China Competition Policy & IP

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Brattle

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Meetings/Seminars/Projects

SAMR Highlights Acceleration of Policies and Measures to Support the Healthy Development of Platform Companies

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On August 19, 2022, a teleconference on national market supervision work was held in Beijing, where the State Administration for Market Regulation (SAMR) reviewed work from the first half of 2022, analyzed the current situation, and deployed key tasks for the second half of the year. At the conference, SAMR put forward requirements to promote ongoing regulation of the platform economy.

At the meeting, SAMR concluded that the market has been running in an orderly manner since the beginning of the year, with market players showing strong resilience and vitality and prices remaining at steady levels. Prominent issues detrimental to the people's vital interests have been effectively addressed. Additionally, authorities have reinforced the protection of intellectual property rights with ongoing innovation and optimization of examination and protection mechanisms. Overall, the market environment for innovation in the platform economy is promising.

For future work tasks, SAMR emphasized the need for authorities to enhance efforts to promote the sustainable and healthy development of market players and effectively maintain a level playing field for all types of market players. In particular, SAMR pointed out that authorities should promote the ongoing supervision of the platform economy, speed up the introduction of policies and measures to support the healthy development of platform enterprises, and endeavor to build a regulatory system that emphasizes ex ante prevention to stimulate early detection and expeditious corrections.

Seminar on Judicial Protection of IPR and Competition in the Digital Economy Held in Beijing

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On August 19, 2022, the Seminar on Judicial Protection of Intellectual Property Rights (IPR) and Competition in the Digital Economy was held at Peking University. It was hosted by the Beijing Intellectual Property Court and the Research Center for International Intellectual Property of Peking University, and co-organized by the Beijing Intellectual Property Judicial Protection Association.

Representatives from the Beijing Intellectual Property Court, the China National Intellectual Property Administration, and the World Intellectual Property Organization (WIPO), along with intellectual property experts and scholars from Peking University, gathered to discuss the digital economy and intellectual property protection.

The seminar was co-chaired by Wang Mingda, President of the Beijing Intellectual Property Judicial Protection Association; Yi Jiming, Professor of Peking University Law School; Du Changhui, Vice President of the Beijing Intellectual Property Court, Xie Zhenke, Director of the Competition and Monopoly Committee of the Beijing Intellectual Property Court; Ma Yide, Professor of Intellectual Property at the University of the Chinese Academy of Sciences; and Yang Ming, Professor at the Peking University Law School.

During the seminar, participants had in-depth discussions on issues such as intellectual property strategy in the construction of the digital economy governance system, network platform governance responsibility in the field of intellectual property, the intersection of intellectual property and competition law in the digital economy, and the protection of intellectual property in new fields and new business models.

Jin Xuejun, President of the Beijing Intellectual Property Court, said that the digital economy has a major bearing on China's overall national development and poses new challenges and opportunities for judicial protection of intellectual property rights and competition. Innovative business models and evolving digital technologies such as big data, cloud computing, and artificial intelligence have resulted in a more diverse range of IP protection objects. The patterns of market competition are constantly being renovated. Correspondingly, there have been calls for strengthening the governance of large-scale internet platforms worldwide.

Du Changhui, co-chair and Vice President of the Beijing Intellectual Property Court, introduced a series of the court's judicial work in protecting the healthy development of the digital economy. From a practical perspective, he highlighted the court's efforts in promoting judicial system reform, issuing adjudication rules, and conducting research on judicial protection of the digital economy.

Regulatory News

Ride-Hailing Licensing Service Company Penalized by Guizhou AMR for Abuse of Market Dominance

Read the Chinese version here

On July 9, 2022, SAMR published the administrative penalty decision imposed by the Guizhou Administration for Market Regulation (Guizhou AMR) on Guizhou Zhoufucheng Logistics Co., Ltd. (Zhoufucheng) for abuse of market dominance.

