



# 大成奢侈品与时尚法律专递

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## Dentons Luxury and Fashion Legal Newsletter

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大成 DENTONS

上海市浦东新区银城中路 501 号上海中心 15/16 层 (200120)  
15/F, 16/F Shanghai Tower, 501 Yincheng Road (M), Pudong New Area, Shanghai  
电话 / Tel: +8621 58785888 传真 / Fax: +8621 58786218

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## 市场动态

### Market Movements

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#### 音米眼镜完成新一轮融资，下半年将挂牌新三板

据报道，创建于 2010 年底的国内线上销量最大的眼镜品牌 INMIX 音米眼镜近期完成了新一轮的融资。本轮融资由中信金石、亚商资本领投，IDG、君联资本等老股东跟投。2015 年 6 月，音米眼镜完成由 IDG 资本和君联资本联合投资的 700 万美元 A 轮融资。据称，音米眼镜将于今年下半年挂牌新三板。

本次融资将有两方面的用途：一是探索线下零售店，音米眼镜将于今年 9~10 月份在北京开出第一家线下旗舰店；二是品牌传播，方式是聚焦内容，涉及用户自我表达、颜值、娱乐等主题。音米眼镜创始人李明表示，其将公司定位为利用互联网的自有品牌零售商，即 SPA (Specialty retailer of Private label Apparel)，并将音米眼镜定位为一个跨越阶层的眼镜品牌。

#### INMIX Completed a New Round of Financing and is Heading to be Listed on NEEQ in Six Months

It is reported that INMIX, a glasses brand has the largest online sales volume in China which was set up at the end of 2010, completed a new round of financing. Gold Stone and ABC Capital were the lead investors while IDG and Legend Capital, as current shareholders, also invested in this round. In June 2015, INMIX completed the A-round financing of US\$ 700 million made by IDG and Legend Capital. It was said that INMIX would list on NEEQ in the second half of this year.

The fund from the financing will be used in two aspects. One is to explore offline retail stores. INMIX will open its first flagship store in Beijing during September to October this year. The other is for its brand promotion, focusing on the contents that involve themes such as self-expression, beauty, entertainment, etc. Mr Li Ming, the founder of INMIX, said that the vision of INMIX is going to be an SPA (Specialty retailer of Private label Apparel), which fits all categories of customers.

#### 路易威登重回香水界

法国奢侈品巨头 LVMH 的旗舰品牌 Louis Vuitton (路易威登) 近日披露了即将面世的香水系列 “Les Parfums”。该系列已于 9 月 1 日登陆 Louis Vuitton 近 200 家门店，分为 100 毫升和 200 毫升两种规格，售价分别为 240 美元和 350 美元。

除了时隔四年重回香水界除外，还引起热议的是，与香水配套，Louis Vuitton 推出了一款特别版的迷你手提箱，可放置三瓶香水，售价 4900 美元。据公司预测，“Les Parfums” 香水系列的第一年销售额可以达到 6000 万欧元。

### Louis Vuitton Came Back to the Perfume Market

Louis Vuitton, the flagship brand of the French luxury brand magnate LVMH, recently released its series of perfume ‘Les Parfums’ that will be put into market soon. The series has been on sale at around 200 stores of Louis Vuitton since 1<sup>st</sup> Sep. It comes with two sizes, 100ml and 200ml. The prices of them are 240 US dollars and 350 US dollars respectively.

Besides the LV’ s coming back to perfume market, another discussion that went viral was that Louis Vuitton released a special mini suitcase which can hold 3 bottles of perfume to form a complete set with its perfume, the price of the suitcase is 4900 US dollars. According the estimation of LV, the ‘Les Parfums’ can reach sales revenue of 60,000,000 euros in the first year.

LV NOW

主题 ▾



### 奥运会也成奢侈品和时尚品牌的竞技场

2016 里约奥运会开幕式之后，小伙伴们就开始八卦本届奥运会上各国的队服了。据不完全统计，下面这些品牌都为本届奥运会队服提供了赞助。

Emporio Armani 品牌旗下的 EA7 运动服装系列为意大利队造势争光。这套运动服系列不只国家运动员可以穿，打开 Emporio Armani 官网，让人忍不住也想来一件。Ralph Lauren 为美国队设计了里约奥运会的闭幕式制服。加拿大队制服是意大利时尚品牌 DSquared2 设计的。法国队则请来了 Lacoste 设计奥运制服，每套衣服还配上防水斗篷，鳄鱼的 logo 也换成了法国国旗的颜色。古巴队制服由法国高档时尚品牌 Christian Louboutin 打造。瑞典队的制服是由国家品牌 H&M 设计生产，配色就是国旗的配色。斯洛文尼亚运动员服装由中国匹克（PEAK）体育用品公司制作和赞助。西班牙队采用了西班牙时尚运动品牌 Joma 的设计。此外，Hermès 在本届奥运会上赞助了巴西马术队官方马术障碍赛的马具用品。

奥运会这个平台能在短时间内让一个品牌传遍全世界，而且奥运会和奢侈品品牌有着很相似的价值观念，运动员们通过刻苦努力、挑战极限达成目标，这也是驱动奢侈品品牌的关键价值；而从奢侈品品牌的角度来看，精益求精的工艺和永无止息的追求精神也是奥运选手必需的。

