

3C Certification Documents as Evidence in IP Cases

“3C” stands for “Compulsory Certification of China” and is a mandatory product certification system with the aim to protect consumer’s safety and national security and strengthen quality control management.¹ An applicant in the process of applying for 3C is requested to submit product models, technical details of products to be certified, manufacturer information, and others, which can be used as evidence in IP cases. The authors in this article will analyze the value of 3C certification documents as evidence in IP cases with an invalidation case handled by the authors and other precedents in relation to 3C certification.

I. Basic information of 3C certification

We don’t mean to and are unable to cover all information of 3C certification process, e.g., the list of 3C mandatory products, certification flow, documents necessary for certification, and would like to focus on certificates and test reports in 3C certification to discuss their value as evidence in IP cases.

1. 3C Certificates

A 3C certificate (sample) called “National Compulsory Certificate for a Mandatory Product” is shown as below:



Figure 1: 3C Certificate²

From a 3C certificate itself, we are informed of at least the following information: (1) manufacturer of a certified product, (2) name,

¹<https://baike.baidu.com/item/3CE8%AE%A4%E8%AF%81/449007?fr=Aladdin>

² <http://image.baidu.com/search/index?tn=baiduimage&ps=1&ct=201326592&lm=-1&cl=2&nc=1&ie=utf-8&word=3CE8%AE%A4%E8%AF%81>

series number, specification, model number of the certified product, and (3) the date of completion of certification.

2. 3C certification test reports

Another important document in 3C certification is Test Report for National Compulsory Certification (“Test Report”) that nevertheless is frequently ignored, and the front page of a Test Report is shown as below:

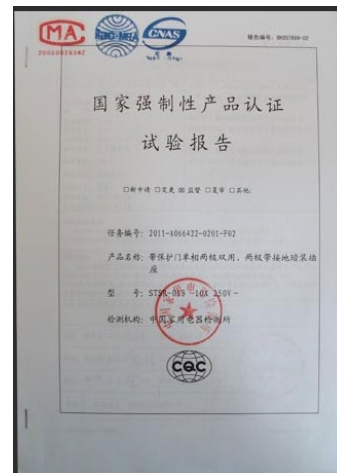


Figure 2: Front Page of Test Report

Although the information listed in the front page of a test report is not substantially different from the one in 3C certificate, more useful information is provided in the main body of a test report, including: (1) basic information for a test report, e.g., date of receipt of test samples, date of completion of test, standards for test, (2) descriptions and explanations: descriptions and explanations of samples, data plates, photos of samples, term sheet of key components, and (3) safety test report and electromagnetic

compatibility test report, and others.

This article will present two samples to demonstrate how to use the information listed in 3C certification documents in both intellectual property administrative and judicial cases.

II.3C certification documents as prior use evidence in patent invalidation case

In a recent patent invalidation case represented by Lung Tin Law Firm, we on behalf of a patent invalidation petitioner successfully built up a prior use evidence chain on the basis of 3C certification documents with other prior-sale evidence to have the target patent invalidated.

It is not a usual case that Patent Invalidation Board (“PRB”) accepts prior use evidence to invalidate a patent. In general, an invalidation petitioner hardly collects prior use evidence that fulfils evidentiary requirements considering that he or she normally is required to collect evidence in relation to prior use occurred several years ago. Under such a situation, a regular defense approach for a patentee is to challenge the formality and legality of prior use evidence, and the PRB consequently takes more cautious attitude to review prior use evidence than other types of evidence.

In the patent invalidation case mentioned above, the invalidation petitioner met the similar challenges. The patent involved in the patent invalidation (“subject patent”) was a patent in relation to an air conditioner and components thereof. One of invalidation arguments was that the technical solutions described in the patent were disclosed by a type of air conditioner product (“product-in-issue”) distributed by the petitioner before the application date of the subject patent. Not surprisingly, the patentee challenged that the current evidence was unable to demonstrate (1) whether the product-in-issue was distributed before the application date of the subject patent, and (2) whether the real products submitted in the invalidation proceeding were revised after being sold.

In response, the petitioner submitted the following 3C certification documents, 3C certificate for product-in-issue, test reports, and “CQC-C0701-2014 Compulsory Product Certification Implementation Rules for

Household Equipment and others with Similar Functions” (Implementation Rules). Among them,

- 3C certificate for product-in-issue shows the model numbers of product-in-issue and issuance date of 3C certificate,

- test reports show the product name, model numbers, report completion and issuance dates, and other design details of product-in-issue, and

- Implementation Rules articulates the principle of post-issuance compliance check, i.e., CQC monitors manufacturer’s production activities to make sure that the products actually produced are in compliance with relevant standards and consistent with sample products in tests for 3C certification.³

The PRB on the basis of the above information in combination with other evidence accepted petitioner’s prior use argument and responded to Patentee’s challenges from the following perspectives:

- It can tell from 3C certificate that petitioner obtained the 3C certificate for product-in-issue before the application date of the subject patent, and test reports show that tests were completed by relevant authority before the application date of the subject patent. The 3C evidence in combination with other prior-sale evidence are sufficient to prove that product-in-issue was distributed before the application date of the subject patent.

