

# Intellectual Property & Antitrust

in 23 jurisdictions worldwide

Contributing editor: Susan M Hutton

# 2011



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# China

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## Intellectual property

### 1 Intellectual property law

Under what legislation are intellectual property rights granted? Are there restrictions on how IP rights may be exercised, licensed or transferred? Do the rights exceed the minimum required by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)?

In the People's Republic of China (PRC or China), there are generally no 'common law' or 'non-statutory' intellectual property rights (IPRs) by possession, use or otherwise. IPRs can only be instituted by a national law, which is implemented by ancillary administrative regulations or related judicial interpretations. The major pieces of legislation granting IPRs in the forms of trademarks, patents, copyrights and trade secrets include:

- the Trademark Law (adopted in 1982 and amended 1993 and 2001);
- the Patent Law (adopted in 1984 and amended 1992, 2000 and 2008);
- the Copyright Law (adopted in 1990 and amended 2001 and 2010); and
- the Anti-unfair Competition Law (adopted in 1993).

### Basic contours of IPRs

Trademark rights grant trademark owners monopoly rights in China for the use of their visible marks in connection with their goods or services. In particular, trademark rights give protection to trademark owners against likelihood of confusion in the marketplace caused by competitors in the use of the same or similar marks on the same or similar goods or services. Any person can acquire the exclusive right to use a trademark for the goods it manufactures, processes, markets, or for the service items it provides, by filing an application for registration of such mark in relation to the goods or services in question with the Trademark Office (TMO) of the State Administration for Industry and Commerce (SAIC). The term of a registered trademark is 10 years, counted from the day the registration is approved and renewable for 10 years for each renewal of registration.

Patents convey inventors a time-limited property right in their inventions. More specifically, the patent property right is the right to exclude others from the use (eg, making, selling, offering to sell and importing) of a patentee's invention in China during the term of the patent. An application is required to be filed with the State Intellectual Property Office (SIPO) for examination of an invention before patent can be granted for the invention. The term of patent rights for inventions is 20 years, and the term of patent rights for utility models and for designs is 10 years, counted from the date of filing.

Copyrights provide protection for the personal rights as well as property rights of authors in their works of authorship. The copyright law affords authors a variety of exclusive rights to their works including the rights of publication, authorship, integrity, alteration, reproduction, distribution, translation, adaptation and compilation.

Copyright arises from creation of works of authorship without any requirement of registration with the government. The personal rights of an author, namely the rights of authorship, alteration and integrity, are unlimited in time, while the term of property rights is ordinarily the life of the author plus 50 years.

Trade secrets are a particular category of confidential information pertaining to commercial or industrial activity. The legal protection gives the owner or licensee of trade secrets a right to exclude others from misappropriating (eg, stealing, disclosing or using) the information. Any commercial or technical information that is 'useful' (in the sense of being able to bring economic benefits to their owner or licensee), 'not generally known' and is subject to appropriate steps taken by its owners or licensees to protect its secrecy may be eligible for protection as trade secrets.

### Restrictions in exercise, licensing and assignment of IPRs

The exercise, licensing and assignment of IPRs are subject to various restrictions found in the relevant statutes or created in judicial practice. Below is a summary of major restrictions for the four forms of IRPs described above.

#### Trademarks

Trademark protection generally extends to registration or use of the same or similar mark in respect of identical or similar goods as are covered by the registration by the trademark owners. Trademarks registered without commercial use in China for three consecutive years are subject to cancellation. Also, the exercise of trademark rights is restricted by a trademark fair use principle created in judicial practice, in that another business may use a trademark as a descriptive term as long as the relevant public is not led to believe that the non-owner is the source of the goods or services identified by the mark. Written licence agreements are required for the exclusive licence of registered trademarks and all trademark licence agreements are required to be recorded with the TMO.

#### Patents

The protective boundary of a patent is generally restricted by (in the case of a patented invention or utility model) the patent claims, or (in the case of a design patent) by the product as shown in the drawings or photographs. Under certain circumstances, compulsory licences to exploit the patented invention may be granted. The 'patent exhaustion' doctrine prohibits a patentee from enforcing its right against subsequent purchasers of a product after its first sale in the market. In judicial practice, a patent rights holder who participates in a standard organisation and consents to the adoption of national, industrial or local standards containing its patented technology may be considered to have granted an implied licence for others to implement such standards. Written licence agreements are required for the licensing of patents and the licence agreements are required to be recorded with the SIPO.

