

China Competition Policy & IP

MONTHLY UPDATE

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Regulatory News

SAMR Issues Five-Year Plan for Rule of Law Market Regulation

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On December 20, 2021, the State Administration for Market Regulation (SAMR) issued the “Rule of Law Market Regulation Development Implementation Guidelines (2021–2025).”

The guidelines, which provide a five-year plan for strengthening the rule of law in China’s market economy, emphasize four main focus areas:

1. Strengthening anti-monopoly legislation and building a unified domestic market with high efficiency, standardization, and fair competition.
2. Actively promoting the formulation and revision of the Anti-Monopoly Law.
3. Strengthening and improving anti-monopoly enforcement and resolutely punishing monopolistic behaviors that harm the business environment.
4. Strengthening enforcement guidance in anti-monopoly and anti-unfair competition and intellectual property rights (IPR) infringement fields.

Through adherence to the guidelines, it is hoped that, by 2025, there will be an intelligent and efficient market supervision system with clear responsibilities for all market supervision departments.

State Council Launches National Anti-Monopoly Bureau

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On November 18, 2021, China signaled its intentions to further crack down on monopolies with the launch of the National Anti-Monopoly Bureau. The new agency, which shares a building with SAMR, will further enrich anti-monopoly supervision forces and provide a strong guarantee for anti-monopoly work in China.

The Anti-Monopoly Bureau consists of three divisions, each focusing on a different task: the Competition Policy Coordination Department (policymaking), the Anti-Monopoly Law Enforcement Department I (antitrust enforcement), and the Anti-Monopoly Law Enforcement Department II

(merger reviews). Along with the bureau's three divisions, the Competition Policy and Big Data Center was also established in an effort to strengthen theoretical research and technical support on anti-monopoly and competition policy.

Gan Lin has been appointed Director of the Anti-Monopoly Bureau. She also serves as the Deputy Director of SAMR as well as Secretary General of the State Council's Anti-Monopoly Committee.

In a December interview, Ms. Gan summarized SAMR's anti-monopoly achievements in recent years, which will lay a foundation for the Anti-Monopoly Bureau's work. Since SAMR took over anti-monopoly supervision in China in 2018, the regulator has worked to improve the country's anti-monopoly legal system and has investigated and handled 345 monopoly cases, concluding 1,920 cases of concentration of undertakings around key areas such as the platform economy, medicine, public utilities, building materials, and automobiles. SAMR has fully implemented the investigation system on fair competition, and – in the process – repealed and revised nearly 30,000 documents that hinder the unified national market and fair competition.

Further, the authority has improved the rules of the anti-monopoly system for the platform economy, investigating "either-or" behaviors and strictly reviewing merger cases. Since 2020, SAMR has imposed administrative penalties on 88 gun-jumping cases, with fines amounting to RMB 60 million in total.

Moving forward, the Anti-Monopoly Bureau will continue to work towards improving the anti-monopoly legal system to further establish the foundation of the rule of law; strengthen anti-monopoly supervision and enforcement to further maintain a fair competition order in the market; and optimize the anti-monopoly regulatory system and mechanisms to further enhance the effectiveness of anti-monopoly supervision.

SK hynix's Acquisition of Part of Intel's Memory and Storage Business Conditionally Approved by SAMR

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On December 22, 2021, SAMR announced it had approved SK hynix's acquisition of Intel Corporation's flash memory (NAND flash) and solid-state drive (SSD) business with restrictive conditions, finding that the transaction may have the effect of excluding or restricting competition in certain enterprise SSD markets.

In the proposed transaction under review, SK hynix – a South Korea-based, leading semiconductor supplier that produces memory, SSD, and image sensor-related products globally – sought to acquire part of Intel's memory and storage business, with Intel Corporation as the ultimate controller.

The case has several relevant product markets. SK hynix and the target business have horizontal overlap in the PCIe enterprise SSD, the serial advanced technology attachment (SATA) enterprise SSD, customer SSD, and NAND flash memory markets. Additionally, SK hynix is engaged in the upstream dynamic random-access memory (DRAM) business, which has a vertical relationship with downstream SSDs, while NAND flash memory has the same vertical relationship with SSDs. SAMR defined the relevant geographic market in the case as the global market, while focusing on the situation in the Chinese market.