The relevant product market in this case is the online ride-hailing licensing service market, and the relevant geographical market is Xingyi City, Guizhou Province. According to the regulations of Xingyi City's transportation bureau, a driver must obtain a transportation certificate before carrying out business activities on a ride-hailing platform. Zhoufucheng has been the exclusive licensing partner of the ride-sharing company DiDi since December 2019. Based on the number of licenses issued, Zhoufucheng holds a dominant market share of at least 53.17% in the relevant market. In addition, Zhoufucheng has obtained exclusive agency authorization from DiDi, which has a market share of 91.87% in the online ride-hailing market in Xingyi. Therefore, Zhoufucheng has the dominant position in the relevant market.

Under such circumstances, Zhoufucheng – which also provides commercial vehicle insurance in addition to transportation certificates – adopted various means to force DiDi's ride-hailing drivers in Xingyi City to purchase commercial vehicle insurance from the company exclusively. Between December 2019 and August 2021, 1,481 DiDi drivers did so, accounting for 95% of all newly-licensed DiDi cars during that period. Therefore, Zhoufucheng abused its dominant market position by restricting drivers from purchasing commercial insurance from other insurance companies. In turn, this created a lock-in effect, reducing the competitive pressure the company faced and improperly consolidating and strengthening its market power. Such conduct excluded and restricted relevant market competition, harming drivers' interests.

Accordingly, Guizhou AMR confiscated Zhoufucheng's illegal revenue and imposed fines of 4% of its sales for the 2020 fiscal year, amounting to a total of RMB 1,842,000.40.

Shanxi AMR Fines Seven Motor Vehicle Testing Companies for Monopoly Agreement

Read the Chinese version here

In August 2022, SAMR published the decision on the administrative penalties imposed by the Shanxi Administration for Market Regulation (Shanxi AMR) on seven motor vehicle testing companies in Shuozhou City for reaching and implementing a monopoly agreement. The Shanxi AMR started investigating the alleged monopoly agreement in November 2021 and made the administrative penalties decision on the case in August 2022.

From September 2020 to January 2021, Shuozhou Lantian Automobile Testing Co., Ltd. (Lantian) and six other competing companies – including Shuozhou Wangxinyuan Automobile Testing Co., Ltd., Shuozhou Junchi Automobile Testing Co., Ltd., Shuozhou Antai Automobile Testing Co., Ltd., Shuozhou Dingtong Automobile Testing Co., Ltd., Shuozhou Shuoping Automobile Testing Co., Ltd., and Shuozhou Changyun Automobile Testing Co., Ltd. – negotiated and implemented a monopoly agreement to increase the price of motor vehicle testing services for small motor vehicles with less than seven seats. Beginning on September 21, 2020, the seven companies uniformly charged safety testing fees of RMB 350 per vehicle for small motor vehicles with less than seven seats while jointly distributing revenue and dividing the sales market.

Shanxi AMR ruled that the seven companies had reached and implemented agreements to fix the price of motor vehicle testing services, which excluded and restricted competition in the relevant market and harmed consumer interests. Accordingly, Shanxi AMR imposed fines of 5% of the sales in the 2020 fiscal year for the leading company, Lantian, and 3% of the sales in the 2020 fiscal year for the remaining six companies, amounting to a total of RMB 208,437.67.

SAMR Releases Cases of Alleged Price Violations in the Coal Sector

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Recently, SAMR organized teams to investigate coal enterprises in three provinces – Shanxi, Inner Mongolia, and Shaanxi – to further strengthen the supervision of coal prices. In August 2022, SAMR announced that the investigation found 10 cases of suspected price violations in the coal industry, including nine cases of suspected price gouging and one case of suspected non-implementation of government pricing.

The offenders investigated in the cases of alleged price gouging were all enterprises. SAMR found that price gouging in the coal sector was achieved through three primary forms:

1. **Significant increase in sales price.** Coal manufacturers substantially increased their sales prices without significant changes in costs. For example, one coal company investigated by SAMR pushed up coal price expectations by significantly hiking up the selling price of coal beginning in April 2021 without any significant increase in costs. The average selling price of thermal coal increased by 2.76x from March 2021 to October 2021.

