

China Competition Policy & IP

MONTHLY UPDATE

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Meetings/Seminars/Projects

Shanghai AMR Holds Market Supervision Conference

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On February 9, 2022, the Shanghai Administration for Market Regulation (Shanghai AMR) held a conference on market supervision. The conference comprehensively summarized the market supervision work that took place in Shanghai in 2021 and outlined work priorities for 2022.

In 2021, the Shanghai market supervision system fulfilled its duties and achieved breakthroughs in the innovation of policy integration, institutional mechanisms, and regulatory methods. Notably, there were no major food and drug, special equipment, or product quality accidents throughout the entire year. Shanghai AMR played a functional, high-level market supervision role and added new impetuses to create a market-oriented, legal, and international first-class business environment.

In 2022, Shanghai AMR will continue to promote the high-quality development of industries, such as digital advertising, retail pharmacies, medical devices, and cosmetics, and implement relevant development policies and compliance guidelines. Shanghai AMR will also work to strengthen anti-monopoly and anti-unfair competition enforcement to optimize the competitive market environment further.

Chen Xuejun, Director of Shanghai AMR, noted that the work of Shanghai AMR in 2022 will focus on six main areas:

1. Innovatively develop and expand market players;
2. Systematically improve market competition ecology;
3. Continuously prevent market security risks;
4. Strategically consolidate the foundation of quality development;
5. Holistically enhance the effectiveness of market governance; and
6. Adhere to strengthening the overall leadership of the Party.

It is hoped that development in these six areas will help promote and strengthen the rule of law and achieve better results in market supervision.

Regulatory News

SAMR and NDRC Jointly Question Commodity Exchanges on Price Fluctuations

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On February 9, 2022, the State Administration for Market Regulation (SAMR) announced that, in response to the recent fluctuations in iron ore prices, SAMR's Price Supervision and Competition Bureau and the Price Department of the National Development and Reform Commission (NDRC) recently jointly questioned relevant commodity exchanges. The authorities reminded the exchanges that they must carefully verify market and price information before releasing it and provide the factual sources of the released information. The exchanges shall not fabricate and release false price information, spread false information on price increases, or implement price gouging.

SAMR and NDRC are highly concerned about the fluctuations in iron ore prices and will further monitor such fluctuations and take effective measures to ensure the stable operation of iron ore market prices. The authorities will strengthen market supervision and severely and immediately punish illegal acts, such as fabricating and disseminating information on price increases and engaging in price gouging.

Beijing AMR Imposes Administrative Penalty on Geistlich for Monopoly Agreements to Limit Minimum Resale Prices

[Read the Chinese version here](#)

In July 2021, Beijing AMR launched an investigation into Geistlich Trading (Beijing) Co., Ltd. (Geistlich) for its suspected monopolistic behavior of limiting the minimum resale prices of its products. On February 9, 2022, Beijing AMR issued the administrative penalty decision in the case, the first against a monopoly agreement in 2022.

According to the decision, the relevant products in this case comprise materials used in dental implants, including bone substitutes and filling materials (Geistlich Bio-Oss and Geistlich Bio-Oss Collagen) and absorbable biofilm (Geistlich Bio-Gide), all of which are Class III medical device products. The relevant geographical market in this case is the mainland China market.

From 2008 to 2020, Geistlich reached monopoly agreements with dealers to restrict the resale prices of their products. Geistlich also set up assessment and evaluation mechanisms to monitor dealers'

implementation of the monopoly agreements, punishing the dealers who failed to implement the policy.

Beijing AMR held that the products in question are high-value, Class III medical device products, which need to be approved by the National Medical Products Administration and therefore have a high access threshold. Geistlich's price-fixing monopoly agreement excluded and restricted the price competition in the relevant market, resulting in high resale prices by dealers to hospitals for five or even ten years and harming the interests of consumers. Therefore, Geistlich was ordered to stop the illegal behaviors and fined 3% of its 2020 financial year sales, which amounted to RMB 9,123,598.