As assessed, SAMR believes that the transaction will increase the concentration of the PCIe and SATA enterprise SSD markets, enhancing the market power of the post-concentration entity. In 2020, in the global SATA enterprise SSD market and the global PCIe enterprise SSD market, the Herfindahl-Hirschman Index (HHI) measures were 2,544 and 2,775, respectively, and will become 2,851 and 3,456 after the concentration, with a significant increase in market concentration. Additionally, the number of major competitors in the market will be reduced, which may also enhance the incentive and ability of competitors in the relevant markets to coordinate prices.

According to the remedy proposal submitted by the filing parties, SAMR decided to approve the SK hynix-Intel concentration with additional restrictive conditions. The post-concentration entity will be required to fulfill six obligations, including no increases in average price, no expansions of production, and no bundled sales for the relevant products involved. Five years after the effective date of the restrictive conditions, the post-concentration entity may apply to SAMR to lift the conditions. SAMR will decide upon application whether to lift the conditions based on the state of competition in the market.

Industry Updates

Liujie Sentenced in First Unfair Competition Case Involving Livestreaming Data Rights

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On December 21, 2021, the Yuhang District People's Court in Hangzhou, Zhejiang Province, handed down its judgement in an unfair competition dispute over livestreaming data rights between Beijing Microseeding Horizon Technology Co., Ltd. (Microseeding Horizon) and Shanghai Liujie Information Technology Co., Ltd. (Liujie), the developer and operator of Xiaohulu, a software as a service (SaaS) livestreaming website based on big data.

Microseeding Horizon, the plaintiff, is the operator of Douyin, the sister app of TikTok and – as of the end of 2021 – had over 10 million live broadcasters and hundreds of thousands of daily active users. It sued the defendant, Liujie, for unfair competition, alleging that Xiaohulu captured Douyin's non-public data through technical means and disclosed much of it, including the revenues earned by influencers on the platform as well as the tips – or virtual gifts – given to influencers by “head fans” on all major livestreaming platforms, including Douyin.

Microseeding Horizon requested compensation of RMB 4.5 million for economic losses and reasonable rights protection expenses, in addition to a statement on Xiaohulu admitting to wrongdoing.

The court examined Liujie's alleged conduct and found that the company – which denied using data capturing methods – did not give a convincing explanation on the specific technical means used to obtain Douyin's livestreaming data. The court also took into account multiple impacts of the alleged conduct, including:

- 1. Impact on operators:** Liujie's actions undermined Microseeding Horizon's data display rules, which, in turn, disrupted the balance between user privacy and user loyalty on Douyin. Such conduct eroded users' expectations and trust in Microseeding Horizon's data security protection, thereby undermining the platform's competitive advantages.
- 2. Impact on consumers:** Liujie obtained the corresponding basic data without the consent of the tipping users and the broadcasters, which violated their personal information rights.
- 3. Impact on social and public interests:** Though there is no innovation in Liujie's use of Douyin's data, the sharing of the data could, to a certain extent, bring about vicious competition between platforms and even lead to family and social instability, thus harming the overall social welfare.

Ultimately, the court determined that Liujie's procurement and use of Douyin's data was improper, and infringed upon the legitimate rights and interests of Microseeding Horizon and Douyin's influencers and tipping users. Likewise, Liujie's conduct disrupted the competitive order of the market and violated the Article 12 provisions of the Anti-Unfair Competition Law, constituting unfair competition.

The court ruled that Liujie should immediately stop the behavior; publish a statement on the official Xiaohulu website to eliminate the impact of their behavior; and compensate Microseeding Horizon RMB 1,000,000 for economic losses, including reasonable costs.

Tencent Wins China's First Game Map Infringement Case

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On December 6, 2021, the High People's Court of Guangdong publicly announced China's first effective judgement on infringement disputes over game maps. The dispute, an appeal of a copyright infringement and unfair competition case, was between plaintiff Shenzhen Tencent Computer System Co., Ltd. (Tencent) and defendants Changyou Yunduan (Beijing) Technology Co., Ltd. (Changyou Yunduan) and Hero Entertainment Co., Ltd. (Hero Entertainment).

Tencent is the exclusive agent for the operation of *Cross Fire*, a popular online first-person shooter game that launched in mainland China in 2007. Industry experts opined that the content of made-for-mobile *Crisis Action*, a shooter game developed by Changyou Yunduan and operated by Hero Entertainment, has similarities with *Cross Fire* in terms of maps, gameplay, and UI interface. In 2017, Tencent sued Changyou Yunduan, Hero Entertainment, and other related parties for copyright infringement and unfair competition, and requested RMB 98 million in compensation.

