

Abuse of IP Rights Under China's Antitrust Rules: Recent Cases Have a Potentially Serious Impact

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Corporations doing business in China, based on their intellectual property (IP) rights, need to be aware of the potentially serious impact of China's Anti-Monopoly Law and other antitrust rules. China's Anti-Monopoly Law prohibits the holder of IP rights from abusing those rights when it has a dominant market position. Such dominance can be achieved under Chinese law with a market share as low as 10 percent. Two recent cases demonstrate the greater reliance of Chinese companies on the antitrust rules, particularly when bargaining for lower royalties and license fees.

Interdigital v. Huawei

The Shenzhen Intermediate Court recently decided that Interdigital abused its patent rights by requiring Huawei to pay "excessive" royalties for essential patents for mobile telephone technology. The license terms proposed by Interdigital to Huawei reportedly complied with the European Telecommunications Standards Institute's policy as Fair, Reasonable and Non-Discriminatory (FRAND) terms. However, the court found that the terms of the proposed license were not a FRAND complaint, and even if the offered licenses were a FRAND compliant, the royalties to be paid by Huawei should not exceed 0.019 percent of the sale price of each Huawei product using the patents. This was significantly less than what Interdigital was prepared to accept (and reportedly less than that agreed upon in Europe for the same license). In effect, Interdigital must now give Huawei a compulsory license at the lower royalty rate as fixed by the Chinese Court. Interdigital has indicated it will appeal the decision.

While the judgment has not been published, it is reported that other findings of the Shenzhen Intermediate Court include that Interdigital had also abused its IP rights by:

- Tying the licensing of essential patents to the licensing of non-essential patents
- requiring that Huawei provide a grant-back of certain patent rights

Microsoft v. Guangzhou Kam Hing

Another recent IP abuse case involves Microsoft, who reported Guangzhou Kam Hing to the Chinese local authorities in 2010 for using pirated Microsoft software. This resulted in Guangzhou Kam Hing being fined by the Chinese authorities. Subsequently, Microsoft filed a complaint to a local (Nansha)

court claiming damages of RMB 4.7 million and requiring that Guangzhou Kam Hing purchase a specified quantity of genuine Microsoft software at a certain price. Guangzhou Kam Hing has now brought proceedings in the Guangzhou Intermediate Court accusing Microsoft of abusing its IP rights by allegedly:

- Applying quantity restrictions to reinforce its dominant position
- Charging excessive prices thereby gaining “monopoly” profits

There was also a claim of discrimination in its pricing of software licenses based on differential pricing in Hong Kong and Mainland China for the same product. It is unclear whether the claim of discriminatory pricing is being pursued. The decision in this case is still pending.

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