### Copyright

The Copyright Law only protects the original 'expression' of an 'idea' rather than the 'idea' itself. Fair use is a well-established defence to a charge of copyright infringement, which allows certain uses of a copyrighted work without obtaining permission of the copyright owner when done for essentially non-commercial purposes. Compulsory licence to use protected works is also stipulated in the Copyright Law, under which no consent from a copyright owner is required as long as compensation is made to the copyright owner. Written licence agreements are required for the exclusive licence of copyrights.

### Trade secrets

Information will not be treated as a trade secret unless it has been maintained as such by its owner by taking all reasonable measures to preserve the secrecy of that information considered by its owner to be a trade secret. Independent conception (ie, a trade secret is acquired properly if it is independently conceived or discovered through parallel research) and reverse engineering (ie, the act of examining a product and figuring out the ideas and methods involved in its creation and structure) are recognised as defences to a charge of trade secret infringement.

### WTO requirements

It is fair to say that the above forms of IPRs granted under PRC law do not exceed the minimum requirements of TRIPs.

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#### 2 Responsible authorities

Which authorities are responsible for administering IP legislation?

In addition to the People's Courts, at the national level, three administrations under the State Council are in charge: SAIC (for trademarks and unfair competition), SIPO (for patents) and the National Copyright Administration or NCA (for copyrights). TMO, which is responsible for trademark registrations, is a department of SAIC.

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#### 3 Proceedings to enforce IP rights

What types of legal or administrative proceedings are available for enforcing IP rights?

In the PRC, both administrative actions and court proceedings are available for enforcing IPRs. Administrative authorities at the national and local levels (ie, SAIC, SIPO, NCA and their local counterparts) are vested with broad investigative powers, and can examine and seal up articles relating to IPR infringements. If an administrative authority finds that a complaint of infringement is justified, it has the power to order cessation of the infringing activity, confiscate the infringing materials, impose fines on the infringer and seize materials, tools and equipment used in the course of the infringement.

Rights holders also have right to file lawsuits before Chinese courts against any infringement of IPRs. Only courts have the power to award compensation of damages, to issue orders for preservation of evidence and, in lawsuits involving infringement of patents, trademarks and copyrights, to issue preliminary and permanent injunctions.

If an act of infringement is so serious that it breaks the criminal code, the infringer will be prosecuted for IPR-related crimes, such as serious acts of passing off another person's registered trademark or patent, selling unauthorised copies made by another if the selling party clearly knew that the copies were unauthorised, and obtaining trade secrets of another party by theft, inducement, coercion or other improper means and causing substantial economic damages.

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#### 4 Remedies

What remedies are available to a party whose IP rights have been infringed?

In a civil action, rights holders may request remedies such as immediate cease of infringement, exclusion of disturbance, elimination

of negative effects, and compensation for damages. As regards the amount of compensation for damages, courts can order the infringer to compensate the actual loss the rights holder has proved to have sustained. Alternatively, the amount of the infringer's illegal profits can be used as compensation. If the aforesaid two kinds of damages cannot be determined, the court may grant the rights holder statutory damages of up to:

- 1 million renminbi;
- or up to three times the licence fees in the case of patent infringement; and
- 500,000 renminbi for copyright infringement.

Administrative sanctions imposed by administrative authorities for infringing acts that damage the public or social interests are also available (see question 3 for examples of administrative remedies). An offending entity or individual may be criminally punished if criminal offence is found under the criminal code.

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#### 5 IP legislation and competition

Does IP legislation make any specific mention of competition or contain provisions on the anti-competitive or similar abuse of IP rights?

If a patentee's exploitation of a patented invention is determined to be anti-competitive, a compulsory licence may be granted to an applicant for such licence by the SIPO in order to eliminate or diminish the 'anti-competitive effect' (see article 48 of the Patent Law). But no specific rules on what constitutes 'exploitation of a patent with anti-competitive effect' are available.

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#### 6 Remedies for deceptive practices

With respect to trademarks, do competition or consumer protection laws provide remedies for deceptive practices in addition to traditional 'passing off' or trademark infringement cases?

Yes. The Anti-unfair Competition Law and the applicable consumer protection laws provide a wide range of remedies for deceptive practices including without limitation counterfeiting, misrepresentation, fraud, false advertisement, and false or misleading packaging. Civil remedies, administrative sanctions or even criminal punishment may be granted or imposed according to applicable laws.

