

China Competition Policy & IP

MONTHLY UPDATE

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Meetings/Seminars/Projects

National Market Supervision System Anti-Monopoly Work Conference Held in Beijing

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On March 17, 2022, the National Market Supervision System Anti-Monopoly Work Conference was held in Beijing. The conference comprehensively summarized anti-monopoly work in China in 2021, analyzed new challenges and requirements for the future, and deployed the key tasks for 2022. Gan Lin, Deputy Director of the State Administration for Market Regulation (SAMR) and Director of the National Anti-Monopoly Bureau, attended the conference and delivered a speech.

Regulators stated that significant successes were achieved in many areas of anti-monopoly work in 2021, including enforcement in key areas and major cases, the construction and implementation of a fair competition policy system, the development of an anti-monopoly enforcement system, and international cooperation and competition advocacy. Further, the competition ecology of the platform economy was significantly refined, and the competitive market environment steadily improved.

In 2021, 176 monopoly cases were investigated and handled nationwide, with fines amounting to RMB 23.586 billion, while 727 cases of concentration of operators were concluded, with four cases approved with conditions and one case prohibited. Other highlights from the year included the official launch of the National Anti-Monopoly Bureau, which enhanced regulatory powers in market supervision, and China's hosting of the 7th annual BRICS International Competition Conference in Chengdu.

Five priorities for anti-monopoly work in 2022 were shared at the conference:

1. Improve the anti-monopoly rule of law and the legal system of fair competition to provide clearer guidance for market players.
2. Boost market expectations and confidence, intensifying the implementation of fair competition policies to facilitate the smooth flow of domestic circulation.
3. Stabilize the macroeconomy and safeguard people's well-being, strengthening anti-monopoly regulation and enforcement in key areas.
4. Promote the construction of a modern regulatory system and team building to enhance the capacity for fair competition governance.
5. Strengthen enterprises' compliance capacity, shape a new competitive advantage for China, and improve the discourse in international competition rules.

SPC Reports on Anti-Monopoly and Anti-Unfair Competition Judicial Work

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On March 8, 2022, during the fifth session of the 13th National People's Congress, Chief Justice and President of the Supreme People's Court (SPC) Zhou Qiang reported on SPC's work in 2021 and presented its priorities for 2022.

With regards to safeguarding fair competition in the market, the SPC strengthened its anti-monopoly and anti-unfair competition judiciary function in 2021, concluding 49 monopoly cases and 7,478 unfair competition cases. These cases involved conduct such as "either-or," imitation of brand names or likenesses, and fraudulent transactions and reviews, with strict punishment for acts that hindered fair competition and harmed the interests of the public. In 2021, the SPC also explored the rules of data rights protection, served the digital economy, and promoted the development of e-commerce.

In 2022, the SPC will continue to increase judicial protection of intellectual property rights, improve the rules for adjudicating anti-monopoly and anti-unfair competition, regulate the development of the digital economy in accordance with the law, and protect the legitimate rights and interests of platform practitioners and consumers.

China Institute of Applied Jurisprudence Hosts Symposium on the Revision and Application of the Anti-Monopoly Law in the Digital Market

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On March 24, 2022, the Internet Judicial Research Center of the China Institute of Applied Jurisprudence hosted a symposium on the revision and application of the Anti-Monopoly Law in the digital market. Nearly 20 experts and scholars – from institutions including the China University of Political Science and Law, Peking University, Tsinghua University, and the China Society of Economic Reform, as well as representatives from internet companies and judges – participated in the symposium.

During the symposium, the participants discussed the intersection of anti-monopoly administrative enforcement and anti-monopoly civil litigation, the specific application of the provisions of the anti-monopoly law on abuse of market dominance in the digital market, the liability for damages for anti-monopoly infringement, and the anti-monopoly law regulation of data and algorithms. They also shared their insights on the understanding of the provisions, judicial application, case adjudication, and corporate compliance in the context of the draft amendment to the Anti-Monopoly Law.

The symposium was designed to promote the integration of antitrust theories in the digital economy era and to help form a legal consensus on some important antitrust issues in the digital market.

