

中国反垄断法及其知识产权

The IP/Antitrust Interface in China

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假冒伪劣 - COUNTERFEITING

“... a tumultuous period in which the rigid hierarchies of colonial times finally dissolved, replaced by the more fluid social order of a democratic commercial society. Self-fashioning and self-advancement slowly became a viable way of life...”

Stephen Mihm, *A Nation of Counterfeiters*, p.24

打击假冒伪劣 - ANTI-COUNTERFEITING

- China has IP laws that meet international standards
- Chinese courts do enforce IP rights, and particularly IP rights held by foreign parties
- To a large extent the threat to IP from counterfeiters can be assessed and managed

反壟斷法 – Anti-Monopoly Law

Comes into effect August 1, 2008

Article 55 – This Law does not apply to action taken by undertakings to protect their legitimate intellectual property rights in accordance with the intellectual property laws and regulations;

however, this Law does apply to action taken by undertakings that **eliminates or restricts competition** by **abusing** intellectual property rights.

反壟斷法 – Anti-Monopoly Law

- Article 55 and Articles 13(4) and 15(1) suggest that the intellectual property laws are viewed as something separate but equal to the Anti-Monopoly Law, similar to the U.S.
- Some in China and elsewhere would argue that intellectual property laws are subordinate to the antitrust laws

知识产权的滥用 – What is an Abuse?

What is meant by an “abuse of intellectual property rights” in Article 55?

- Microsoft was accused of unfairly bundling a Chinese handwriting recognition system (2000)
- Critics in both China and the U.S. accuse firms in the other party of misusing patent pools and standard setting – Philips DVD3C, MPEG-2, ATSC

知识产权的滥用 – What is an Abuse?

Case - 德先 诉 索尼 (Dexian v. Sony)

上海市第一中级人民法院 (Shanghai No. 1 Intermediate People's Court) commenced 2004 – heard January 17, 2007 – no decision yet

Dexian accused Sony of adopting a technology that prevents batteries made by other companies from being used in Sony's digital cameras. The complaint was made under the Anti-Unfair Competition Law.

Sony said it had a patent on the technology relating to signals between a camera and its battery

中国的民法体系 - China's Legal System

China has a civil law legal system

- Legal reform commenced in 1902
- Based on the German Bürgerliches Gesetzbuch (civil code) of 1900
- China is adopting a code in parts
 - Contract Law (合同法) 1999
 - Property Rights Law (物权法) 2007

中国的民法体系 - China's Legal System

- Civil law uses deductive reasoning – from the top down
- Common law uses inductive reasoning – from the bottom up – cases and precedent
- Civil law statutes are statements of general principles
- Should not be read restrictively as in common law

中国的民法体系 - China's Legal System

The Anti-monopoly Law is a statement of general principles

More specific guidance may be provided in:

- 条例 – Tiaoli – generally adopted by the State Council
- 办法 – Banfa - generally adopted by ministries and agencies
- 解释 – Jieshi - Explanations or Interpretations – issued by the Supreme People's Court

反壟斷法 – Anti-Monopoly Law

Other IP Provisions:

Prohibited monopoly agreements

Art. 13(4) – Restricting the purchase of new technology and equipment, or restricting the research and development of new technology and products.

Exemptions to Prohibited Monopoly Agreements

Art. 15(1) – For the purpose of improving technologies, research, and the development of new products.

知识产权的滥用 – What is an Abuse?

合同法 1999 Contract Law

第三百二十九条 非法垄断技术、妨碍技术进步或者侵害他人技术成果的技术合同无效。

Article 329

A technology contract which illegally monopolizes technology, impairs technological advancement or infringes on the technology of a third person is invalid.

知识产权的滥用 – What is an Abuse?

Existing Guidelines:

Interpretation of the Supreme People's Court concerning some issues on the Application of Law in the Trial of Cases on Disputes over Technology Contracts – December 16, 2004

Article 10 – illegal monopolization and impairing technological progress

1. restricting one party from undertaking new research and development on the technology; requiring non-reciprocal grant-backs or sole-ownership of jointly developed IP

知识产权的滥用 – What is an Abuse?

2. restricting a party from obtaining similar technology from other origins

3. impeding one party's exploitation of the market

4. requiring the licensee to also acquire raw materials and other items from the licensor

5. unreasonably restricting the source of raw materials and other items

6. prohibiting the licensee from making objections as to the validity of the IP

反垄断法 – Anti-Monopoly Law

第十七条 禁止具有市场支配地位的经营者从事下列滥用市场支配地位的行为：

(五) 没有正当理由搭售商品，或者在交易时附加其他不合理的交易条件；

Article 17 Undertakings are prohibited from the following behavior that abuses their dominant market position:

(v) Implementing tie-in sales **without any justification**, or imposing other unreasonable trading conditions;

知识产权的滥用 – What is an Abuse?

- Provisions of the Interpretation are very similar to the provisions of the EU TTBER issued in April 2004
- But in the AML Article 17(5) – tied selling is restricted only if it is not part of “**competing on the merits**”
- That the AML is less restrictive than the SPC Interpretation suggests changes are coming

知识产权的滥用 – What is an Abuse?

2005 Report on Foreign Related IPR Cases

- Commissioned by the State Intellectual Property Office (SIPO)
- Reviewed 15 disputes
 - several regarding technical standards; Cisco/Huawei; Qualcomm/Datang; Leviton/Zhejiang East
 - DVD patent pool dispute
 - disputes over motor vehicle designs

知识产权的滥用 – What is an Abuse?

Conclusions:

- China needed to improve IP awareness and strategies
- China needed to increase its participation in international standard setting organizations
- China needed to improve its antitrust laws
 - in particular – clarify exhaustion of rights
 - parallel imports

Impact of the AML on IP ?

- Zhang Qin – Deputy Director – SIPO 2007-03-13
 - Commented that a visiting DOJ official in charge of IP abuse only emphasized IP protection, not prohibition of IP abuse
 - But “a prohibition on IP abuse is urgently needed”

Impact of the AML on IP ?

March 2008 legislative meetings

SIPO Deputy Director Li Yuguang said that China has suffered significant losses because of barriers posed by foreign IPR, particularly technical standards

Impact of the AML on IP ?

April 2008 – Meetings in Beijing to discuss possible IP regulations for the AML

MOFCOM official responsible for WTO compliance said that the IP/Antitrust interface is problematic around the world. There is little agreement on how it should be structured.

Impact of the AML on IP ?

June 2008

Reports that SIPO is investigating Microsoft for charging excessively high prices and bundling – part of an investigation regarding counterfeiting

Report denied by SIPO the next day

What to do Now ?

- Ask yourself why is the restriction being used in China? Is it reasonable and proportionate for that purpose?
- Consider the principles when interpreting the rules
- Use the Supreme People's Court 2004 Interpretation as a guide; European practice may also help
- Consider the issues that China has raised in the 2005 report and elsewhere
- Monitor the forthcoming regulations and guidelines, and be prepared to adapt to changes in the rules

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