

China Competition Policy & IP

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Regulatory News

The Supreme People's Court Proposes Policy Measures for Improving Intellectual Property Adjudication

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On October 29, 2021, the Supreme People's Court issued the "Opinions on Strengthening Intellectual Property Adjudication in the New Era to Provide Effective Judicial Services and Guarantees for Building a Powerful Intellectual Property State," proposing 20 policy measures for improving intellectual property adjudication in China.

The proposed policy measures revolve around four different aspects:

- 1. Improving the requirements of intellectual property adjudication in the new era.** Strengthening intellectual property rights (IPR) protection is a key element of improving the property rights protection system. The courts must build a fair, efficient, and scientific judicial system to safeguard social fairness, justice, and intellectual property rights as well as the legal rights and interests of individuals.
- 2. Fairly and efficiently adjudicating intellectual property cases in accordance with the law.** Fair adjudication of IPR lawsuits will help create a fair and competitive market and legal environment, and will stimulate innovation and creativity.
- 3. Enhancing the overall effectiveness of judicial protection of intellectual property rights, and creating an environment conducive to innovation.** The courts will increase the compensation for IPR infringement damages to more effectively deter infringement in a timely manner. Moreover, the courts will strengthen the regulation of IPR sham and malicious lawsuits to prevent IPR abuse.
- 4. Promoting the modernization of the intellectual property adjudication system.** This includes building high-level intellectual property adjudication institutions and a trial system with specialized trials of cases, centralized jurisdiction, and intensified procedures. It also means strengthening the formation of IPR adjudication teams, ensuring that they are proficient in law and technology, consider the overall situation, and possess a firm political stance as well as an international perspective. Finally, promoting the integration of information technology into intellectual property adjudication is also needed.

SAMR Approves ITW's Acquisition of MTS's Test & Simulation Business with Remedies

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On November 18, 2021, the State Administration for Market Regulation (SAMR) announced its approval of the acquisition of MTS Systems Corporation's (MTS's) Test & Simulation business by Illinois Tool Works Co., Ltd. (ITW) with restrictive conditions.

The acquirer, ITW, primarily manufactures equipment and systems, including equipment and software for testing and measuring materials, structures, and electronics used in consumer durables, automotive, and other industries. MTS conducts product design, manufacturing, and research in various markets. According to the acquisition agreement, ITW intends to acquire all the issued and circulating equity of MTS's Test & Simulation business and obtain that entity's sole control.

SAMR's investigation into the acquisition found that ITW and MTS have horizontal overlap because they are both engaged in the production and sales of ground vehicle durability testing equipment, static material testing equipment, electro-hydraulic servo material testing equipment, and electric mechanical material testing equipment.

SAMR determined that such overlap and concentration have the effect of eliminating or restricting competition in the high-end electro-hydraulic servo material testing equipment market in China. In turn, this could:

1. Result in the concentrated entity's market dominance, and a related increase in market concentration
2. Eliminate the close competitive relationship between the two parties
3. Further weaken the bargaining power of downstream users

Ultimately, SAMR decided to approve the acquisition with remedies. ITW, MTS, and the concentrated entity will be required to fulfill obligations that include continuing to perform all existing business contracts involving related goods and services with Chinese customers and maintaining the service quality that was provided before the acquisition. SAMR also imposed certain restrictions on business aspects such as prices and trading conditions.

SAMR Imposes Administrative Penalties on Three Auto Logistics Companies

[Read the Chinese version here](#)

In July 2018, the former Zhejiang Administration for Industry and Commerce launched an investigation into NYK Automotive Logistics (China) Co., Ltd. (NYK China), Ningbo Landun Zhiyu International Logistics Co., Ltd. (Ningbo Landun), and Tianmen Sanbang Logistics Co., Ltd. (Tianmen Sanbang) for their suspected monopoly agreements. On October 8, 2021, Zhejiang Provincial Market Supervision Administration – which the Zhejiang Administration for Industry and Commerce merged into in 2018 – issued an administrative penalty decision for the case.

According to the decision, NYK China, Ningbo Landun, and Tianmen Sanbang – three competitive operators in China’s nationwide commodity vehicle transportation service market – participated in electronic bidding for a specific commodity vehicle transportation project, during which they illegally exchanged their bidding information by phone. Then, Ningbo Landun and Tianmen Sanbang stopped further bidding to fix the price, which guaranteed NYK China to win the bid as the parties agreed upon.

In addition, NYK China and Ningbo Landun also divided the relevant commodity vehicle transportation logistics service market through verbal agreements. All three companies violated Article 13 of the Anti-Monopoly Law, which prohibits horizontal monopoly agreements.