Intellectual Property Court Releases Its 2021 Annual Report

[Read the Chinese version here](#)

On February 28, 2022, the Intellectual Property Court of the Supreme People's Court of China released its 2021 Annual Report.

According to the report, the court has fully utilized its advantages in centralizing the hearing of monopoly appeals and technology-related intellectual property (IP) appeals since it was founded in 2019. Over the course of 2021, the court increased judicial protection of intellectual property rights (IPRs) in key areas, such as core technologies and emerging industries, and further accentuated the effectiveness of the national-level appellate hearing mechanism for IPR cases.

The report disclosed that, in 2021, the Intellectual Property Court accepted a total of 5,238 technology-related IP and monopoly cases, with 4,335 newly received cases and 3,460 concluded ones, representing a closing ratio of 79.8%. Compared to 2020, the number of new cases received by the court increased by 1,158, or 36.4%, and the number of concluded cases increased by 673, or 24.1%.

The report highlights four themes from the collective cases in 2021:

- 1. The number of both civil and administrative substantive cases has continued to grow.** The court received 2,569 new civil substantive cases of second instance, representing an increase of 620 cases, or 31.8%, as compared to last year. The court received 1,290 new administrative cases of second instance, representing an increase of 620 cases, or 92.5%, compared to last year.
- 2. Cases have involved an increasingly extensive array of emerging industries.** New types of disputes proliferated at an accelerated rate, with over a quarter of the cases in 2021 involving emerging industries, such as new-generation information technology, biomedicine, high-end equipment manufacturing, energy conservation and environmental protection, or new materials and new energy.

3. **The international character of litigation has become more pronounced.** The number of foreign-related cases handled by the courts continued to grow rapidly, with domestic litigation intertwined with foreign litigation in some cases. The role of intellectual property as a strategic resource for national development and a core element of international competitiveness became increasingly prominent.
4. **The geographical origin of cases has become more diversified.** Cases are mostly concentrated in economically developed and industry-intensive regions, with more than half of the cases received by the court from the three IP courts in Beijing, Shanghai, and Guangzhou. However, a growing number of cases are originating in central and western regions, such as Zhengzhou, Chengdu, and Wuhan.

The report revealed that the proportion of civil cases in disputes over monopoly agreements – especially horizontal monopoly agreements – has seen an increase. These cases covered industries such as information and communication technology, driver training services, and fire testing services, some of which also involved industry associations. The court supported monopoly agreement allegations in multiple cases, which highlights a clear attitude towards increased judicial anti-monopoly efforts.

The report also notes that monopoly-related administrative cases are beginning to enter court proceedings, and that there has been an increase in civil antitrust cases involving foreign parties. Moreover, antitrust issues have been greatly intertwined with intellectual property issues. Such cases involve abuse of dominant market position concerning patents and horizontal monopolistic agreements.

The report highlights the court's successes and advancements in 2021. In terms of innovation protection, the court has scientifically delineated the boundaries of rights in various cases, reasonably balanced the interests of all parties, and fully utilized the function of intellectual property adjudication in stimulating scientific and technological innovation and maintaining fair competition.

Concerning the trial mechanism, the court has made continuous efforts to reform and improve the litigation mechanism, promote the unification of adjudication standards, enhance the mechanism of hearing new types of cases, and make full use of the construction of intelligent courts to improve judicial efficiency.

Industry Updates

12 Anti-Monopoly Administrative Penalty Cases Sentenced in First Instance

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On February 9, 2022, the Hainan Free Trade Port Intellectual Property Court issued a public judgment on 12 anti-monopoly administrative penalty cases. The plaintiffs in the cases were 12 fire safety inspection companies, including an engineering company in Hainan, and the defendant was the Hainan Administration for Market Regulation (Hainan AMR). The court ruled to maintain Hainan AMR's original administrative penalty decisions and reject the plaintiffs' request to revoke the penalty.

On November 19, 2020, the defendant Hainan AMR found that the 12 companies had reached and implemented monopoly agreements with one another and with other competitors to fix the price for fire safety inspection services. Hainan AMR therefore imposed administrative fines on each of the 12 companies, amounting to 1% of their respective 2018 annual operating revenues. The plaintiffs disagreed with this administrative penalty decision and filed administrative lawsuits requesting the penalty decision be revoked.