- The products provided by the petitioner in this invalidation proceeding are the 3C certified products with a particular model number. The products with the particular model number are substantially same in terms of structures, effects and appearance.⁴

As shown above, 3C certification documents as prior use evidence can be used at least from the following perspectives: (1) a 3C certificate can show that the basic design of a certified product is made and sample products are produced before the date for applying for 3C certificates, (2) 3C certification documents can be used together with other prior sale evidence to

³ Section 7.1.1, Implementation Rules

⁴ Please see Invalidation Decision No. 35665 for more information.

establish a prior sale evidence chain, and (3) 3C certification documents can be used together with other evidence to show that the products are not modified after being sold.

III .Use of 3C certification documents in other IP cases

The authors did an online search with a key word “3C certification” and found out that 3C certification documents are used in other IP cases as evidence to prove the identity of manufacturer, when an infringement occurs, trademark infringement in parallel importation, and others.

1. Use of a 3C Certificate to prove the manufacture of the products

In a design patent judgment between Oppl Co., Ltd. (“Oppl”) vs. Ningbo Oumei Illumination Technology Co., Ltd. (“Oumei”), and Zhejiang Tmall Network Co., Ltd.,⁵ the court identified the manufacturer on the information disclosed in the 3C Certificate by holding that “Oumei has applied for 3C certification documents with the national quality certification center, and Heshi company was designated to be the manufacturer. During the process, Heshi supported Oumei with regards to 3C certified sample preparation, factory audit and other supporting works...Meanwhile, according to the records of the compulsory product certification certificate of China, i.e., the 3C certificate, the authorizer is Oumei and the manufacturer (producer) is Heshi. The name, series, specifications, models of the products clearly direct to the infringing products.”

2. Use of 3C Certificate to determine when the infringement occurs

In the trademark infringement litigation between Wuxi Swan Holding Co., Ltd vs. Guangdong Shuangfeng Electric Appearance Co., Ltd and TCL Air Conditioner (Zhongshan) Co., Ltd.,⁶ the court referred to the 3C certificate to determine when the infringement occurs. In the judgment, the court stated that “the

defendants applied for the 3C certificate for the infringing products in March 2016, and the legal representative of one of defendants applied for a design patent over the infringing products in August 2016, and therefore, it was presumed that the infringement action had been occurred since March 2016.

3. Use a 3C certificate to determine whether the parallel import is an infringement

In the trademark infringement litigation between Michelin Group vs. TAN Guoqiang and OU Can⁷, the plaintiff’s products were originally manufactured abroad but without a 3C certificate in China, and the defendants sold those products without the plaintiff’s authorization. The court hold that “the sales of such products without 3C certificate is illegal, and has potential safety risk. The sales of such products damaged the quality and reputation of the plaintiff, and also harmed the trademark right of the plaintiff”. Based on the above, the sales of the parallel imported products by the defendants constituted trademark infringement. In this case, the 3C certificate is the core evidence in determining the trademark infringement in parallel import.

IV .Conclusion

Considering the importance of 3C certification documents as evidence in IP cases, if the products in issue are related to a 3C certificate, both parties shall pay attention to the details of the 3C certificate, e.g., the information about manufacturer, products series, certified time, sample designs, which can be useful evidence together with other supporting evidence.

⁵ Zhejiang High Court 2nd Instance Judgment (2017) Zhe Min Zhong No. 547.

⁶ Guangdong Province Foshan City Chan Cheng District Court 1st instance Judgment, (2017) Yue 0604 Min Chu 13067. This is the 1st instance judgment and we failed to find 2nd instance judgment online.

⁷ Hu Nan Chang Sha Middle Level People’s Court (2009) Chang Zhong Min San Chu No. 0073

The newsletter is not intended to constitute legal advice. Special legal advice should be taken before acting on any of the topics addressed here.

For further information, please contact the attorney listed below. General e-mail messages may be sent using LTBJ@lungtin.com which also can be found at www.lungtin.com

Hong HU, Ph.D., Attorney at Law, Patent Attorney, Counsel: LTBJ@lungtin.com

Yang LI, Partner, Senior Patent Attorney: LTBJ@lungtin.com



HU, Hong

(Ph.D., Attorney at Law, Patent Attorney, Counsel)

Mr. Hu is currently working in Lung Tin as Counsel, practicing in all IP areas including patent prosecution/litigation and trademark litigation. Before Lung Tin, Mr. Hu worked in a multinational corporation as in-house IP Counsel and in U.S. and Chinese law firms as Patent Attorney, covering Chinese and U.S. patent litigation/prosecution matters.

Mr. Hu obtained Ph.D. in Law degree and Master of Law degree from Peking University Law School, LL.M. degree from George Washington University Law School, and Bachelor of Science degree (Textile Engineering) from Sichuan University.



LI, Yang

(Partner, Senior Patent Attorney)

Mr. Li is a senior patent attorney at Lung Tin, where he focuses on all patent matters with particular expertise in patent invalidation and litigation in a variety of technical disciplines as well as patent prosecution in telecommunication and electricity area.

Prior to joining Lung Tin, Mr. Li has been an examiner in SIPO and deputy director in Patent Reexamination Board (PRB) in charge of reexaminations and invalidations particularly in telecommunications from 2003 to 2013. In spite of his significant experience practicing before SIPO and PRB, Mr. Li also provides patent portfolio, patent ability, freedom-to-operate, and non-infringement opinions for both domestic and international clients.