Due to its proactive reporting and cooperation in providing evidence, NYK China was fined 2% of its sales from the 2017 fiscal year with a 90% discount, amounting to RMB 1,749,215. Meanwhile, Tianmen Sanbang was fined 1% of its 2017 sales, amounting to RMB 145,952, and Ningbo Landun was fined 1% of its 2017 sales, amounting to RMB 334,116.

SAMR Issues Anti-Monopoly Guidelines for API Sector

[Read the Chinese version here](#)

On November 15, 2021, SAMR issued guidelines aimed at preventing monopolies in the active pharmaceutical ingredient (API) market. The guidelines point out that enforcement agencies should continue to strengthen supervision and law enforcement in the API sector, and that those who knowingly violate the Anti-Monopoly Law or deliberately take measures to avoid investigations will be penalized in accordance with the law.

Monopoly agreements in the API sector include agreements, decisions, or other concerted actions by operators that exclude or restrict competition. Along with listing API operator behaviors that constitute horizontal or vertical monopoly agreements or coordinated behaviors, the guidelines

explain the exemption and leniency system and establish provisions to regulate the behavior of industry associations.

According to the guidelines, common abuses of market dominance in the API sector include selling API at unfairly excessive prices and refusing to deal with counterparties. The guidelines clarify the consideration factors for determining whether an operator has market dominance, refine the forms of common abuses of market dominance, and clarify the identification and consideration factors for joint abuse of market dominance.

There is no significant difference between anti-monopoly investigations of the concentration of undertakings in the API industry and other industries. A concentration of undertakings that reaches the thresholds determined in the “Provisions of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings” will be required to file a prior notification with the relevant commerce department of the State Council, and no such concentration may be implemented without clearance.

In addition, the guidelines detail the types of abuse of administrative power to exclude or restrict competition in the API field involving restricting transactions and obstructing the free circulation of commodities.

Shanghai High People’s Court Issues Damage Compensation Calculation Methods for Karaoke Copyright Infringement Disputes

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In November 2021, the Shanghai High People’s Court issued the “Answers to the Calculation of the Amount of Damage Compensation in Disputes over Copyright Infringement by Karaoke Operators.” Formulated to help unify judgment standards, the issuance of the guidelines promotes the regulation of copyright use in Shanghai’s karaoke industry and determines the amount of damages paid by karaoke operators in copyright infringement disputes.

In recent years, karaoke operators have frequently been subject to lawsuits filed by copyright owners, severely disrupting the order of copyright usage in the karaoke industry. The Shanghai High People’s Court has collected statistics and research on such cases and, after consulting experts on intellectual property evaluation for scientific and feasibility demonstrations, the court drafted the damages compensation guidelines.

The guidelines focus on principles of justice, strong protection, specialized policies, and proportional coordination, and clarify that all copyright owners – regardless of whether they are a collective management organization or a party who is not a member of the organization – will be granted the same level of protection. The guidelines also distinguish between two different litigation objects:

usage of an entire music library versus usage of individual songs. For the whole music library, the damages compensation is calculated based on the standards of copyright royalty, while for individual songs, it is calculated based on the single-on-demand royalty. If the number of on-demand songs cannot be ascertained, compensation will be calculated using the statutory compensation method based on the copyright royalty.

After the guidelines were issued, many in the music industry, academia, and judiciary voiced their support. Zhang Bin, the Vice President of Shanghai High People's Court, stated that "the Shanghai court will make great efforts to implement the guidelines, give full play to the leading role of judicial norms, consolidate the source of litigation governance, and promote the regulation of the orderly use of copyrights and the sound development of the city's cultural and entertainment industry."

Public Opinion Solicited for Two Draft Guidelines on Internet Platforms

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On October 29, 2021, SAMR released two draft guidelines – both related to the classification and responsibilities of internet platforms – soliciting public comments. Together, the "Guidelines on Classification of Internet Platforms" and the "Guidelines on Implementing Subject Responsibilities of Internet Platforms" aim to define and categorize platform categories and sizes as well as promote the sound development of platform economies and protect the rights and interests of various platform users.

The classification guidelines categorize the country's internet platforms by user scale, business type, economic volume, and restrictive capacity, and further divides them into three size levels based on the following qualifications:

1. **Super large:** Super large platforms have more than 500 million annual active users, their core business involves at least two types of platform businesses, and they have a strong capability of restricting merchants from reaching consumers. The market valuation of super platforms is more than RMB 1 trillion.
2. **Large:** Large platforms have more than 50 million annual active users in China, with a market valuation of more than RMB 100 billion.
3. **Small and medium:** Small and medium-sized platforms should also have a certain amount of annual active users in China, with certain types of businesses, economic volumes, and restrictive capacities.

The subject responsibilities guidelines stipulate that the super large and large platform operators will be held to higher regulatory standards and must observe the principles of fairness and non-discrimination. When providing related goods or services, each platform should treat itself (or affiliated companies) and its operators equally, without implementing self-preferential treatments.