有些品牌虽没有拿下赞助权，但推出了运动系列产品，比如 Gucci 推出过“城市系列”，向 2012 伦敦奥运致敬。

还有许多品牌将目标投向了更远的未来。LVMH 集团将与巴黎组委会并肩争取 2024 年夏季奥运会的主办权。届时，巴黎代表团的全部工作人员都将身着 LVMH 集团旗下的设计师品牌高田贤三（KENZO）的服装。

## Olympics Becomes an Arena of Luxury and Fashion Brands

Uniforms designed by luxury and fashion brands are widely discussed after the opening ceremony of Olympic games. According to incomplete statistics, the following brands offered sponsorship at 2016 Olympics.

EA7, the sportswear brand under Emporio Armani, designed uniforms for Team Italy. Not only the athletes but also the general people can have this new design by purchasing at its online store. Ralph Lauren designed uniforms for Team USA. Italian brand Dsquared2 designed uniforms for Team Canada. Team France invited Lacoste to design its Olympic uniforms equipped with a waterproof Cloak with the logo of crocodile made of the three colors from the French Flag. Uniforms of Team Cuba were designed by French high-end brands Christian Louboutin. Uniforms of Team Sweden were designed by its national brand H&M with the colors from the Sweden Flag. Slovenia Uniforms were designed and sponsored by Chinese Brand Peak. Team Spain invited its national brand Joma to design the uniforms. In addition, Hermès sponsored the harness of Brazil equestrian team for obstacle race.

The Olympics, as a platform, enables a brand to be known by the whole world at one night. Meanwhile, the Olympics and the luxury brands share similar values – the athletes achieve the goals by hard efforts and extreme challenge, which is a key value driving luxury brands. From the perspective of luxury brands, pursuing the excellence in skills and the endless spirit of pursuit are also essential to athletes.

Although some brands did not obtain the sponsorship for the Olympics, they launched sports products. For example, Gucci launched “Cities” as a salute to the 2012 London Olympics.

Many brands look forward to the future. LVMH Group will cooperate with Paris Olympics Organizing Committee to compete for the bid to host 2024 Olympic Games. At that time all staff of the Delegation of Paris will wear the attire design by KENZO.

### 《芭莎艺术》和《新视线》上月停刊，纸媒向新媒体发展

著名艺术时尚类杂志《芭莎艺术》和《新视线》已宣布从今年 8 月起停刊。继《外滩画报》杂志停刊后，白领阶层所喜爱的这两家时尚杂志陆续退出纸质媒体舞台。

曾经，大批有着国外杂志“血统”的杂志掀起了在中国期刊市场的“淘金之旅”热潮。尽管按照《外商投资产业指导目录》，中国不允许外资进入图书、报纸、期刊的出版业务。但许多外国传媒公司仍绕道而入，通过版权合作等方式几乎占据了我国时尚类杂志的“半壁江山”。如今它们又由于受到新媒体的猛烈冲击，纷纷停刊，不禁令人唏嘘。但是，这并不意味着时尚杂志的没落，据了解，它们一直在试图向新媒体转型。《芭莎艺术》的官方微信已宣布，其官网经过不断调整之后重装上线，并且目标是做“中国第一美学网站”。并且，有消息称接下来有公司会收购《芭莎艺术》这个品牌。

### BAZAAR ART and THE OUTLOOK MAGAZINE Both Stopped Publication of Hardcopies Magazines Last Month and Planned to Develop Through New Media

Recently, it is said that the famous art and fashion magazine *BAZAAR ART* and *THE OUTLOOK MAGAZINE* both has stopped publication hardcopies magazines since August. After the discontinued publication of *THE BUND*, a group of the famous art and fashion magazines stepped down from the stage of papery media.

A large number of magazines with foreign origin caused a gold fever in the Chinese periodical field. Though according to the *Guidance for Foreign Investments in Various Industries*, foreign investments are not allowed in the field of publication of books, newspaper and magazines, many foreign media groups still get around this restriction and make the investment by working with copyright owners and has occupied nearly half of the market of art and fashion magazine. It is a shame that they have to stop publication due to the attack of new medias. However, this does not indicate the breakdown of art and fashion magazines. It is said that they are making the transition to new medias. *BAZAAR ART* declared on Wechat that its official website of *BAZAAR ART* has renewed after adjustment for a long period. Their target is to make a China Number One website of esthetics. In addition, it is said that there is a company that will purchase the brand of *BAZAAR ART*.