Regulatory News

Yunnan AMR Fines Four Driver Training Institutions for Monopoly

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On March 18, 2022, SAMR released the administrative penalty decision of the Yunnan Administration for Market Regulation (Yunnan AMR) against four driver training institutions in Dayao County, Yunnan Province, for reaching a monopoly agreement.

In March 2021, Yunnan AMR opened an investigation into the suspected monopolistic behavior of Dayao County Jinxing Motor Vehicle Driving Training Co., Ltd., Dayao County Agricultural School Automobile Driver Training Station, Dayao Yicheng Driving Training Service Co., Ltd., and Dayao County Jinhui Ji Motor Vehicle Driving Training Co., Ltd. On February 28, 2022, Yunnan AMR made an administrative penalty decision on the four driver training institutions in accordance with the law.

Yunnan AMR found that after four joint discussions, the four involved driver training institutions signed the “Self-Regulatory Convention of Dayao County Motor Vehicle Driving Training Industry” on July 30, 2020. The convention established the training fees charged by the driving institutions beginning on August 1, 2020: Small car manual (C1) training fees were not to be less than RMB 5,400 per person; small car automatic (C2) training fees were not to be less than RMB 6,400 per person; three-wheeled motorcycle (D) training fees were not to be less than RMB 580 per person; and two-wheeled motorcycle (E, F) training fees were not to be less than RMB 460 per person. Each member paid a performance bond of RMB 100,000. On October 20, 2020, after being questioned by the relevant departments, they made corrections and terminated the flat fee.

Yunnan AMR held that the four institutions entered into a monopoly agreement to fix or increase the price of goods, and therefore administered a fine of 3% of their sales in 2020, which in total amounted to RMB 452,212.24.

SAMR Imposes Three Administrative Penalty Decisions Due to Failures to File

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On March 28, 2022, SAMR issued three decisions on administrative penalties for failures to file concentrations of undertakings with the authorities in accordance with the law. The three decisions involved AGRE Asia Link Operating Platform Limited's (AGRE Asia's) acquisition of Guangri Limited's equity, Apollo Asia Real Estate Management, LLC's acquisition of Wexun Limited's equity, and BNP Paribas Personal Finance's (BNP Paribas's) acquisition of Zhejiang Wisdom Puhua Leasing Limited's (Wisdom Puhua's) equity. The first two transactions involved the real estate industry, while the BNP Paribas/Wisdom Puhua transaction involved the financial industry.

On August 18, 2017, AGRE Asia acquired 45 common shares of Guangri, a company primarily engaged in the development and operation of industrial land in Shanghai. After the transaction, AGRE Asia and Gemdale Properties and Investment Corporation Limited (Gemdale) jointly controlled Guangri, with 45% and 55% equity interests, respectively.

On September 27, 2018, Apollo Asia acquired one common share of Weixun, a company primarily engaged in the development and operation of industrial land in Suzhou. After the transaction, Apollo Asia held 50% of the equity interest in Weixun and shared joint control with Gemdale.

On May 21, 2021, BNP signed an Equity Transfer Agreement with Geely International Limited, Zhejiang Zhongjian Investment Co., Ltd., and Zhejiang Geely Automobile Co., Ltd. to acquire 20% of Wisdom Puhua's equity and obtain joint control.

All three of these concentrations of undertakings violated Article 21 of the Anti-Monopoly Law since they were implemented without filing with the relevant authorities. However, SAMR assessed that none of the concentrations had the effect of excluding or restricting competition and therefore fined AGRE Asia and Apollo Asia RMB 400,000 each, and BNP Paribas RMB 300,000.

SPC Releases Judicial Interpretation of Anti-Unfair Competition Law

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On March 17, 2022, the Supreme People's Court (SPC) released the "Judicial Interpretation of Anti-Unfair Competition Law." The judicial interpretation went into effect on March 20, 2022.

With 29 articles, the judicial interpretation clarifies the application of Article 2 of the Anti-Unfair Competition Law and details the determination of the acts of counterfeiting and forgery, false publicity, and online unfair competition.