In the first-instance judgement in 2019, the Intermediate People's Court of Shenzhen held that *Crisis Action's* six game maps did indeed constitute copyright infringement, ordered each defendant to stop infringement, and awarded Tencent RMB 45 million of compensation. The defendants appealed the judgement.

In the recent second-instance judgement, the High People's Court of Guangdong's final ruling found that four – instead of six – of *Crisis Action's* game maps constituted infringement. The court held that the virtual space constructed by the game map is, to a certain extent, a digital expression of the simulated real world and an important platform for realizing the interaction between the virtual and the real. When the spatial layout structure of the game map is specific enough and meets the characteristics of a graphic work, it can be protected as such. The court determined that, for shooting games, the spatial layout structure of the game scene map is key to its creation and the game's core expression, and should thus be recognized as a graphic work.

For compensation, the court determined that Tencent would be awarded RMB 25 million. This figure was determined by multiplying the total *Crisis Action* profits by the contribution ratio of individual game maps to the game as a whole, and by the usage rate of the infringed game maps versus all of the game's maps.

Claims of 13 Concrete Companies against Guangdong AMR Dismissed

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The Guangzhou Intellectual Property Court handed down its first-instance judgement in several disputes over administrative penalties, which were brought by 13 concrete companies in Guangdong against the Guangdong Administration of Market Regulation (Guangdong AMR). The court dismissed all 13 cases.

On February 21, 2017, the former Guangdong Anti-Monopoly Bureau received a report that several ready-mixed concrete companies in the urban areas of Maoming and Gaozhou were suspected of monopolizing by issuing joint price increases. In October 2018, the case was transferred to the Guangdong AMR and, on June 1, 2020, the local regulator issued an administrative penalty decision.

Guangdong AMR found that 19 companies with competitive relationships – including Maoming Hongji Building Materials Co., Ltd., Huazhou Avenue Building Materials Co., Ltd., and Guangdong Avenue Building Materials Co., Ltd. – negotiated and exchanged information on unified increases in the sales price of concrete through gatherings and WeChat groups, and reached an oral monopoly agreement to “fix or change the price of goods.” This violated Article 13 of the Anti-Monopoly Law, and the 19 companies were each fined separately with penalties ranging from RMB 30,000 to RMB 1.2 million.

Among the 19 companies involved, 13 refused to accept the decision and, in turn, filed 13 administrative lawsuits with the Guangzhou Intellectual Property Court. The relevant cases were heard by the court's administrative special trial collegiate panel. The panel held that the administrative penalty decision made by the Guangdong AMR was clear in terms of facts and correct in its application of the law following legal procedures. Additionally, it found that the 13 companies' petition to revoke the above-mentioned administrative actions had no factual and legal basis, and thus should be rejected according to law.

The 13 companies have once again refused the judgement, and have appealed for a second trial.

Gree Ordered to Pay AUX RMB 167 Million in Damages in Patent Infringement Lawsuit

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On December 8, 2021, the Intermediate People's Court of Ningbo issued two civil judgements finding that AUX Air Conditioning Co., Ltd. (AUX), which sued Gree Electric Appliances Co., Ltd. (Gree) and Ningbo Yongge Information Technology Co. Ltd. (Yongge) for two invention patent infringements, was owed RMB 167 million in compensation by the defendants.

The patent involved in the cases was an invention patent titled "compressor," with the patent number ZL00811303.3. The plaintiff, AUX, claimed that defendant Yongge sold a GREE Pinyuan air conditioner, which infringed AUX's patent rights. After technical comparison of the Gree air conditioner to their own units, AUX believed that the alleged infringing product had already fallen into the protection scope of its patent rights. AUX claimed that the manufacturer Gree should bear the responsibility of compensation, and that the seller Yongge should bear the responsibility of taking down the e-commerce products and paying the litigation costs.

On July 19 and October 15, 2021, the Intermediate People's Court of Ningbo held public hearings on the case. The court held that the infringing technical solution fell within the scope of protection of the patent-in-suit and that Gree's defense, which was that the technology in question was already publicly known, was not valid according to the judicial appraisal, patent specification, and relevant regulations. The court ordered Gree to provide AUX with economic compensation of RMB 96 million and RMB 70.6 million, respectively, for the two cases of infringement, totaling RMB 167 million.

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