Case Study on Antitrust Regulation on Intellectual Property Abuse and Countermeasures of Undertakings

Featured Article

Intellectual property rights and antitrust law are two legal systems that encourage innovation and promote market competition. They are functionally complementary, but there are also important differences: Intellectual property law is based on the economic value of intellectual property and its main function is not only to grant and protect rights holders exclusive rights but also balance the relationship between rights holders and licensees; As a method to maintain market competition, antitrust laws mainly regulate the exercise of intellectual property rights. If the exercise exceeds the reasonable range, it will eventually lead to a long-term lack of supply in the market, soaring prices and distorted resource allocation. Such behavior may be regulated by antitrust laws. At present, intellectual property antitrust cases are more common in knowledge-intensive industries such as communications and medicine. It is of great significance for undertakings to clarify the boundary of the proper exercise and abuse of intellectual property, which could help undertakings respond to antitrust investigations or antitrust litigation properly as well as lay out corporate intellectual property rights wisely.

1. China Antitrust Laws and Regulations on Intellectual Property

The anti-monopoly regulation of intellectual property rights is generally based on Article 55 of China Anti-monopoly Law, and Regulations on Prohibition of Abuse of Intellectual Property Rights Exclusion and Restriction of Competition as specific regulations. On June 26, 2019, State Administration for Market Regulation (SAMR) issued Article 12 of Interim Provisions on Prohibiting Abuse of Dominant Market Positions and Article 10 of Interim Provisions on Prohibition of Monopoly Agreements which added 3 factors to determine dominant market position in IP field and listed 4 kinds of monopoly agreements in the technical field.

Article 55 of China Anti-monopoly Law indicates regulatory purpose towards the abuse of intellectual property. It affirms the relevant rights enjoyed by undertakings granted by intellectual property law, but also indicates that intellectual property rights must not be abused by operators. The act of excluding or restricting competition by intellectual property rights may not violate the relevant provisions of the Intellectual Property Law, but it has fallen into the scope of the Anti-monopoly Law.

To determine the abuse of intellectual property rights to eliminate and restrict competition, the former State Administration for Industry and Commerce issued the Regulation on the Prohibition of the Abuse of Intellectual Property Rights to Eliminate and Restrict Competition, with specific provisions on standards and penalties.

The development and advance of intellectual

property antitrust practices leads to various new regulations, and the standards for intellectual property antitrust behaviors have gradually formed their own characteristics. On June 26, 2019, Interim Provisions on Prohibition of Abuse of Dominant Market Positions and Interim Provisions on Prohibition o f Monopoly Agreement issued by SAMR list the factors to determine dominant market position and forms of monopoly agreements concerning the abuse of intellectual property rights, which not only provide new guidance for law enforcement agencies, but also help IP undertakings avoid antitrust risks.

On January 2, 2020, the SAMR issued the Draft Revision of the Anti-monopoly Law (Draft for Public Comment). Although the original article 55 concerning IP antitrust have not been revised, it is worth noting that future antitrust legislation will increasingly focus on the Internet field and innovation-intensive industries. Market competition will become more covert and fierce. In a broad sense, corporate intellectual property also includes asset benefits such as data. The intellectual property antitrust regulation will continue to incorporate new content on the original basis.

In 2019, New antitrust regulations in the field of intellectual property rights are as follows:

Article 12 of Interim Provisions on Prohibition of Abuse of Dominant Market Positions

The dominant market position of a business operator in IP field can be determined by considering the factors such as the substitutability of intellectual property rights, the dependence of downstream markets on the use of commodities provided by intellectual property rights, and the countervailing power of trading counterparts.

Article 10 of Interim Provisions on Prohibition of Monopoly Agreement

The competing business operators are prohibited from reaching any of the following monopoly agreements with each other on restricting the purchase of new technology or new facilities or the development of new technology or new products:

(1) Restrict the purchase or use of new technologies and techniques;

(2) Restrict purchase, lease or use of new facilities and new products;

(3) Restrict investment, research or develop new technologies, new techniques, and new products;

(4) Refuse to use new technologies, new techniques, new facilities and new products;

(5) Restrict the purchase of new technologies and facilities or restrict the development of new technologies and products through other means.