### LVMH 集团出售尚嘉中心股份给梁安琪

有消息称，LVMH 集团已将其持有的一家位于上海虹桥的新建高端商场“尚嘉中心”的股份出售给“澳门赌王”何鸿燊的第四任妻子梁安琪。此前曾传闻国际私募基金黑石集团拟以 50 亿元人民币的代价向 LVMH 集团和何鸿燊收购尚嘉中心的股份。2007 年，何鸿燊与 LVMH 集团分别通过旗下澳娱集团和 L Real Estate 房地产公司，各投资 5 亿美元建造了尚嘉中心 L'Avenue。LVMH 集团出售股份后，意味着梁安琪成为尚嘉中心的唯一持有人。据悉，LVMH 集团和历峰集团旗下所有在尚嘉中心设有门店的品牌将继续运营。

### LVMH Group Sold Its Shares in L'Avenue to LEONG, On Ki Angela

It is reported that LVMH Group has sold its shares in L'Avenue, a newly-built high-end shopping center located in Hongqiao, Shanghai to Angel Luong, On Ki, the fourth wife of Ho, Hung San, the tycoon of Macao gambling industry. Rumor has it before that the international private fund Blackstone Group was to buy out the shares of LVMH Group and Ho, Hung San in L'Avenue for RMB 5 billion. Ho, Hung San, by his entertainment group, and LVMH Group by its L Real Estate, both invested in L'Avenue for US \$ 500 million respectively in 2007. After the sale of shares by LVMH Group, Angela Leong becomes the sole owner of L'Avenue. It is said that the brands under LVHM Group and Richemont will continue their business operation in L'Avenue.

## 案例研究

### Case Study

#### “红鞋底”标识能否在中国注册为商标？

由法国鞋履设计师 Christian Louboutin 先生于 1992 年设计出来的红底鞋是国际知名奢侈品牌 Christian Louboutin 的招牌标识。由于其能够凸显女性的美丽及性感，红底鞋一直受到时尚界的喜爱。红鞋底商标于 2010 年在世界知识产权组织马德里国际商标体系网站上进行国际公告，注册号为 G1031242，商标权人为 Christian LOUBOUTIN，原属国系英国。据说，Christian Louboutin 先生在办理申请手续时曾说，“鞋底的艳丽红色就是用来告诉大家，这双鞋是我设计的。穿着这双鞋的女人更能够吸引男人们的目光。”

Mark	IRN	Holder	Origin	Transaction
	<a href="#">1031242</a>	Christian LOUBOUTIN	GB	Registration

#### 案情回顾

为了使红色鞋底设计在中国同样获得保护，根据《商标国际注册马德里协定及该协定有关议定书的共同实施细则》（以下简称“《议定书》”），Christian Louboutin 公司作为申请人，向国家工商行政管理总局商标局商标评审委员会（以下简称“商评委”）提出了红鞋底标识在中国的领土延伸保护申请。然而，2010 年 10 月 21 日，商标局以国际注册第 G1031242 图形标识缺乏显著性为由，驳回申请人提出的商标注册申请。

申请人因不服商评委做出的决定，于是提出复议。商评委在 2015 年 1 月 22 日做出复议决定，其仍旧认为，申请标识不具有显著性。理由包括：

- （一）申请标识由通常的高跟鞋图形及鞋底指定单一的颜色组成，指定使用在女高跟鞋商品上，相关公众不易将其作为用来区分同类商品的来源的标识加以认知。
- （二）申请人提交的证据不足以证明整体标识在女高跟鞋商品上的申请标识，经过实际有效的商业使用，已经具有显著性。



(三) 根据商标确权审查的地域性原则，申请标识在其它多个国家和地区获准注册，不能成为其在我国获准申请的依据。

因此，商评委决定，根据我国商标法第十一条第一款第(三)项、第三十条、第三十四条的规定，对申请标识指定使用在第25类复审商品上在我国领土延伸保护申请予以驳回。

申请人于2015年2月9日，以商评委为被告，向北京知识产权法院提起商标行政诉讼，请求法院判决撤销该决定。原告(即申请人)认为：首先，申请标识属于非传统商标中的位置商标。位置商标指某种商品特定部位的形状、图案、颜色以及它们的组合，公众通过它们来区分商品或服务的提供者。它不是和平面商标或立体商标并列的商标类型，只是在平面或立体商标的基础上进一步限定了商标的使用的位置，符合商标构成条件。另外，我国签署的《商标法新加坡条约》中细则三第七条已承认位置商标。其次，原告认为申请标识已经通过使用，使消费者能够通过它来识别商品的提供者，即已取得“第二含义”，因此具有显著性。为证明申请标识具有“第二含义”，原告提交了其商品在全球媒体上的新闻报道、在中国的销售记录、时尚编辑证明函、以“红底鞋”为搜索词的网页搜索结果等证据。

到目前为止，法院对该案还未进行判决。

### 争议焦点分析

本案的争议焦点是兼有位置商标和单一颜色特点的红鞋底标识是否符合我国商标构成条件。

我国修订后的《商标法》于2014年5月1日正式实施，其规定了商标构成条件：(一)具备法定的商标构成要素；(二)具有显著性，或通过使用获得显著性；(三)不在禁止注册范围内。若要在我国申请注册商标，以上三个条件必须同时满足。红底鞋标识显然不属于禁止注册范围内，以下将结合本案分析前述第(一)、(二)个条件是否满足。

#### 关于显著性的要求

新《商标法》第九、十一条均强调商标应当具有显著性，缺乏显著性的标识不得作为商标注册，如仅表示商品的质量、主要原料、功能、用途、重量、数量及其他特点的标识，但是通过使用取得显著性的除外。由于显著性是一个抽象的法律概念，商标法不可能穷尽商标缺乏显著性的情形。因此，我国商标局在商标审查实践的基础上，还制订了商标显著性审查标准，如《商标审查标准》(1994年12月)、《外文商标审查标准》(2001年12月)等。