Highlights of the interpretation include:

1. The application of Article 2 of the Anti-Unfair Competition Law

Since its implementation, Article 2 of the Anti-Unfair Competition Law has become one of the main legal bases for the People's Court to determine new types of unfair competition. However, inconsistencies in adjudication standards occur from time to time. In this regard, the judicial interpretation stipulates that – if an operator's act disrupts the order of market competition, damages the legitimate rights and interests of other operators or consumers, and is not included in Chapter II of the Anti-Unfair Competition Law or in provisions of the Patent Law, Trademark Law, or Copyright Law – the People's Court can apply Article 2 to determine whether it is an act of unfair competition.

2. Business ethics in the Anti-Unfair Competition Law

Whether the operator has violated business ethics is the core standard when applying Article 2 of the Anti-Unfair Competition Law to determine the justification of the competition conduct. The judicial interpretation clarifies that business ethics in the Anti-Unfair Competition Law shall not be equated with everyday moral standards, but rather with codes of conduct generally complied with and recognized in a particular business field. The People's Court shall determine whether the operator has violated business ethics in accordance with the law, considering the specific circumstances of the case, the rules of the industry or commercial practice, the subjective state of the operator, the willingness of the counterparty, the impact on the rights and interests of consumers, the order of market competition, and the public interest of society.

3. Counterfeiting and forgery

In 2021, the courts across the country concluded a total of 8,654 unfair competition disputes, of which counterfeiting and forgery cases accounted for a large proportion. The judicial interpretation elaborates on the provisions of Article 6 of the Anti-Unfair Competition Law on counterfeiting and forgery. It clarifies the definition of "influential" marks and the factors to be considered, and explains that the Anti-Unfair Competition Law cannot protect marks belonging to the prohibited scope of the Trademark Law.

4. Internet unfair competition

Given the rapid development of technology and business models in the internet industry, the judicial interpretation – instead of enumerating new behaviors constituting unfair internet competition – summarizes and refines the conditions for legal application to serve judicial purposes. The necessary guidance for judicial decisions is provided while allowing for market self-regulation and technological innovation.

The judicial interpretation is an important initiative of the SPC to thoroughly utilize its function in intellectual property adjudication and promptly respond to the judicial needs of new fields and new industries. It is of great significance in enhancing the judiciary against unfair competition,

strengthening the fundamental position of competition, and facilitating the formation of an efficient, standardized, fair, and unified domestic market.

SPC Intellectual Property Court Reports on Its Work in First Three Years

[Read the Chinese version here](#)

The year 2022 marks the third anniversary of the establishment of the Intellectual Property Court of the Supreme People's Court (SPC). On February 27, 2022, at the 33rd meeting of the Standing Committee of the 13th National People's Congress, the president of the SPC presented a special report on the implementation of the "Decision of the Standing Committee of the National People's Congress on Several Issues Concerning Litigation Procedure of Patent and Other Intellectual Property Cases" over the past three years.

The report shows that, after three years of operation, the appeal hearing mechanism for intellectual property cases at the national level has been remarkably effective. The Intellectual Property Court has received 9,458 second-instance cases related to technical intellectual property and monopolies since the court's establishment in January 2019. The court has concluded 7,680 cases, representing an average annual increase of 49.3% in newly received cases.

In addition, local courts have accepted 59,351 first-instance cases on technical intellectual property rights and monopolistic practices and have concluded 55,835 cases in the past three years, with an average annual increase of 10.5% in newly received cases. The number of the first- and second-instance patent infringement cases increased by an average of 26.5% and 31.8% per year, respectively, and the number of cases with claims exceeding RMB 100 million has been on the rise.

These figures reflect the strong demand for judicial protection of intellectual property rights in the context of technological development. These cases involved an increasingly extensive array of emerging industries, with the court accepting more than one-fifth of cases involving industries such as new-generation information technology, biomedicine, high-end equipment manufacturing, and energy conservation.

Moving forward, the SPC will work to strengthen the judicial protection of scientific and technological innovation achievements and intellectual property rights with greater vigor, safeguard the order of fair competition in the market with more practical measures, and strengthen the anti-monopoly and anti-unfair competition judiciary. The SPC will continue to improve the rules for adjudicating competition cases, take a proactive stance in the international governance of intellectual property rights, fairly adjudicate foreign-related intellectual property cases in accordance with the law, and equally protect both domestic and foreign rights holders.