2. Analysis of Typical Cases

In recent years, some typical IP antitrust cases have emerged in the judicial and administrative area, which play an important role in understanding of the relationship between intellectual property rights and antitrust and clarifying the boundary between the legal exercise and abuse of intellectual property rights. The author lists several important typical cases as follows:

2.1 Huawei v. IDC

- Facts

Both Huawei and IDC (Interactive Digital Technology Corporation) are members of the European Telecommunication Standardization Association. IDC holds the Standard Essential Patent (SEP) for global 3G wireless communication technology standards and Huawei needs to use IDC's SEP in its production and operations. However, IDC promised to license its SEP to the members of the European Telecommunication Standardization Association on Fair, FRAND (reasonable, and non-discriminatory) terms. However, the licensing to Huawei has multiple abuses such as unfairly high prices, discriminatory treatments, refusal to trade, tie-in sales and unreasonable trading conditions. The Shenzhen Intermediate People's Court found that IDC had abused its

dominant position in the SEP licensing market concerning 3G technology standards, and ordered IDC to stop the infringement and compensate the victim for 20 million Yuan; According to the FRAND obligation, the relevant licensing rate Determined not to exceed 0.019%. The Guangdong Higher People's Court made the second-instance judgment and upheld the Shenzhen Intermediate People's Court's first-instance judgment.

- Chinese Court's Ruling

Whether it is a contractual obligation, an obligation based on the commitment to join the standard organization, or an obligation determined based on the principles of legal fairness and honesty and credit, Huawei has the right to request IDC to license in accordance with the FRAND principle.

The court's important means of judging whether the charges are reasonable is by analogy with Qualcomm and similar companies such as Apple and Samsung, and finally concludes that IDC has committed abuses.

2.2 Qualcomm antitrust case

- Facts

On February 10, 2015, the National Development and Reform Commission issued a 6.088 billion Yuan fine to Qualcomm, equivalent to 8% of Qualcomm's sales in China in 2013, and ordered Qualcomm to make five rectifications. The content of the administrative punishment resolution includes three parts: the party(Qualcomm) has dominant market position in the wireless standard essential patent licensing market and baseband chip market, the party's abuse of dominant market position, and the basis and decision for administrative punishment.

- NDRC(National Development and Reform Commission)'s Ruling

Qualcomm has a dominant market position in the wireless SEP licensing market and the baseband chip market. The NDRC defines the relevant market as a relatively narrow market. With regard to SEP, the same view as the court of "Huawei v. IDC" was adopted, that is, each standard essential patent license constitutes an independent relevant product market. For baseband chips, according to different technical standards, it is further refined into three baseband chip markets: CDMA, WCDMA and LTE.

Since Qualcomm has a dominant position in the baseband chip market, potential and actual licensees are highly dependent on the parties' baseband chips. If Qualcomm refuses to provide baseband chips, the potential or actual licensees may not be able to enter or must exit the relevant market , unable to effectively participate in market competition.

The wireless communication terminal manufacturer shall pay a fair and reasonable patent license fee when using the wireless SEP of Qualcomm, but patent license offer from Qualcomm includes unreasonable conditions such as the expired patent fee, free reverse patent license, tie-in sales of non-wireless SEP license without any justifiable causes. Qualcomm takes advantage of the dominant position in the baseband chip market, threatening not to supply baseband chips, and forcing potential licensees to sign patent license agreements that contain unreasonable conditions.

2.3 Hytera v. Motorola

- Facts

The plaintiff, Hytera, complained that Motorola had a dominant market position in the metro private network communication market in Chengdu. Motorola refused to open up the interconnection interface to Hytera and refused to achieve system-level interconnection without any justifiable causes, which excluded and restricted competition in the metro private network communication market under Article 17 of China Anti-monopoly Law. The abuse of the dominant market position has caused substantial damage to the Hytera and Motorola shall bear corresponding liability according to law.

- Chinese Court's Ruling

To determine whether the act of refusing to open the API constitutes refusal to trade, it shall be considered whether Motorola has rejected the plaintiff's request to open the API and whether the refusal has resulted in the exclusion or restriction of competition, and whether the defendant has no reasonable causes. However, the evidence cannot prove that the API interconnection method has been directly used for direct interconnection between different manufacturers' equipment between metro lines. Although Motorola has the competitive advantage of switch interconnection, its refusal to provide the plaintiff with the API will not lead to exclusion or restriction of competition.

The evidence also shows that ISI method, terminal interconnection method and gateway interconnection method are all technically feasible, which constitutes an alternative solution to the API solution. Motorola's refusal also has valid reasons. According to this, the suspicious monopolistic conduct does not constitute refusal to deal.