2. **Adding links in the transaction chain to increase prices at multiple levels.** Coal manufacturers sold coal to affiliated trading companies, further increasing the price.

3. **Selling thermal coal at high prices under the name of chemical coal.** Coal manufacturers signed confirmation letters to sell chemical coal but instead sold thermal coal, thereby circumventing the pricing restrictions in long-term agreements for thermal coal.

On the other hand, investigations into the non-implementation of government pricing were primarily targeted at the coal trading centers, which increased the cost of coal trading by setting their own rates. For example, in an investigation of the pricing practices of a coal trading center on July 19, 2022, SAMR found that – in the process of providing online coal trading services – the trading center did not implement government pricing and set its own items and charges.

Three Departments Issue Notice to Promote Development of Solar Photovoltaic Industry

Read the Chinese version here

On August 17, 2022, the Ministry of Industry and Information Technology, SAMR, and the National Energy Administration issued a joint notice, "Promoting the Coordinated Development of the Photovoltaic Supply Chain and Industry Chain." The notice highlights the issues of industry homogenization, unhealthy competition, and market monopoly in the solar photovoltaic (PV) industry.

According to the notice, all relevant local authorities in industry and information, market regulation, and energy departments should focus on the strategic goal of carbon peaking and carbon neutrality. This includes scientifically planning and managing the development of the solar PV industry in their region and actively promoting the construction of the national PV market. To optimize regional industrial layout, local authorities need to regulate the market order, support all market players in engaging in market competition on an equal footing, and guide the participation of all kinds of capital in the PV industry. In developing and constructing solar PV power generation projects, local authorities should sternly prohibit enterprises from hoarding resources and forcibly requiring investment in supporting industries.

In addition, the notice also requires local market regulation authorities to strengthen joint inter-departmental law enforcement to crack down on illegal conduct, including price gouging, monopolization, and the manufacturing and sales of counterfeit products in the solar PV industry.

SPP Issues Notice to Carry Out Public Interest Litigation in the Field of Anti-monopoly

Read the Chinese version here

On August 1, 2022, the Supreme People's Procuratorate (SPP) issued the "Notice on Implementing the 'Anti-Monopoly Law of the People's Republic of China' Actively and Steadily Carrying out Public Interest Litigation and Procuration Work in the Anti-monopoly Field." The notice requires the Chinese procuratorial authorities to conscientiously implement the revised Anti-Monopoly Law (AML) and conduct public interest litigation and procuration work in the anti-monopoly field, focusing on safeguarding people's livelihoods in areas such as the internet, public utilities, and pharmaceuticals.

The notice is in line with the amended AML, effective as of August 1, 2022, which introduces a specific prosecutorial public interest litigation provision. The notice thus emphasizes the significance of understanding how the law applies with precision. Authorities should carry out precise anti-monopoly public interest litigation and procuration targeting prominent issues – including monopolistic practices and serious infringements of the rights and interests of consumers – with an emphasis on livelihood areas such as the internet, public utilities, and pharmaceuticals. The handling of anti-monopoly civil public interest litigation cases shall be under the jurisdiction of the procuratorates at or above the city level where the illegal conduct occurs, where the damage results, or where the offender's domicile is divided into districts. Major and complex cases are handled directly by the provincial procuratorates or the SPP.

The notice requires strict control over the conditions for filing and approval procedures. While respecting the law enforcement rules, regulations, and professional opinions of anti-monopoly enforcement agencies, the notice requires the procuratorial authorities to accurately determine whether the monopoly behavior of the operator infringes on the public interest and whether it is necessary to file a civil public interest lawsuit. For internet companies that undertake certain public management functions and important social responsibilities, civil public interest litigation may be explored to urge them to carry out rectification.