The dispute between the plaintiffs and the defendant focused on whether the agreement to fix the minimum price of fire safety inspections was a monopoly agreement, as well as whether the base of the penalty fine was the entire business income of the previous year or if it was just the sales of each company's fire safety inspection business. The Hainan Free Trade Port Intellectual Property Court ruled that the agreement was a monopoly agreement with a fixed minimum price and clarified that the "previous year's sales" in the penalty provision should be understood as all sales, not sales of the companies' fire safety-related businesses alone. Therefore, the penalty made by Hainan AMR was within the statutory range of the anti-monopoly administrative penalty.

This was the first batch of administrative litigation cases accepted since the official opening of the Hainan Free Trade Port Intellectual Property Court on December 31, 2020. This public sentence has the effect of increasing judicial openness and interpreting the law on a case-by-case basis.

China's First Unfair Competition Case over Intelligent Voice Command Selected as One of the "Top Ten Nominated Cases of 2021"

[Read the Chinese version here](#)

On January 22, 2022, the Supreme People's Court and the China Media Group jointly announced the results of the "Top Ten Nominated Cases of 2021 for Promoting the Rule of Law in the New Era," in which China's first unfair competition case regarding intelligent voice command was selected as the top case by voters.

The plaintiff in this case is Baidu Online Network Technology Co., Ltd. (Baidu), the developer and operator of the smart speaker Xiaodu. The defendant, Beijing Zile Technology Co., Ltd. (Zile Technology), produces and sells a similar smart speaker, Duyaya. Zile Technology uses "Xiaodu" to refer to its product in promotional content and even uses the same voice command – "Xiaodu Xiaodu" – to activate the machine. Due to this, Baidu filed a lawsuit against Zile Technology for suspected unfair competition.

The case was heard by the Haidian District People's Court of Beijing. The court held that, after being widely used and promoted by Baidu, "Xiaodu" is a trading name with a certain influence, as stipulated in the Anti-Unfair Competition Law. As a specific voice command, "Xiaodu Xiaodu" has also established a clear and stable connection with Baidu and its products, and has high popularity and influence.

Considering the fact that "Xiaodu" and "Duyaya" are similar products in terms of functions, target audiences, and sales channels, the court determined that – since Zile Technology's conduct was subjectively malicious and objectively confusing to the relevant public – the alleged conduct constituted unfair competition. The court ruled that Zile Technology shall eliminate the negative influence, and compensate Baidu for economic losses of RMB 500,000 and reasonable expenses of RMB 50,000.

The ruling is timely given the urgent need to protect the rights and interests of operators in the innovation and development of artificial intelligence products. It thus has exemplary significance in regulating the market order of artificial intelligence products and curbing malicious behaviors.

China's First Unfair Competition Case Involving VIP Membership Accounts Sentenced

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On December 3, 2020, the Haidan District People's Court of Beijing announced its final ruling of the second instance in the unfair competition dispute between plaintiff Shenzhen Tencent Computer Systems Co., Ltd. (Tencent), and defendants Beijing Zhuoyi Xunchang Technology Co., Ltd. (Zhuoyi) and Jiangsu Liebao Network Technology Co., Ltd. (Liebao). This judgment was published on the official website of China Judgments Online in February 2022.

Tencent, operator of Tencent Video and Tencent Sports, claimed that the revenue gained from membership management mode and the paid VIP mode on the two platforms is the main driver of the company's video business income. However, Liebao set up a specific area in Uhaozu, its Android mobile application software, and its website to provide users with rental services for content that is supposed to only be accessible to those with VIP memberships to Tencent Video, Tencent Sports, and Tencent Sports Premium. Such conduct seriously damages Tencent's membership management system and constitutes unfair competition. Zhuoyi, meanwhile, was aware of the aforementioned infringement, but nonetheless made the Uhaozu app available for download in its Wandoujia app store, which also constitutes unfair competition.