Industry Updates

SPC Rules Huaming-Taipu Mediation Agreement Constitutes Horizontal Monopoly

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In March 2022, the SPC concluded an appeal case between Shanghai Huaming Power Equipment Co., Ltd. (Huaming) and Wuhan Taipu Transformer Switch Co., Ltd. (Taipu), which involved a patent “mediation agreement” between the two enterprises. It was found that the mediation agreement constituted a horizontal monopoly agreement – and that the agreement’s content was not substantially related to the scope of protection of the patent in question – and violated the mandatory provisions of the Anti-Monopoly Law. Therefore, the court overturned the first-instance judgment and confirmed the invalidity of the mediation agreement in its entirety.

In October 2015, Taipu sued Huaming for infringement of its invention patent for an “off-circuit tap changer.” In January 2016, Taipu withdrew its lawsuit after the two parties signed a mediation agreement stipulating that Huaming could only produce certain types of off-circuit tap changers. Huaming could also only resell other types of off-circuit tap-changers to downstream customers using Taipu’s supply and with prices determined according to Taipu’s supply price. In June 2019, Huaming filed a lawsuit before Wuhan Intermediate People’s Court in Hubei Province, claiming that the mediation agreement in question violated the Anti-Monopoly Law and should be deemed invalid.

The court of the first instance determined that the mediation agreement was not a monopoly agreement and ruled against Huaming’s claims. Huaming filed an appeal and, in the second instance, the SPC ruling determined that both Huaming and Taipu produced and sold off-circuit tap changers and therefore have a competitive relationship. In addition, the mediation agreement divided the market of off-circuit tap changers and restricted the sales price and production quantity of the products covered by the agreement, which excluded and restricted the normal competition between operators. Further, the patent in question is not a fundamental patent that cannot be avoided in the field of off-circuit tap changers. Therefore, the fact that Taipu owned and exercised the patent did not exclude the illegality of the mediation agreement in question.

iQIYI Wins Lawsuit Against Rental Platform for Unfair Competition

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On March 8, 2022, the second instance verdict in the unfair competition dispute between Beijing iQIYI Science & Technology Co., Ltd (iQIYI) and Hunan Nan'ao Network Technology Company Ltd (Nan'ao) was publicly released. The Beijing Intellectual Property Court upheld the first instance verdict, deciding that Nan'ao Network should compensate iQIYI for economic losses of RMB 1 million and reasonable costs of RMB 30,000.

iQIYI is one of China's major online video platforms. Its user agreements clearly stipulate that the platform's membership system is based on the basic principle of "one person, one membership account, no sharing" and that paid membership revenue is an important source of income for video sites. Nan'ao is a company that provides gaming and video rental account services via mobile apps.

In the first instance, iQIYI argued that all major video platforms rely on membership systems in which each subscriber only has one account and is prohibited from sharing their accounts with others. This was violated when Nan'ao set up special areas in the four platforms it operates to provide services for renting iQIYI's membership accounts and reaped high profits. Such conduct severely undermined iQIYI's membership management system and business model, constituting unfair competition. Nan'ao had 718 items related to iQIYI accounts on its four platforms, generating a total of 177,100 transactions.

Accordingly, iQIYI filed a lawsuit against Nan'ao, seeking compensation of RMB 8 million for economic losses and RMB 100,000 for reasonable expenses. Nan'ao argued that the service it provided was an intermediary service for information distribution and that the iQIYI accounts at issue were all uploaded by Nan'ao platform users who were also paid members of iQIYI. Nan'ao had promptly deleted the relevant areas on its platforms and fulfilled its duty of care. Nan'ao also argued that its main business was game account rental, and that its video account rental services only represented a small percentage of its operations and hence would not have an impact on iQIYI.

In the first instance, the court held that Nan'ao had breached Article 2 of the Anti-Unfair Competition Law and that its behavior constituted unfair competition. As iQIYI's actual losses and Nan'ao's illegal earnings were not ascertainable, the court, considering multiple factors, awarded the defendant a discretionary compensation of RMB 1 million and RMB 30,000 for reasonable expenses by the law.