The notice also emphasizes the need for procuratorial authorities to strengthen their capacity to provide safeguards for properly handling antitrust procuratorial public interest litigation cases. The procuratorial authorities should systematically study antitrust laws and rules, especially the revised content of the antitrust law. In addition, authorities should strengthen the bridging of antitrust public interest litigation with relevant provisions in other laws, such as the anti-unfair competition law and the intellectual property law, to enhance the ability to solve problems systematically. It is also necessary to strengthen judicial case studies on anti-monopoly law enforcement and to improve the mechanism for coordinating anti-monopoly law enforcement with public interest litigation procuration. In handling cases, the authorities should strengthen communication and coordination with the courts and proactively embrace social supervision.

Shanghai AMR Publishes Its First Anti-Monopoly Review of a Concentration of Undertakings Case

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On August 5, 2022, the Shanghai Administration for Market Regulation (Shanghai AMR) published its anti-monopoly review opinions for the filing of a joint venture between Hangzhou Lin'an Zhongcheng Transportation Facilities (Hangzhou Zhongcheng) and Teld New Energy (Teld). After the transaction, Hangzhou Zhongcheng will hold 51% of the joint venture's equity, and Teld will hold the remaining 49%. The new joint venture will be engaged in the business of electric vehicle charging services. This is the first simplified procedure case reviewed by a provincial antitrust authority since the pilot program was introduced in July 2022 for delegating the review of certain concentration cases.

There are two relevant markets: China's electric vehicle charging pile equipment market and Hangzhou's electric vehicle charging service market. In the first market, Teld and their affiliated entities account for a market share of 5–10%, while Hangzhou Zhongcheng and its affiliated entities have zero market share. In the second relevant market, Teld and its affiliated entities account for market shares of 10–15%, while Hangzhou Zhongcheng and its affiliated entities have zero market share; ultimately, the estimated market share of the joint venture is in the range of 0–5%. It was therefore reviewed under a simplified procedure by Shanghai AMR, which will submit its review report and recommendations to SAMR for further consideration.

Industry Updates

Final Judgment in Infringement Dispute between TCL and MBO Issued by SPC

Read the Chinese version here

In August 2022, the Supreme People's Court (SPC) issued a final judgment on the patent infringement dispute between TCL Air Conditioner (Zhongshan) Co., Ltd (TCL) and Guangdong MBO Refrigeration Equipment Co., Ltd (Guangdong MBO), a subsidiary of Anhui MBO Intelligent Electrical Appliance Co., Ltd. (Anhui MBO). The SPC dismissed the appeals and upheld the first-instance judgment that the infringer, MBO, should immediately cease its infringing acts and compensate the patentee, TCL, with RMB 1.68 million.

TCL, established in 2000, is a well-known company engaged in designing, manufacturing, and selling air conditioning products. It has a patent for an invention entitled "Air Conditioner Grille Assembly and Vertical Air Conditioner." Guangdong MBO, established in 2010, is a wholly-owned subsidiary of Anhui MBO and mainly focuses on R&D, manufacturing, and sales of refrigeration equipment. TCL claimed that the relevant products, manufactured by Guangdong MBO and sold through the online shop set up by Anhui MBO, allegedly infringed its patent rights. Therefore, the company filed a lawsuit with the Guangzhou Intellectual Property Court, requesting the court to order the defendants to immediately stop the infringement and compensate for economic losses and other reasonable expenses amounting to RMB 4.11 million. On November 23, 2020, the Guangzhou Intellectual Property Court handed down the first instance judgment, which awarded compensation of RMB 1.68 million to TCL.

Appeals were filed to the SPC by both parties, with TCL seeking punitive damages of RMB 7.98 million in addition to the economic loss of RMB 3.99 million. On the other hand, the defendants argued that the damages awarded in the first instance were too high. The SPC held that the 3–5% technology contribution rate – i.e., the ratio of the technology's contribution to the total profit of the infringing product – determined in the first-instance judgment regarding the patents in question was reasonable. The damages awarded in the first instance were, therefore, appropriate. Regarding TCL's request for punitive damages, the SPC held that it was beyond the scope of the original trial claim and should be rejected.