判断一个商标是否具有显著性，理论上，我国采取“自他商品识别力说”，即认为显著性乃标识借以识别自己与他人商品之能力，是一相对的概念，须考虑该商标使用的商品、商品的消费

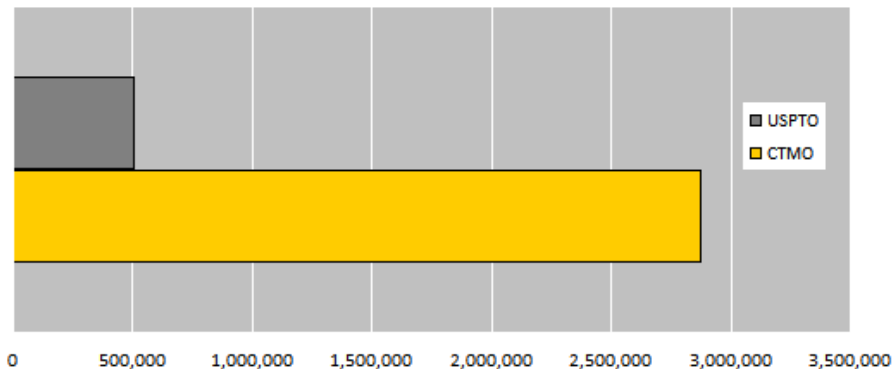
者等因素，故只能在个案中决定。凡是标识具有识别商品来源能力者，即具有商标的显著性。如果符号本身在外观上欠缺商标的显著性，但经过长期使用，具有识别商品来源的作用，也承认该符号具有了商标的显著性。

国家工商行政管理总局商标局（2000）商标异字第 2463 号《关于第 1317000 号“花好月圆”商标异议的裁定》中曾表示，因“花好月圆”是人们在喜庆（特别是婚庆）活动中常用的吉祥语之一，而酒类商品与此类喜庆活动密切相关，因而该符号使用在酒类商品上直接表达了人们的美好祝福，消费者并不能通过它将涉案商品从其他酒类商品中区分出来，因此“花好月圆”符号缺乏商标的显著性。

本案中，红鞋底标识能否直接（或通过使用）使消费者区分出商品的提供者就是 Christian Louboutin 而不是其他品牌，将成为法官考量红鞋底标识是否具有显著性的标准。

### 关于商标构成要素

新《商标法》第八条明确规定“任何能够将自然人、法人或者其他组织的商品与他人的商品区别开的标志，包括文字、图形、字母、数字、三维标志、颜色组合和声音等，以及上述要素的



组合，均可以作为商标申请注册”。《商标审查标准》第二部分“商标显著特征的审查”第五条“其他缺乏显著特征的”中明确包含“单一颜色”。由此可见，在我国，就颜色商标而言，至少两种颜色的颜色组合是可以作为商标申请注册的要素，而红鞋底标识，作为一个单一颜色的标识并不具备我国法定的商标构成要素。

本案中，我国商评委和知识产权法院的态度或许将更倾向于严格按新《商标法》对于构成商标所必须具备的要素来操作，而单一颜色标识不具备我国商标构成要素。另外，据统计，去年我国商标申请数量已达将近三百万件（2,876,048 件）；去年我国法院受理的商标有关争议案件共 24,168 件。而美国约五十万件（503,889 件）。如果单一颜色很容易在我国注册成为商标，那么它将可能排除大量在其之后申请的商标获得注册的可能性；并且其他商标很容易成为侵害其商标权的侵权者，相关的商标争议因此也会大幅度增加。由此造成商标市场的混乱，并不是大家所希望看到的。

因此，我们认为，单一颜色的红鞋底在争取我国商标权的路途上将满是障碍。

### 美国司法实践

关于“单一颜色是否获得商标保护”这一问题，在 2011 年 Christian Louboutin 诉 YSL 的“红鞋底争夺战”中，我们也可以得到一些启示。一审时，美国联邦法院判原告 Christian Louboutin 败诉，理由是红鞋底的使用过于宽泛。但二审时，法院判定 Christian Louboutin 享有对红鞋底的商标权，但同时认为当其他品牌设计的鞋子整体为红色时，不属侵权，YSL 即是如此。



由此可见，美国法院的态度是：单一颜色在一定程度上是可以注册为商标，受有关法律保护的，但是其保护范围有限，且法院似乎并不乐意看到更多单一颜色商标的出现。这一点在 Tiffany 和 LOUIS VUITTON 的商标维权经历上也可以看出来。Tiffany 蓝于 1998 年成功注册为单一颜色商标，但是只有在同类或类似商品或服务上，该单一颜色商标才收到法律保护。换言之，在不同类别商品和服务上使用 Tiffany 蓝，并不构成侵权。LOUIS VUITTON 的棋盘格商标申请于今年 5 月被德国法院以“过于简单，缺乏显著性”为理由予以驳回，即使棋盘格已经超过了一种颜色。

### Will Red Sole Mark Be Protected as A Registered Trademark In China?

The shoe with the mark of the sole color of red (Red Sole Shoes) which was designed by a French footwear designer Mr. Christian Louboutin, is signboard of the world-renowned luxury brand Christian Louboutin. The shoes with red soles are always popular in fashion industry because they can show women's beauty and their sexy appearance. The trademark of red soles is announced on the website of World Intellectual Protection Organization (WIPO) Madrid International Trademark System. Its IRN is G1031242. Its owner is Christian LOUBOUTIN and the origin is Great Britain. It is said that when making the application of the trademark, Mr. Christian Louboutin said, "The gorgeous red sole is going to tell you that this pair of shoes is my design. In this pair of shoes, women attract men's attention."