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#### 7 Technological protection measures and digital rights management

With respect to copyright protection, is WIPO protection of technological protection measures and digital rights management enforced in your jurisdiction? Does legislation or case law limit the ability of manufacturers to incorporate TPM or DRM protection limiting the platforms on which content can be played? Could TPM or DRM protection be challenged under the competition laws?

Yes. WIPO protection of TPMs and DRMs is enforced in China. Under the Copyright Law, without permission of a related rights holder, an act of intentionally circumventing or destroying the technological measures taken by such rights holder for protecting the copyright or copyright-related rights in a copyrighted work (eg, sound recording or video recording in digital format); or intentionally deleting or altering the DRM information of a copyrighted work may be subject to civil liabilities, administrative penalties or even criminal punishments.

No legislation or judicial practice limits the ability of manufacturers to incorporate TPM or DRM protection limiting the platforms on which content can be played. Incorporating TPM or DRM itself is not anti-competitive.

**8 Industry standards**

What consideration has been given in legislation or case law to the impact of the adoption of proprietary technologies in industry standards?

No specific consideration has been given in legislation or case law in China to the impact of proprietary technologies in international standards. No indication or reference in legislation or cases in China that shows any objection to the international standard practices such as that members need to grant licences for proprietary technologies under 'fair, reasonable and non-discriminatory' (FRAND) terms.

There has been no case law dealing with the issue of 'patent hold-up' or 'patent ambush'. That said, an official reply issued by the Supreme People's Court in 2008 to a local high court does touch upon this issue. In that case, a construction engineering firm was sued for patent infringement by a patentee because the construction firm followed an industrial standard applicable in the construction industry in construction designs and engineering work. The official reply stated that if the patentee participated in the formation of the industrial standard or the patent has been incorporated into the 'national, industrial and local standard' with the patentee's consent, the patentee will be deemed to have consented to others exploiting the patent in connection with their implementation of such standard and therefore the exploitation by others of the patent does not constitute patent infringement. The official reply further stated that if the patentee requests others who implement the standard to pay a licence fee, the amount of the licence fee should be 'obviously' lower than the normal licence fee and the patentee will be barred from charging a licence fee if the patentee undertook not to charge the fee when the standard was formulated or when the patent was incorporated into the standard.

**Competition****9 Competition legislation**

What legislation sets out competition law?

The Antimonopoly Law of the People's Republic of China (AML), which was promulgated on 30 August 2007 and came into effect on 1 August 2008, is the principal legislation setting out general principles of competition law. Other regulations governing other areas may contain certain rules relating to competition law. For example, the Regulations on Administration of Technology Import and Export have some specific provisions in relation to restrictions in a technology licensing arrangement.

Generally speaking, the following four types of monopolistic conduct are prohibited based on applicable criteria:

- monopoly agreements;
- abuse of dominant market position;
- concentration of business operators; and
- abuse of administrative power to eliminate or restrain competition.

**10 IP rights in competition legislation**

Does the competition legislation make specific mention of IP rights?

Yes. Article 55 of the AML provides that the law does not apply to acts of exercising IP rights in accordance with relevant laws and administrative regulations on IP rights. This provision essentially states that the act of exercising of IPRs in accordance with relevant laws or administrative regulations on IPRs is not presumed to be anti-competitive. However, the AML also provides that any 'abuse' in exercising IPRs to eliminate or restrain competition is prohibited. The AML does not provide a definition of what constitutes an abusive act in exercising IPRs or lay out specific circumstances.

**11 Review and investigation of competitive effect**

Which authorities may review or investigate the competitive effect of conduct related to IP rights?

To date, no specific authorities have been granted the power to review or investigate the competitive effect of the conduct related to IP rights. That said, the Anti-monopoly Law Enforcement Agency, a ministry-level agency to be designated by the State Council, together with corresponding empowered agencies, will generally be responsible for all the anti-monopoly law enforcement work and co-ordination. With respect to the import of technology in the form of licensing or assignment of IP rights, the Ministry of Commerce (MOFCOM) currently has the power to review the related licensing contract and there are a few guidelines issued by MOFCOM specifying situations where restrictive practices are subject to scrutiny. Also, under the draft Regulations on Pricing Monopoly circulated for comments by the National Development and Reform Commission on 12 August 2009, operators are prohibited from abusing IP rights by engaging in any conduct involving pricing that has the effect of eliminating or restricting competition. There is no indication from the PRC governmental authorities as to how the new agency (the Antimonopoly Law Enforcement Agency, as mentioned above) will interact with other authorities for the review or investigation of competition issues presented by the conduct related to IP rights.