Likewise, the guidelines state that operators of super large and large platforms must establish and improve the mechanisms of data security review and internal control. Internet platform operators must abide by anti-monopoly laws, regulations, and rules, and cannot engage in monopoly agreements, abuse of market dominance, or other monopolistic behaviors. Operators may not use technological or other means to influence user choices or implement unfair competition behaviors that disrupt the normal operation of network goods or services legally provided by other operators.

SAMR's Anti-Monopoly Bureau Replies to Suggestions from Three NPC Deputies

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On November 12, 2021, SAMR's Anti-Monopoly Bureau issued replies to the suggestions made by three National People's Congress (NPC) deputies at the third and fourth meetings of the 13th NPC between March 5 and March 11, 2021. The suggestions involved platform supervision, the expansion of the Anti-Monopoly Committee, and the enhancement of law enforcement power.

Recommendation #1: *"Recommendations on Preventing Large Internet Companies from Using Online Group Buying to Form Monopoly in Grassroots Areas of the City and County, Seriously Affecting People's Interests,"* proposed by deputy Li Guowei.

SAMR replied that community group buying has hindered the normal development of the existing supply chains, disrupted the market price order by low-price dumping, and threatened the survival of small vendors. In response to these problems, SAMR has successfully implemented policies and carried out a number of relevant actions in the last year, and initial results have been achieved. As a next step, SAMR will continue to strengthen the supervision and law enforcement of the platform economy and fully consolidate the subject responsibilities of internet platform companies.

Recommendation #2: *"Recommendations on Supporting and Strengthening the Healthy Development of the Glass Industry,"* proposed by deputy Wang Gang.

SAMR replied that, first, the agency will carry out law enforcement in an impartial manner to ensure fair competition among all market participants in the glass industry. Secondly, SAMR will put equal emphasis on the effects and causes of governance, take the initiative to strengthen the coordinated supervision of the industry, promote the coordination of industrial policies and competition policies, and promote the construction of an effective and orderly competitive market structure. Last, the agency plans to focus not only on Anti-Monopoly Law enforcement, but also on promoting the establishment of a long-term mechanism for maintaining fair competition.

Recommendation #3: *"Recommendations on Strengthening the Anti-Monopoly Law Enforcement in the Network and Social Fields,"* proposed by deputy Yang Song.

SAMR replied that, in response to the monopoly and disorderly competition in the platform economy, the agency has fully standardized the order of platform economy competition and accelerated the modernization of platform competition governance. Moving forward, SAMR will

strengthen market supervision with greater efforts, improve institutional rules from a more forward-looking perspective, and conduct theoretical research with higher efficiency.

Industry Updates

Tencent's Claim of Copyright Infringement Against ByteDance Heard in the Second Instance

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In January 2019, Tencent sued ByteDance's video-sharing platform Xigua Video for its unauthorized recruitment and organization of hosts to broadcast the videogame *Honor of Kings*. Tencent, claiming copyright infringement, sought RMB 50 million in compensation. Guangzhou Intellectual Property Court made the first instance judgment of the case, ordering ByteDance (Xigua Video's owner) to pay Tencent RMB 10 million in compensation. Three companies associated with Xigua Video were required to immediately cease *Honor of Kings* live broadcasts.

However, after the Guangzhou court's first instance judgment, Tencent and ByteDance both refused to accept the judgment and appealed the case to the Supreme People's Court. On October 29, 2021, the Intellectual Property Court of the Supreme People's Court publicly heard the case in its second instance. There are three controversial disputes in the case:

1. Whether ByteDance has infringed Tencent's copyright in the live broadcasts of *Honor of Kings*.

Tencent believes that it has set strict restrictions on the duration, theme, and scope of dissemination of live broadcasts of the game, which requires usage licenses. ByteDance argues that, since Tencent had cooperated with Xigua Video and organized events to encourage hosts to broadcast the game, hosts had reason to believe that they had the right to broadcast the game on their platform.

2. Whether online games constitute as works under the Copyright Law. Tencent contends that game screens should be protected by the Copyright Law as "movie-similar works." ByteDance argues that, even if the online game screens do constitute works, the live game screens formed by the hosts' operation do not. Because they are generated and contributed by the hosts, the copyright of the relevant game screens should belong to the game hosts.

3. Whether ByteDance makes reasonable usage of *Honor of Kings*. Tencent believes that the premise of "appropriate quotation" is to cite the original work in the new work. Since live broadcasts of video games are mostly skill displays and do not have original ideas, they cannot become works. However, ByteDance refutes that hosts' use of the game screens constitutes "appropriate quotation" as stipulated in Article 24 of the Copyright Law.

At present, the second instance judgment has not yet been announced.

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