## Facts of the Case

To obtain the protection for the design of red soles in China, Christian Louboutin, as the applicant, made an application of the extension of protection of red soles as a trademark at the Trademark Review and Adjudication Board of the Trademark Office of the State Administration For Industry & Commerce of the People's Republic of China (SAIC) (hereinafter refer to "Trademark Board" ). On 21<sup>st</sup> Oct 2010, the Trademark Board rejected the application for trademark registration and gave the reason that the No. G1031242 mark lacked distinctiveness.

The applicant was not satisfied with the decision and applied for reconsideration. The Trademark Board made a decision on the reconsideration with the same view that the mark in application lacked distinctiveness. The reasons were as the following.

- (1) The mark in application is consisted of a picture of a high-heeled shoe and a single color on it, the product of which is women's shoes. However, it is not easy for the public to recognize it as a sign to distinguish the different sources of the products from the same category.
- (2) The evidences submitted by the applicant failed to prove the mark in application, which is entirely marked on the product of women's heels, has gain distinctiveness through effective and real commercial use.
- (3) According to the principle of territory, the fact that the mark in application is registered as a trademark in other countries and areas cannot be a foundation to make it successfully registered in China.

Accordingly, the Trademark Board decided to reject the application of protection extension on the mark in application used on the products in Category 25, according to the 3<sup>rd</sup> item of Paragraph 1 of Article 11, Article 30 and 40 of the Trademark Law.

On 9 Feb 2015, the applicant brought an administrative lawsuit against the Trademark Board at the Intellectual Property Court in Beijing. The claimant, namely the applicant, made the following arguments. First, the mark in application is a position mark. A position mark is a shape, picture, color or their combination applied in specific areas of a product, which can be used for the public to distinguish the providers of the products or the services. It is not a type of trademark ranked with Two-Dimension Mark or Three- Dimension Mark, but limits the position of the trademark based on Two-Dimension Mark or Three- Dimension Mark. Position mark meets the conditions of a trademark. In addition, in the *SINGAPORE*

*TREATY ON THE LAW OF TRADEMARKS* that our country signed, Rule 3, Paragraph 7 has admitted the validation of position mark. Second, the mark in application has obtained “a second meaning” and has become distinctive through the use, which enabled the consumers to distinguish the providers of the products. To prove the mark in application has obtained “a second meaning”, the claimant submitted the reports on international medias of its products, the sale record in China, confirmation letters from fashion editors and the search results with the key word of “red soles”, etc.

Until now, the court has not made any decision on this case.

### Analysis of core issues

The core issue of this case is whether the red sole mark with both the characteristics of position mark and single color mark is in accordance with the constitutive requirements of a trademark in the *Trademark Law* in China.

The amended *Trademark Law* that took effect on 1<sup>st</sup> May 2014 clarifies the constitutive requirements of a trademark, including: (i) Having the constituent elements consisting of trademarks provided by the law; (ii) Having distinctiveness, or having distinctiveness that is obtained after use; (iii) Not being included in the list of signs that shall not be used as trademarks. Only if a mark meets all the three requirements, it can be registered as a trademark in China. Red soles mark is not included in the list of those shall not be used as trademarks. Thus the issues are whether (i) and (ii) are satisfied here.

#### Regarding the requirement of distinctiveness

Article 9 and 11 of the amended *Trademark Law* emphasizes that a trademark shall have distinctiveness; a mark without distinctiveness shall not be registered as a trademark, such as a mark which merely directly expresses the quality, key ingredients, functions, purposes, weight, quantity and other characteristics of the commodities, except that it possesses salient features after use. Considering that distinctiveness is an abstract legal concept, the Trademark Law cannot include all situations of non-distinctiveness, the Trademark Office made standards of distinctiveness based on practices, including *Trademark Examination Standard* (Dec 1994) and *Foreign Language Trademark Examination Standard* (Dec 2001).

In determination of the distinctiveness, China applies the doctrine that distinctiveness is a capability of a mark enabling the public to recognize its own products from others. It is a relative concept, which can only be judged case by case as the products where the mark is applied to and the consumers shall also be put into account. If a mark enables the public to recognize its own products from others, it shall be considered as having distinctiveness.

A mark itself that lacks distinctiveness can possess distinctiveness through effective long-time use, and therefore gain the capability of recognition.