**12 Competition-related remedies for private parties**

Do private parties have competition-related remedies if they suffer harm from the exercise, licensing or transfer of IP rights?

Yes. The general rules laid out in the AML on competition-related remedies also apply to the harm suffered by private parties arising from the enforcement of IP rights.

**13 Competition guidelines**

Has the competition authority issued guidelines or other statements regarding the overlap of competition law and IP?

No. That said, the general principles laid out in the AML on this topic appear to set the tone that conduct relating to the exercise, licensing and transfer of IP rights according to respective laws and regulations on IP rights is not an anti-competitive conduct per se and whether the conduct in question constitutes 'abuse' should be analysed according to specific circumstances, the criteria of which are yet to be issued by the authorities (see question 10).

**14 Exemptions from competition law**

Are there aspects or uses of IP rights that are specifically exempt from the application of competition law?

Under article 55 of the AML, the lawful exercise of IP rights is basically exempt from the application of the AML because a fundamental rationale is that an IP right is essentially a right excluding others from using the owner's IP and the enforcement of this exclusionary power is supported by various laws and regulations governing IP rights.

**15 Copyright exhaustion**

Does your jurisdiction have a doctrine of, or akin to, 'copyright exhaustion' (EU) or 'first sale' (US)? If so, how does that doctrine interact with competition laws, for example with regard to efforts to contract out of the doctrine, to control pricing of products sold downstream and to prevent 'grey marketing'?

No, although a similar concept exists under patent law.



**16 Import control**

To what extent can an IP rights holder prevent 'grey-market' or unauthorised importation or distribution of its products?

There is no clear or settled conclusion on 'grey market' or 'parallel import' issues under the present legislation and judicial practice in China. A case was decided in November 1999 by the Guangzhou Intermediate People's Court, which was decided in favour of a trademark licensee in China. In that case, a licensee had obtained exclusive Chinese licensing rights from a foreign trademark owner and the court supported this licensee's right against a parallel importer where the defendant sold commodities bearing the same trademark without permission from the foreign trademark owner or the Chinese licensee, despite having knowledge of the exclusive licence in China. However, it remains a question as to whether the court decision of that case will influence the PRC legislative initiative in this regard.

**17 Competent authority jurisdiction**

Are there circumstances in which the competition authority may have its jurisdiction ousted by, or will defer to, an IP-related authority, or vice versa?

Not under the current legislation, given the nascent stage of the development of the competition law and its interaction with IP-related laws and regulations.

**Merger review****18 Powers of competition authority**

Does the competition authority have the same powers with respect to reviewing mergers involving IP rights as it does with respect to any other merger?

Yes, as far as current rules and practices are concerned. This preliminary conclusion is based on the fact that all merger transactions meeting certain thresholds are subject to the scrutiny of the same governmental authority (currently MOFCOM) regardless of whether IP rights are involved.

**19 Analysis of the competitive impact of a merger involving IP rights**

Does the competition authority's analysis of the competitive impact of a merger involving IP rights differ from a traditional analysis in which IP rights are not involved? If so, how?

There is not enough information to make any assessment in this regard at this point. It may be more productive to revisit this issue when decisions from MOFCOM (or the new agency to be designated to administer the AML) are available.

**20 Challenge of a merger**

In what circumstances might the competition authority challenge a merger involving the transfer or concentration of IP rights?

We are not aware of any special rules on merger examination involving transfer or concentration of IP rights. According to general rules of the AML, business operators shall declare to the Anti-monopoly Law Enforcement Agency in advance regarding the proposed concentration (which, among other things, include a merger of business operators) reaching the thresholds for declaration prescribed by the State Council. Among the factors to be considered in the examination, the impact on market access and technological advancements should be analysed in relation to the transfer, licence or other concentration of IP rights.

**21 Remedies to alleviate anti-competitive effect**

What remedies are available to alleviate the anti-competitive effect of a merger involving IP rights?

In theory, where a concentration of business operators is not prohibited, the Anti-monopoly Law Enforcement Agency may decide to attach restrictive conditions (eg, mandatory or compulsory licences) for reducing the perceived anti-competitive effect of the concentration. However, given that the implementation of the AML only took place in August last year, there is no information on which to base an answer to this question.

**Specific competition law violations****22 Conspiracy**

Describe how the exercise, licensing, or transfer of IP rights can relate to cartel or conspiracy conduct.