The defendant Liebao argued that Uhaozu is only a trading platform for merchants to publish their goods. As a platform service provider, Liebao does not have a competitive relationship with Tencent Video's paid membership system. The other defendant, Zhuoyi, argued that the content at issue is released by the developers themselves and, as a free distribution platform, Wandoujia has no subjective fault.

Tencent proposed three methods to calculate damages. The first was to calculate Tencent's loss of available benefits based on the recent number of positive reviews on the three types of Tencent VIP memberships on the defendant's platform, the monthly unit price of membership, and the duration of the infringement. The second was to calculate Tencent's actual loss based on the number of downloads on the defendant's platform and the rental price of the three types of Tencent VIP members. The third was to estimate the loss based on 1% of the licensing fees in the six authorization contracts submitted by Tencent, resulting in an estimate of RMB 10 million. Accordingly, Tencent asserted that its economic loss in the case should be RMB 4 million.

The Haidian District People's Court of Beijing held that both Liebao and Tencent are competing for user traffic, and Liebao's behavior affects Tencent's interests. Thus, Liebao and Tencent have a competitive relationship. Moreover, Liebao's conduct harmed the legitimate rights and interests of Tencent, causing a reduction in Tencent's trading opportunities, which constitutes unfair competition. No evidence shows that the other defendant, Zhuoyi, participated in the conduct at issue. Therefore, the court ruled that Liebao shall publish a statement to eliminate the impact of the

unfair competition, and compensate Tencent for economic losses of RMB 1 million and reasonable expenses of RMB 50,000.

iQIYI Wins the First Algorithmic Recommendation Case in China

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In September 2018, iQIYI Technology Co., Ltd. (iQIYI) filed a lawsuit against Beijing ByteDance Technology Co., Ltd. (ByteDance) for infringing the information network dissemination rights of the television series *Story of Yanxi Palace*. It is the first infringement case involving algorithmic recommendations in China. On December 31, 2021, the Haidian District People's Court of Beijing made a judgment in the case and recently disclosed the decision.

The plaintiff in the case, iQIYI, is the operator of the online video platform of the same name, which has the exclusive worldwide rights to broadcast the popular drama *Story of Yanxi Palace* on the internet. During the period when *Story of Yanxi Palace* was exclusively broadcast on the iQIYI platform and gained a wide viewership, ByteDance – without authorization – disseminated and recommended short videos featuring content from the television series. Users uploaded these videos to ByteDance's Toutiao platform and obtained high view counts. Due to this, iQIYI argued that ByteDance failed to fulfill its duty of reasonable care as the company was either aware of or should have known about the infringing content and thus infringed iQIYI's exclusive rights to disseminate *Story of Yanxi Palace*.

To address the company's losses, iQIYI submitted an economics report from which was constructed a consumer behavior model to quantify the damages. The report estimates that the infringement caused the iQIYI platform to lose between approximately 4.88 million and 10.44 million users, resulting in a revenue loss of between RMB 57 million and RMB 140 million. In addition, iQIYI also estimated the relevant illegal gain from advertising by ByteDance based on five different calculation methods, ranging from RMB 34.3 million to 91.2 million. Therefore, iQIYI requested ByteDance to pay compensation for economic losses of RMB 29.216 million and expenses for the maintenance of rights of RMB 784,000.

In response, ByteDance argued that the short videos at issue were uploaded by users and that ByteDance only provided an information storage service. As an internet technology company, ByteDance believed it had fulfilled the duty of reasonable care and did not have any subjective fault for infringement.

The court found that ByteDance had sufficient conditions, capacity, and reasonable grounds to know that many of Toutiao's users had committed the infringing acts. Moreover, ByteDance not only provided information storage space services but also provided algorithmic recommendation services – namely information flow recommendation services – and, therefore, should have more duty of care to its users' infringing acts. In this case, the impact of the infringement by Toutiao's users had

been enlarged by the support of the algorithmic recommendation service by ByteDance. Due to this, the court ruled that ByteDance’s conduct constituted contributory infringement and awarded the plaintiff RMB 1.5 million in economic losses and RMB 500,000 in reasonable litigation expenses.

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