The (2000) Trade Yi Zi No. 2463 *Ruling on Opposition of the Mark No.1317000 “花好月圆”* that was made by the Trademark Office suggested that “花好月圆” ( “the flowers are blossoming and the moon is full” ) is a bless phrase in celebration especially in wedding and alcohol is connected to such celebration. The wording of “花好月圆” just shows greeting but does not enable the public to recognize its own products from others. Therefore, it is lack of distinctiveness.

In this current case, whether consumers can distinguish the provider of Christian Louboutin from others by red soles (directly or after use) shall be the key issue for the court to judge in determining whether red sole mark has distinctiveness.

#### Regarding the requirement of the constituent elements

Article 8 of the amended *Trademark Law* clarifies that ‘any mark which can differentiate the commodities of a natural person, legal person or any other organization with the commodities of others, including text, graphics, alphabets, numbers, three-dimensional mark, color combination and sound, etc, and a combination of the aforesaid elements, may be registered as a trademark.’ *Trademark Examination Standard* clarifies a single color mark as of none distinctiveness in Part 2 The Examination of Distinctiveness Article 5 Other Situation without Distinctiveness. Therefore, in China, regarding color trademark, a color mark with the combination of at least two colors is a constituent element of a trademark. However, a red sole mark, which is a single color mark, is not.

In this case, the Trademark Board and the Intellectual Property Court may prefer to make a decision strictly in accordance with the requirement of the constituent elements in the amended *Trademark Law*. Nevertheless, a single color mark does not satisfy this requirement. Also, it is said that 24,168 trademark disputes has been raised before Chinese Court in 2015. In contrast, only around five hundred thousand (503,889) TM applications have been filed with USPTO in 2015. If a single color trademark were easily registered in China, it would disturb the registration of a large number of marks in the future. Meanwhile, the use of the marks in application in the future are even likely to bring infringement against the registered one in the past and disputes will be raised accordingly. This is likely to cause chaos in the trademark market while it is not we hope to see.

Accordingly, in our view, it is very hard to register a single color mark as a trademark.

Practice in the U.S.

Regarding the question whether a single color mark can obtain trademark protection at law, it seems that the *Christian Louboutin v. YSL* case can also give us a hint. In the first instance, the federal court made a judgment against the claimant Christian Louboutin with the reason that red soles were in wide use. However, in the second instance, the court confirmed that Christian Louboutin owned the trademark right of red soles but held the view that if the product is entirely red, there shall be no act of infringement; such as YSL's use in its shoes.

As we can see, the attitude of the American court is that, a single color can be registered as a trademark to some extent and can be legally protected in limited circumstances. The court seems unwilling to see more single color trademarks to be registered. This can be inferred from both Tiffany and LOUIS VUITTON cases. Tiffany blue was registered as valid trademark in 1998. But it can be protected only if it is applied on the same or similar products or services. In other words, Tiffany blue can still be used in different categories of products and services and it will not be considered as infringement. LOUIS VUITTON was rejected by a German court on its application for chessboard trademark with the reason that it was 'too simple and lack of distinctiveness' though a chessboard mark had more than one color.

## 立法动态

### Regulation Update

#### 《消费者权益保护法实施条例（征求意见稿）》

近日，国家工商总局向工商系统内下发了《消费者权益保护法实施条例（征求意见稿）》（以下称《消保法实施条例征求意见稿》）。以下方面值得关注：

##### “职业打假人”不属于消费者

最受关注的《消保法实施条例征求意见稿》第二条对该法适用对象进行了界定：“消费者为生活消费需要而购买、使用商品或者接受服务，其权益受本条例保护，但是自然人、法人和其他组织以营利为目的而购买、使用商品或者接受服务的行为不适用本条例。”本条规定无疑给“职业打假人”当头一棒。早在1995年，王海在北京隆福大厦购买了12副假冒索尼耳机，并依法获得赔偿，从此走上以营利为目的的“职业打假”道路。“职业打假”也因此迅速引起关注，并被效仿。“职业打假”二十年来，对其评价褒贬不一。据称正式的《消费者权益保护法实施条例》会在今年年内出台，是否会对消费者和“职业打假”进行“一刀切”，我们将拭目以待。

##### “三包”服务不必以消费者提供发票为前提

《消保法实施条例征求意见稿》第九条规定，对无发票和“三包”凭证但是有其他证据证明商品或者服务在“三包”期内的，经营者不得拒绝履行“三包”义务。

##### 规范预付卡退卡

《消保法实施条例征求意见稿》第三十八条规定，消费者自购买预付卡之日起三十日内，可以凭经营者开具的购货凭证、服务单据或者收费清单等销售凭证向经营者办理退卡；经营者应当自消费者提出退卡要求之日起七日内，按照购货凭证、服务单据或者收费清单等销售凭证标明的价款办理退卡。

#### The Administrative Measures on the Law of the People's Republic of China on the Protection of Rights and Interests of Consumers (Draft for Comments)



Recently, the SAIC issued the *Administrative Measures on the Law of the People's Republic of China on the Protection of Rights and Interests of Consumers (Draft for Comments)* (hereinafter referred to as "*Draft Administrative Measures on Law of Consumer Protection*") to the local AICs. The following points are noteworthy.

