E-commerce platforms are full of Chinese traders selling foreign cosmetic products they purchased at a lower price outside China. These branded goods are sold without the trademark owner’s consent for a much lower price than that of the official retailer. The consequences of such so-called “parallel imports” are well-known: the foreign brand and its official Chinese distributor suffer economic losses and the brand is diluted by cheap sales of parallel imports. The latter problem is particularly acute if the foreign brand markets itself in the luxury segment.

The Relevant Law on Parallel Import of Cosmetic Products into China

Online sales of parallel imports constitute an especially difficult problem in China. E-Commerce platforms do not have takedown tools against parallel import as they do against counterfeit sales and offer for sales. E-commerce platforms’ takedown systems are in fact limited to trademark infringement cases. However, according to the Chinese law, parallel import into China of genuine products purchased abroad does not violate the Chinese trademark law. The first legitimate sale of the genuine product abroad exhausts the rights of the trademark holder in China. Therefore, takedown actions for the e-commerce in such cases lack legal ground and will be rejected.

However, parallel import of cosmetics may still be illegal if it violates one the many complex cosmetic registration and labeling regulations of the People’s Republic of China.

Alternative Legal Avenues against Imported Foreign Cosmetics
China allows the sale of imported cosmetics — without need of registration with the China FDA — but only if the products are sold to Chinese consumers (not B2B) through designated Chinese e-commerce platforms like Tmall (Alibaba) and JD.com (JingDong). The products, coming directly from outside China, are exempt from any licensing and recordation requirements with China FDA. However, only the legitimate holder of the trademark rights over the imported cosmetics or its licensees can register and sell products on these platforms. In fact, Tmall and JD.com always request proof of trademark registration from the seller before allowing it to open a shop on their platform.

Outside the designated e-commerce channels, the import of unregistered foreign cosmetic products by any person or entity for resale is not exempted from the requirement of prior recordation with the China FDA and the related labeling provisions. Once the Chinese importer has received the goods purchased abroad, and stored them in a Chinese warehouse, the importer will have to show China customs that those cosmetics have been recorded with the China FDA before being able to clear and deliver them to the end Chinese buyer. The violation of such provisions by the seller of the parallel imported cosmetics in China may lead to the confiscation of the involved good and require payment of a fine 3 to 5 times their illegal profits. We have seen several administrative punishment decisions issued based on these grounds.

The practical problem with attacking parallel importers for violation of the registration provisions is that China Customs does not have the ability to check every parcel and shipment. Therefore, parallel importers of foreign cosmetic products usually ship small quantities that will likely remain undetected by the customs’ authorities.

There is, however, another way to attack such traders — even when they are trading in small quantities to avoid being caught by China Customs. Imported cosmetics must bear a Chinese white label on the back of the primary product packaging. This label contains mandatory information about the foreign product, whose labels would otherwise be in other languages (i.e. those of the markets where they were first commercialized). If the imported cosmetics do not bear the Chinese white labels, they will violate Article 35.2 of China Regulations on the Supervision and Regulation of Cosmetics (for failing to attach the Chinese label to the parallel imported cosmetics). Such violations can be reported by anybody to the local Market Supervision Administration (MSA) and the products will be confiscated and fines will be issued against the importer. The administrative decision must be issued within 90 days from the date of the complaint and in practice decisions are normally issued within 3-40 days. If the infringer then refuses to abide by the decision and keeps selling illicit parallel imports, the right holder can file a second administrative complaint. The administrative authorities will add other forms of punishment to those already indicated, including the suspension or revocation of the importer’s business license.

Conclusions

Parallel import of foreign cosmetics into China is an ever growing problem for foreign brands. Online trade and small shipments make it difficult for foreign brands to track and punish these gray market importers. Although such phenomenon could be reduced by tightening the supply chain outside China (e.g. by tightening sales conditions of EU or US distributors and monitoring of the supply chain), not all brands have that capacity. Also, even when tight distribution rules are in place, parallel import does not completely disappear. At some point, a brand owner will have to deal directly with these Chinese importers or risk facing market losses.

Given the above facts, initiating administrative actions against parallel importers that violate the white label regulations appears to be an effective strategy. Not only will infringers be stopped and deterred by the issuance of a fine, and the confiscation of illicit earnings, but with such an administrative decision in hand, the right holder can legitimately and successfully obtain the removal of the infringing listings from the relevant e-commerce platforms. Last but not least, showing a proactive stance against parallel imports will effectively reduce the risk of the trademark owner against product liability claims from Chinese consumers.

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