SPC Awards Damages in SEP Infringement Case

Read the Chinese version here

In January 2019, Xu Bin and Ningbo Lubao Technology Industrial Group Co., Ltd. (Lubao) sued Hebei Yi Deli Rubber Products Co. (Yi Deli) and Hebei Jitong Road & Bridge Construction Co., Ltd. (Jitong) for infringement of their patent rights. Following a judgment by the Shijiazhuang Intermediate People's Court in Hebei Province on May 15, 2020, the plaintiff and the defendant Yi Deli appealed to the SPC. In August 2022, the SPC published the final judgment.

Mr. Xu was the owner of a bridge expansion patent and granted Lubao an exclusive license to use it. The patent was incorporated into a recommended standard for the transport industry by the Ministry of Transport, which makes it a standard essential patent (SEP). The defendant Yi Deli produced a bridge expansion device on a highway in Hebei without permission and sold it to the defendant Jitong, which constituted patent infringement. In the first instance, the Shijiazhuang Intermediate People's Court ordered Yi Deli to compensate Mr. Xu and Lubao for economic losses and reasonable expenses totaling RMB 100,000.

The plaintiffs and the defendant Yi Deli appealed to the SPC. The plaintiffs requested the court to rule that the two defendants immediately cease the manufacture, sale, and use of products infringing their patents and compensate the plaintiffs RMB 3 million. The defendants, meanwhile, requested the court reject the plaintiffs' request, as the case was not a dispute over infringement of patent rights but a dispute over royalties from SEPs.

The SPC held that the dispute was over the infringement of patent rights. The case did not involve negotiation between the parties on royalties and licensing terms; thus, it was not a dispute over royalties from SEPs. Moreover, upon knowing that the patent in question was an SEP, the infringers both failed to take the initiative to seek a patent license and failed to negotiate after receiving the patent license negotiation letter from the patentee. Instead, they infringed again in a subsequent project.

Considering this subjective fault of the infringers, the SPC took twice the license fee of the patent as the amount of compensation, which amounts to a total of RMB 3 million combined with the plaintiffs' expenses.

Second-Instance Judgment Issued by SPC in China's First Drug Patent Linkage Case

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On August 19, 2022, the SPC handed down the second-instance judgment in the case between Chugai Pharmaceutical Co., Ltd. (Chugai) and Wenzhou Haihe Pharmaceutical Co., Ltd. (Haihe). It is

the first case involving drug patent linkage in China. The judgment in this case marks a milestone in the advancement of the drug patent linkage system implementation. The system was introduced in July 2021 and has served as an early mechanism for originators and generics to resolve patent disputes over the application of generic drugs by linking the approval of generic drugs and the patent protection of the relevant innovative drugs.

The plaintiff, Chugai, is the holder of the marketing license for the listed patented drug Eldecalcitol Soft Capsules and the patent titled "ED-71 Preparation." The defendant, Haihe, applied to the authorities for a marketing license for a generic version of the above-mentioned patented drug and declared that the generic version did not fall within the scope of protection of the plaintiff's relevant patent rights. Chugai then filed a lawsuit with the Beijing Intellectual Property Court, requesting confirmation that the generic drug fell within the scope of protection of its patent rights. On November 8, 2021, the Beijing Intellectual Property Court formally accepted the case. On April 15, 2022, the Beijing Intellectual Property Court ruled in favor of the defendant Haihe, holding that the generic drug did not fall within the protection scope of the involved patent.