2.4 Yangtze River Pharmaceutical Group v. Hefei Industrial Pharmaceutical Institute Co.,LTD, Nanjing Hicin Pharmaceutical Co.,Ltd. and so on

- Facts

The plaintiff Yangtze River Pharmaceutical Group(Yangtze River) holds that the defendant has a dominant position in the Chinese Desloratadine Citrate Disodium API (Active Pharmaceutical Ingredient) market and it has implemented unfairly high prices and increased prices without reasonable causes, restricted transactions without reasonable causes, Implemented tie-in sales or imposed other unreasonable trading conditions etc. The court was requested to order the defendant to immediately stop the infringement and compensate the plaintiff for various economic losses 100 million Yuan (provisional)in total and reasonable expenditure of 500,000 Yuan (provisional).

- Chinese Court's Ruling

In terms of dominant market position, the two defendants are the sole producers of the API involved in the case which have strong price and market control capabilities. It is difficult for other operators to enter the market in the short term.

Regarding the four kinds of abuses that the plaintiff claims the defendant committed, the court finally determined that the defendant's conduct constituted restriction on transaction, unreasonable high price of the drug substance and imposing unreasonable trading conditions. Although there is no tie-in sale of patent, the defendant's act of collecting royalties after the expiration of the "Technical Contract" has no reasonable basis. When analyzing the negative effects of unreasonably high prices of the drug substance, the court held that between the parties there was a supply relationship in the upstream market(API) and competitive relationship in the downstream market (tablets and hard capsules). Defendants' increasing the price broke the balance of the original API market and lead to additional competitive advantages, the defendant passed the dominant market power of the upstream API to the downstream market and abused the dominant market position.

2.5 Ericsson Antitrust Investigation Case (Initial Investigation Stage)

- Facts

In 2019, the State Administration of Market Regulation (SAMR) launched an investigation into Ericsson's related licensing business, which is the second antitrust investigation initiated by the national antitrust authority in the field of intellectual property licensing after the Qualcomm antitrust case. Ericsson, one of the world's largest telecommunications equipment manufacturers, holds most of the SEPs. With the rapid development of the global communications industry, antitrust investigations are also increasingly focused on the problem of abuse of intellectual property rights in this area to exclude and restrict

competition.

2.6 SHARP Intellectual Property Abuse Case

■ Facts

In 2020, many domestic companies have complained to the Mobile China Alliance about Sharp's unreasonably high prices and abuse of prosecution bans during patent licensing negotiations. After being acquired by Hon Hai Technology Group in 2016, Sharp began to implement a radical patent strategy, and initiated a large number of patent infringement lawsuits globally on household appliances, automobiles, mobile phones, and panel companies.

From January 2020, Sharp has sued OPPO infringement of its WiFi and LTE related SEPs in Tokyo(Japan), Munich(Germany), Mannheim(Germany), and Taiwan District Courts and applied for an injunction. Subsequently, OPPO fights back. First, it filed a lawsuit in Tokyo against Sharp for infringing flash charging technology patents. Second, it filed a lawsuit with the Shenzhen Intermediate People's Court for violations of the FRAND obligations in the negotiation of SEPs. Moreover, as can be seen from OPPO's public response, Sharp asked OPPO for unreasonably high patent licensing fees, and used litigation as a tool to ask for injunctions as a threat of negotiation.

3. How to Deal With the Abuse of Intellectual Property from the Perspective of Antitrust

Intellectual property rights antitrust cases are mainly aimed at the behaviors that companies may exclude or restrict competition when exercising intellectual property rights. Such cases mostly occur in the field of communications. One of the most important reasons is related to SEPs. Patent holders are easily presumed to have a dominant market position in independent related markets formed in this technical field, so their actions more easily trigger antitrust concern. According to the existing cases, undertakings should avoid the abuse of intellectual property rights or pay special attention to the following issues in intellectual property antitrust disputes:

3.1 The Characteristics of the Industry and the Usual Trading Model

Intellectual property antitrust cases are characterized by specific market competition behaviors involving intellectual property content, which are more common in the field of communications and medicine, and the characteristics of the industry and transaction patterns will affect the determination of dominant market position and specific abuses .

