information: http://www.wipo.int/madrid/en/general/#para8

People's Procuratorate – The people's procuratorates in China are state organs of legal supervision. Their organization corresponds to that of the people's courts. http://www.china.org.cn/english/features/China2005/142017.htm

Recordal – The process of recording different forms of intellectual property rights.

[2] *EU-China IPR2, Roadmap for Intellectual Property Protection in China, Trademark Protection in China: http://www.ipr2.org/index.php?option=com_content&view=article&id=207&Itemid=52*

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For more information please contact the Helpdesk:

Room 900, Beijing Sunflower Tower No. 37 Maizidian Street
Chaoyang District Beijing 100125, P.R. China
Tel: +86 (10) 8527 6922
Fax: +86 (10) 8527 6923
question@china-iprhelpdesk.eu
www.china-iprhelpdesk.eu

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