Chugai then appealed to the SPC, claiming that Haihe's generic drug did fall within the protection scope of Chugai's patent and that Haihe failed to provide the proper patent certification and perform the notification obligation. The SPC ruled on the plaintiff's appeal claim, finding that the generic drug did not fall within the scope of the plaintiff's patent protection. Additionally, the court found that Haihe's certification was improper but did not adversely impact Chugai's substantive and procedural rights. Lastly, the SPC recognized that Haihe failed in its obligation to notify because it did not provide the relevant documents until Chugai had commenced patent linkage proceedings, but the SPC did not impose sanctions in this regard. Ultimately, the SPC upheld the first-instance judgment and rejected the plaintiff's appeal.

SPC: Fines Should Be Calculated Based on Sales of All Products

Read the Chinese version here

On August 5, 2022, the SPC published the second-instance judgment of the dispute over the administrative penalty between the Hainan Administration for Market Regulation (Hainan AMR) and Shenghua Construction Co., Ltd. (Shenghua).

On November 19, 2020, Shenghua was fined 1% of its 2018 annual sales, equal to RMB 1,007,342.13, by Hainan AMR for implementing a monopoly agreement to fix the prices of goods and services related to fire safety testing. On January 12, 2021, Shenghua filed a lawsuit with the court to revoke the penalty decision.

Shenghua claimed that it did not have a subjective intent to enter into a monopoly agreement and that it would be incorrect to impose a fine of 1% of the company's total annual sales for 2018, as the fire testing business of Shenghua accounts for less than 1% of its total operating business. Shenghua

argued that the fine base should be the sales of involved products instead of the sales of all products. In the first instance, the court ruled in favor of Shenghua.

Hainan AMR subsequently appealed to the SPC. According to the SPC's decision, in determining the fine for a specific case pursuant to the Anti-Monopoly Law, the court should take into account the legislative purpose and the general principles of law application. Apart from factors such as the nature, extent, and duration of the violation, the SPC also considered the fact that monopolistic acts are usually more harmful to the economy.

From this perspective, the generally harsher penalties for monopolistic conduct are conducive to achieving the legislative purpose of the antitrust law to prevent and curb monopolistic conduct. Therefore, it was reasonable to use the company's entire sales as the base for calculating the fine in this case. The SPC ultimately decided to revoke the first-instance judgment and supported the calculation of fines based on the sales of all products.

NetEase Wins Copyright Infringement and Unfair Competition Case

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In August 2022, the second-instance judgment of the dispute over copyright infringement and unfair competition between plaintiff Guangzhou NetEase Computer Systems Co., Ltd. (NetEase) and defendants Guangzhou Rocket Interactive Information Technology Co., Ltd (Rocket) and Chengdu 91 Wan Network Technology Co., Ltd (91 Wan) was publicly released. The Guangzhou Intellectual Property Court upheld the original judgment, deciding that the defendants should compensate NetEase with RMB 600,000.

Fantasy Westward Journey is a popular online game operated by NetEase, and its player base overlaps to a certain extent with the online game *Idle Odyssey to the West*, which – operated by the defendant, Rocket – can be downloaded through the website constructed by 91 Wan. NetEase argued that *Idle Odyssey to the West* infringed the copyright of several art elements of *Fantasy Westward Journey*. In addition, when promoting the infringing game, the defendant used many game elements from *Fantasy Westward Journey*, misguiding players into believing that the infringing game had a specific connection with the NetEase game, also constituting unfair competition.

After considering the number, popularity, and originality of the artworks involved, as well as the nature and duration of the defendant's infringement, the first-instance court ruled in favor of NetEase. The court ordered the defendants to publish an official apology and eliminate the negative impact, and deliberately awarded damages of RMB 600,000 to the plaintiff.

Rocket then filed an appeal to the Guangzhou Intellectual Property Court, requesting the court revoke the first-instance judgment and claiming that the compensation amount should be RMB 550,000 rather than RMB 600,000. Upon a review of the facts and the law applicable to the appeal

claims, the court held that Rocket's grounds of appeal could not be sustained and upheld the first-instance judgment.

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