In the case of the Yangtze River antitrust dispute, the entry of the API market required state approval, which led to a higher industry threshold and constitutes an important consideration to determine the dominant market position of the defendant. In Huawei v. IDC case, concerning tie-in sale, the court held that global licensing is a common and widely adopted transaction model in the market. A package of licenses can improve efficiency and enhance the consumer experience. Therefore, the antitrust law does not of course oppose the package of licenses, but if the package of licenses is compulsory which violates the principle of fair trade without any justifiable causes, it should be regulated by antitrust law.

3.2 Alternatives to Key Technologies

The high dependence on the SEPs held by the suspected abuser will become an important consideration for the court to determine whether it constitutes abuse. Although the relevant intellectual property have a dominant market position in the market formed by the standard, it is necessary to further investigate whether the patentee has committed abuse.

For patentee, alternatives to key technologies are of great significance in proving the legitimacy of behavior. In the case of Hytera v. Motorola, ISI method, terminal interconnection method, and gateway interconnection method are all technically feasible. Compared with the API solution, which constitutes an alternative

solution which is a valid reason for Motorola's refusal. Consequently, the relevant actions against the accused do not constitute refusal to trade.

For the licensee, it is necessary to focus on collecting evidence of high dependence on licensor's technology, such as the industry's entry barrier, the licensor's absolute dominance, and the lack of competitors in the industry.

3.3 Reference from the Similar Contract with Other Competitors in the Same Industry

Since the calculation of licensing fees for SEPs has not been unified, judges will refer to other similar licensing conditions when they determine whether the licensing fees are reasonable. For example, in the case of Huawei v. IDC, the court compared the patent licensing conditions granted by IDC to Apple with that granted to Huawei, and then determined that IDC had committed abuses.

3.4 Countervailing Power of Trading Parties

In Article 12 of the Interim Provisions on Prohibiting Abuse of Dominant Market Positions, future antitrust analysis will focus on the countervailing power between upstream and downstream. Even holders of SEPs may be restricted in face of a powerful buyers. For example, in the field of communication standards (the cases of Huawei v. IDC and Qualcomm), although the global market share of undertakings implementing relevant SEPs has changed significantly, the market is usually composed of a few large companies and many companies with small market shares. In consideration of transaction costs, the larger the buyer's scale, the more transaction cost savings will be obtained from the successful transaction; at the same time, the overall transaction risk will also decrease.

3.5 The Principle of Good Faith

Cases involving the abuse of intellectual property are generally more complicated. In the case of a large amount of evidence, the judge gradually forms an inner confirmation in the confrontation between the original and the defendant's evidence with the principle of good faith. The principle of good faith is specifically expressed as FRAND principle. The principle of good faith plays an important role in determining the infringement of patent rights, especially the remedy rules of SEP, but it is still necessary to gradually establish rules to regulate the use and avoid abuse of this clause.

4. Summary

In summary, in current judicial and law enforcement practice, there are not many antitrust cases on the abuse of intellectual property rights, but it is foreseeable that as China enhances the protection on intellectual property rights holders, The proper exercise and abuse of IPRs will exist at the same time in a long term. In terms of the significant status of antitrust law in China's market economy, undertakings must correctly understand the legislative goal of China Anti-monopoly law in actual operation and deal with intellectual property antitrust dispute with correct application of relevant provisions of antitrust law.

WANG, Xiaobing
Partner, Executive Director, Attorney at Law, Patent Attorney

Mr. Wang Xiaobing has strong skills in Intellectual Property litigation and arbitration, patent &trademark invalidity, Intellectual Property administrative enforcement cases, Intellectual Property legal counsel, unfair-Competition and anti-monopoly, etc. Mr. Wang has plenty of experience in technical areas of new materials, chemical engineering, biomedical engineering, Internet, e-commerce, communication, semiconductor, mechanics, automation, home design, etc. Since March 2007, Mr. Wang has represented hundreds of Intellectual Property cases, among which one was selected into the Gazette of Supreme of People's Court, some of others were elected as Top Ten IP Cases of China courts, Typical IP Cases of China Courts, Top Ten Typical Cases of the IP Judicial Protection of Shanghai Courts, Top Ten Typical Cases of Shanghai Intellectual Property Court, Top Ten Best Cases of IP professional committee of All-China Lawyers Association, etc.

Yi Yang
Paralegal

Ms. Yi Yang specializes in Antitrust & Competition law, Intellectual Property law. She has taken part in several legal cases, including trademark infringement, patent infringement, trade secrets etc.