Under article 13 of the AML, competing business operators are prohibited from reaching any monopoly agreement with each other that restricts the procurement of new technology or new facilities, the development of new technology or new products, or implementing joint boycotting transactions. Thus, it suffices to say that any IP rights arrangement including the exercise, licensing or transfer of IP rights may not be entered into for the foregoing purposes. However, there are no guidelines for the treatment of specific arrangements such as patent pools, copyright collectives and standard-setting bodies.

We are unaware of any cases involving reverse patent settlement payments in China. Generally, normal practices involving IP rights arrangement of patent pools, copyright collectives or standard-setting bodies are not illegal per se as long as they fall within the boundaries of legitimate exclusionary rights of IP holders and without the intent to achieve any effect of limitation or prohibition on free competition.

**23 (Resale) price maintenance**

Describe how the exercise, licensing, or transfer of IP rights can relate to (resale) price maintenance.

There are no specific rules on price maintenance in relation to IP rights. Under the AML, the following two categories of 'monopolistic agreements' between an operator and its counterparty to a transaction in a vertical relationship (eg, a seller and its distributor or reseller) are prohibited: an agreement that fixes the resale prices of products to be sold to third parties and an agreement that restricts the minimum resale prices of products to be sold to third parties.

However, a monopolistic agreement is not unlawful per se, as it is not an outright violation of the AML without an inquiry as to the precise harm to competition and consumer benefits it brings, and the business excuse for its use. The AML specifies a number of circumstances in which the prohibition against price maintenance does not apply. Circumstances that are considered to be pro-competitive that may also be relevant to the exercise, licensing or transfer of IP rights may include that the intent of such restraint is to improve technology, engage in research and development of a new product, upgrade the quality of a product, lower the cost of a product, enhance efficiency, unify the specifications and standards of a product, implement specialisation of services, or improve efficiency in the operations of medium and small businesses and strengthen their competitiveness.

**24 Exclusive dealing, tying and leveraging**

Describe how the exercise, licensing, or transfer of IP rights can relate to exclusive dealing, tying and leveraging.

There are no specific rules on exclusive dealing, tying and leveraging where IP rights are involved.

**Update and trends**

On 25 May 2010, the State Administration for Industry and Commerce (SAIC) posted on its official website for public consultation the following two drafts of regulations to implement the AML: Draft Regulations on Prohibition of Monopoly Agreements, and Draft Regulations on Prohibition of Abuse of Dominant Market Position. Under these two draft regulations, it is proposed that activities of business operators to enforce their intellectual property rights in accordance with the laws or administrative rules governing intellectual property rights are not subject to the Regulations. But the Regulations will apply to the 'abuse' of intellectual property rights to reach a monopoly agreement as well as the abuse of market dominance. The Regulations do not define what constitutes 'abuse' of intellectual property rights.

**25 Abuse of dominance**

Describe how the exercise, licensing, or transfer of IP rights can relate to abuse of dominance.

There are no specific rules on IP-related abuse of dominance.

**26 Refusal to deal and essential facilities**

Describe how the exercise, licensing, or transfer of IP rights can relate to refusal to deal and refusal to grant access to essential facilities.

There are no specific rules in this regard.

**Remedies****27 Remedies for violations of competition law involving IP**

What sanctions or remedies can the competition authority or courts impose for violations of competition law involving IP?

We are not aware of any special sanctions or remedies (such as compulsory licensing or divestitures of IP rights) for violations of competition law involving IP under PRC law. That said, as far as violations of the AML are concerned, the Anti-monopoly Law Enforcement Agency enjoys discretion to order administrative penalties such as imposition of fines, issuance of cease-and-desist orders and confiscation of illegal gains. In a civil court proceeding, remedies including compensation for damages are available according to laws.

**28 Competition law remedies specific to IP**

Do special remedies exist under your competition laws that are specific to IP matters?

No.

**29 Remedies and sanctions**

What competition remedies or sanctions have been imposed in the IP context?

The AML only came into effect on 1 August 2008 and information that is publicly available on this issue is still very limited. That said, we are unaware of any reported cases in which actual competition remedies or sanctions have been imposed in the IP context.

**30 Scrutiny of settlement agreements**

How will a settlement agreement terminating an IP infringement dispute be scrutinised from a competition perspective?

We are unable to answer this question at this point, given the nascent stage of the implementation of the AML in general.

**Economics and application of competition law****31 Economics**

What role has economics played in the application of competition law to cases involving IP rights?

We are unable to comment on this question at this point given that no actual cases (not to mention those involving IP rights) have been reported since the implementation of the AML.

**32 Recent cases**

Have there been any recent high-profile cases dealing with the intersection of competition law and IP rights?

No.



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