### People who take legal measures against fake and shoddy products as an occupation are not considered as consumers

It is well noted that Article 2 of the *Draft Administrative Measures on Law of Consumer Protection* that consumers who purchases and use products or accept services for living consumption are protected under these administrative measures, however natural person, legal entity and other organizations who purchases and use products or accept services for making profits are not applicable under administrative measures. This provision will have a destructive influence on the people who take legal measures against fake and shoddy products as an occupation. Back to 1995, Mr. Wang Hai purchases 12 pieces of fake Sony earphone in Beijing Longfu Mall and got the compensation in accordance with the law, and he started his career of taking legal measures against fake and shoddy products for making profits. This occupation became highly noted and copied. There have always been positive and negative opinions on this occupation for a decade. It is reported that the final *Administrative Measures on the Law of the People's Republic of China on the Protection of Rights and Interests of Consumers* will be promulgated at the end of this year. We will see whether the authorities will draw the line between consumers and people who take legal measures against fake and shoddy products for making profits in such a direct method.

### Providing fapiao is not necessary for requesting "return, repair and change"

Pursuant to Article 9 of the *Draft Administrative Measures on Law of Consumer Protection*, the business operator shall not refuse to provide "return, repair and change" services to consumers who cannot provide fapiao and after-sale services documents as long as they can prove that the products or services are still in the warranty period.

### Provision on return of pre-paid card

Pursuant to Article 38 of the *Draft Administrative Measures on Law of Consumer Protection*, consumer may return the pre-paid card to the business operator within 30 days of purchasing the card by providing the sales document, service document or list of charge; the business operator shall accept the card returned by the consumer within 7 days of request by the consumer in accordance with the price stated in the sales document, service document or list of charge.

## 《互联网广告管理暂行办法》

国家工商总局于 2016 年 7 月 8 日发布了《互联网广告管理暂行办法》（以下称《暂行办法》），自 2016 年 9 月 1 日起施行。在互联网广告合规中以下几点值得重点关注。

### 明确互联网广告的定义

《暂行办法》第三条规定，“本办法所称互联网广告，是指通过网站、网页、互联网应用程序等互联网媒介，以文字、图片、音频、视频或者其他形式，直接或者间接地推销商品或者服务的商业广告。”互联网广告还需要符合《广告法》第二条对广告的定义，即，“在中华人民共和国境内，商品经营者或者服务提供者通过一定媒介和形式直接或者间接地介绍自己所推销的商品或者服务的商业广告活动”。

以下广告属于互联网广告：(1) 含有链接的文字、图片或者视频等形式的广告；(2) 电子邮件广告；(3) 付费搜索广告；(4) 商业性展示中的广告；(5) 其他通过互联网媒介推销商品或者服务的商业广告。应当注意，《广告法》中规定的间接介绍商品和服务的内容也属于广告，因此，通过互联网发布的软文、事件营销、企业形象展示等也将构成互联网广告。

### 互联网广告合规重点要求——具备可识别性

首先，《暂行办法》第七条规定，“互联网广告应当具有可识别性，显著标明‘广告’，使消费者能够辨明其为广告。”该要求是否意味着必须标注“广告”二字？“推广”或“AD”等其他都不可以呢？我们对此保留意见，并期待国家工商总局发布具体规定对此说明。

其次，《暂行办法》明确规定付费搜索内容也属于广告。付费搜索广告应当与自然搜索结果明显区分，不使消费者对搜索结果的性质产生误解。

第三，根据《暂行办法》第八条规定，未经允许，不得在用户发送的电子邮件中附加广告或者广告链接。同时，根据《消费者权益保护法》、《广告法》等关于个人信息保护的规定，未经消费者同意，不得以电子信息方式向其发送广告；以电子信息方式发送广告的，应当明示发送者的真实身份和联系方式，并向接收者提供拒绝继续接收的方式。对于电子邮件、即时通讯信息等广告，我们建议在发件人和标题部分明示邮件、信息的来源和性质，使消费者在打开邮件、信息之前即能获知其广告性质，并且在邮件和信息中应表明发送者的信息和联系方式，提供拒绝接收的方式。

此外，《暂行办法》要求不得以欺骗方式诱使用户点击广告内容，保护用户数据和隐私。从事互联网广告活动的各方当事人应当依法订立书面合同，含电子合同。

## Interim Measures for Administration of Internet Advertising

SAIC promulgated the *Interim Measures for Administration of Internet Advertising* on July 8, 2016, which will take effect on September 1, 2016. The following points are highly recommended to be noted in the compliance of Internet advertising.

### Definition of Internet advertising

Article 3 of the *Interim Measures* provides that the Internet advertising as mentioned in these Measures refers to commercial advertisements which directly or indirectly promote goods or services through websites, web pages, Internet applications and other Internet media in the forms of texts, pictures, audios, videos, etc. Internet advertising also meets the definition of advertisement in Article 2 of the *Advertising Law* which provides that commercial advertising refers to promote goods or services directly or indirectly through a certain medium and form in China by sellers of goods or service providers.

The following advertisements are considered as Internet advertising: (1) advertisements in the forms of texts, pictures or videos which contain links; (2) email advertisements; (3) paid search advertisements; (4) advertisements in commercial display; (5) other commercial advertisements promoting goods or services via Internet media. It is noted that the advertorial, event marketing, enterprise image display, etc. published on the Internet will also be regarded as Internet advertising.