Nan'ao appealed against the first instance judgment. In the second instance, the court held that Nan'ao had damaged iQIYI's legitimate rights and interests, constituting unfair competition. The amount of compensation awarded by the first instance court was also reasonable. Therefore, the second instance court rejected the appeal and upheld the original judgment.

SPC Makes First Anti-Monopoly Review of Reverse-Payment Agreement Related to Drug Patent

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The Intellectual Property Court of the Supreme People's Court (SPC) recently concluded the appeal of a patent infringement application withdrawal for the pharmaceutical invention Saxagliptin tablets, which are used to manage type 2 diabetes. This was the first time a preliminary anti-monopoly review was conducted in a non-monopoly case on a "reverse-payment agreement for pharmaceutical patents." On March 22, 2022, the Intellectual Property Court issued commentary on this landmark case.

In this case, the plaintiff, AstraZeneca, obtained the patent right of the active ingredient Saxagliptin from an outside party, BMS. Another outside party, Jiangsu Vcare PharmaTech Co. Ltd. (Vcare), filed a request for invalidation against the patent at issue in 2011. Later, BMS and Vcare entered into an agreement stipulating that Vcare would withdraw the invalidation request and that BMS and the successor patent owner – AstraZeneca – would not pursue Vcare and its affiliates (specifically, the defendant Jiangsu Aosaikang Pharmaceutical Co., Ltd. (Aosaikang)) for implementing the patent involved after January 1, 2016. Subsequently, Vcare withdrew its request for invalidation, and Aosaikang manufactured and sold Saxagliptin tablets after the above-mentioned agreed date. AstraZeneca then filed a lawsuit in Nanjing Intermediate People's Court against Aosaikang for patent infringement.

The Nanjing Intermediate People's Court held that Aosaikang, as a related party of Vcare, was entitled to enforce the patent in question in accordance with the agreement, and therefore rejected all of AstraZeneca's claims. AstraZeneca appealed to the SPC, and later applied for withdrawal of the appeal on the grounds that it had settled with Aosaikang.

In the process of reviewing the withdrawal application, SPC found that the agreement was in line with the appearance of a so-called "reverse-payment patent agreement." SPC pointed out that, in drug patent cases, the courts should generally examine whether the agreements in question – ones that have the appearance of a "reverse-payment patent agreement" – violate the Anti-Monopoly Law to a certain extent.

Specifically, in this case, SPC held that there were no patent obstacles to the entry of the relevant market due to the patent's expired protection, so there was no need for further review and processing of the case.

Court Rules That Using Pre-recorded Videos on Livestreaming Platforms Constitutes Unfair Competition

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On February 8, 2022, the People's Court of Tianjin Free Trade Zone made a judgment on the unfair competition case between three plaintiffs – Shenzhen Tencent Computer System Co., Ltd., Tencent Technology Co., Ltd., and Tencent Digital (Tianjin) Co., Ltd. – and the defendant Mr. Chen. The court found that the defendant's behavior – enabling users to upload pre-recorded videos to livestreaming platforms – constitutes infringement, and determined punitive damages owed to the plaintiffs.

Tencent is the operator of the livestreaming apps NOW Live and Tencent Live. The defendant Mr. Chen is a Taobao store operator who sold technically processed cell phones capable of achieving unmanned livestreaming on many livestreaming platforms, including NOW Live and Tencent Live. Specifically, the defendant's technical processing of cell phones enabled users to use pre-recorded videos for real-time livestreaming while circumventing the platforms' monitoring. Tencent claims that the defendant improperly exploited Tencent's livestreaming services for illegal business interests; undermined Tencent's competitive advantage formed by the rich, high-quality live streaming content on NOW Live and Tencent Live; and infringed upon Tencent's legitimate business interests, which constituted unfair competition.

The court found that the unmanned livestreaming behavior violated the basic rules of the livestreaming platforms and directly harmed the plaintiffs' economic interests and competitive advantage. In addition, the defendant's conduct also harmed the legitimate rights and interests of consumers to watch real-time live broadcasts and disrupted the normal order of livestreaming operations. Therefore, the court ordered the defendant to compensate the plaintiffs for economic losses of RMB 689,148, which amounted to three times the infringement profit of RMB 229,716.

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