### Key compliance requirement of Internet advertising—identifiably

Firstly, Article 7 of the *Interim Measures* provides that, Internet advertisements shall be distinguishable and prominently marked with "advertisements", in order to enable consumers to identify them as advertisements. Does this mean that the advertisements must be marked the Chinese characters of "advertisement" ? Can other wording such as "promotion" or "AD" be used? We remain skeptical on this and look forward to future detailed provisions of SAIC on this.

Secondly, the *Interim Measures* provides that paid search contents are also Internet advertising. Paid search advertisements shall be prominently distinguished from natural research results.

Thirdly, pursuant to Article 8 of the *Interim Measures*, it is not allowed to attach advertisements or advertising links in the emails sent by the users without their permission. Meanwhile, pursuant to the provisions on protection of personal information under the

*Law of Protection on Rights and Interests of Consumers and Advertising Law*, etc., it is not allowed to distribute advertisements to consumers/users via electronic means without obtaining their consent or by their request. Advertisements distributed via electronic means shall state the true identity and contact details of the senders, together with the method for the recipients to refuse acceptance of future advertisements. Therefore, as to advertisement sent by means of email and instant message, we suggest that the business operator shall mark the identity of sender, mark the source of the information and nature of advertisement at the place of the subject title of the email or instant message, which will enable the consumer to know the nature of the email and instant message. Meanwhile, the contents of the email and instant message shall state the information and contact of the sender and the method for rejecting future advertisements.

In addition, the *Interim Measures* provide that no one is allowed to lure users to click on the content of advertisements by fraudulent means, and the personal data and privacy shall be protected. All parties involved in the Internet advertising activities shall enter into certain contracts in writing, including electronic contracts.

End

如需咨询任何相关问题或针对本文发表任何意见，请联系：

### 徐劲科

公司并购部 高级合伙人

邮箱：bailey.xu@dentons.cn

### 陈洲

公司并购部 律师

邮箱：joanne.chen@dentons.cn

### 汪楷

公司并购部 律师

邮箱：josh.wang@dentons.cn

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大成律师事务所成立于 1992 年，是中国最早的合伙制律师事务所之一。2015 年 1 月，大成律师事务所与全球十大律所之一的 Dentons 律师事务所正式签署合并协议，共同打造一个全新的、布局全球的世界领先国际律师事务所。这将是目前全球律师业规模最大的律师事务所。合并后的新律所在全球统一使用中文名称“大成律师事务所”（“大成”），英文名称“Dentons”。2016 年 4 月 25 日，大成与新加坡历史最悠久、最负盛名的律师事务所瑞德正式合并。目前，新律所执业律师人数超过 7300 人，新律所在全球设有 125 多个办公室，遍及五大洲 55 多个国家和地区，为国内外客户带来更多的法律服务优势。

大成在中国的北京、长春、长沙、成都、常州、重庆、大连、福州、广州、哈尔滨、海口、杭州、合肥、呼和浩特、黄石、吉林、济南、昆明、拉萨、南京、南通、南宁、南昌、宁波、青岛、石家庄、上海、沈阳、苏州、深圳、太原、天津、武汉、乌鲁木齐、无锡、温州、厦门、西安、西宁、银川、郑州、舟山、珠海设有分所，在中国台北设有台湾大成律师事务所。

If you have any inquiries, please feel free to contact:

### Bailey Xu

Corporate and M&A Department Senior Partner

Mail: bailey.xu@dentons.cn

### Joanne Chen

Corporate and M&A Department Attorney

Mail: joanne.chen@dentons.cn

### Josh Wang

Corporate and M&A Department Attorney

Mail: josh.wang@dentons.cn

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## Introduction of Dentons

Founded in 1992, Dacheng Law Offices is one of the first partnership law firms in China. In January 2015, Dacheng Law Offices and Dentons, one of the top 10 global law firms, signed their contract of combination in order to build a new and global leading international law firm in the world. The new law firm is now the largest law firm globally. The new law firm, after the combination, will be known as “大成律师事务所” in Chinese and "Dentons" in English. On 25th April 2016, Dentons and Rodyk, the most famous and oldest law firm in Singapore combined. Now, the new law firm has over 7300 lawyers. It will show more superiority to national and global clients in more than 125 locations serving 55-plus countries and areas over the five continents.

Dentons China Offices' network: Beijing, Changchun, Changsha, Chengdu, Changzhou, Chongqing, Dalian, Fuzhou, Guangzhou, Ha' erbin, Haikou, Hangzhou, Hefei, Hohhot, Huangshi, Jilin, Jinan, Kunming, Lhasa, Nanjing, Nantong, Nanning, Nanchang, Ningbo, Qingdao, Shijiazhuang, Shanghai, Shenyang, Suzhou, Shenzhen, Taiyuan, Tianjin, Wuhan, Urumqi, Wuxi, Wenzhou, Xiamen, Xi' an, Xining, Yinchuan, Zhengzhou, Zhoushan, Zhuhai and Taipei.