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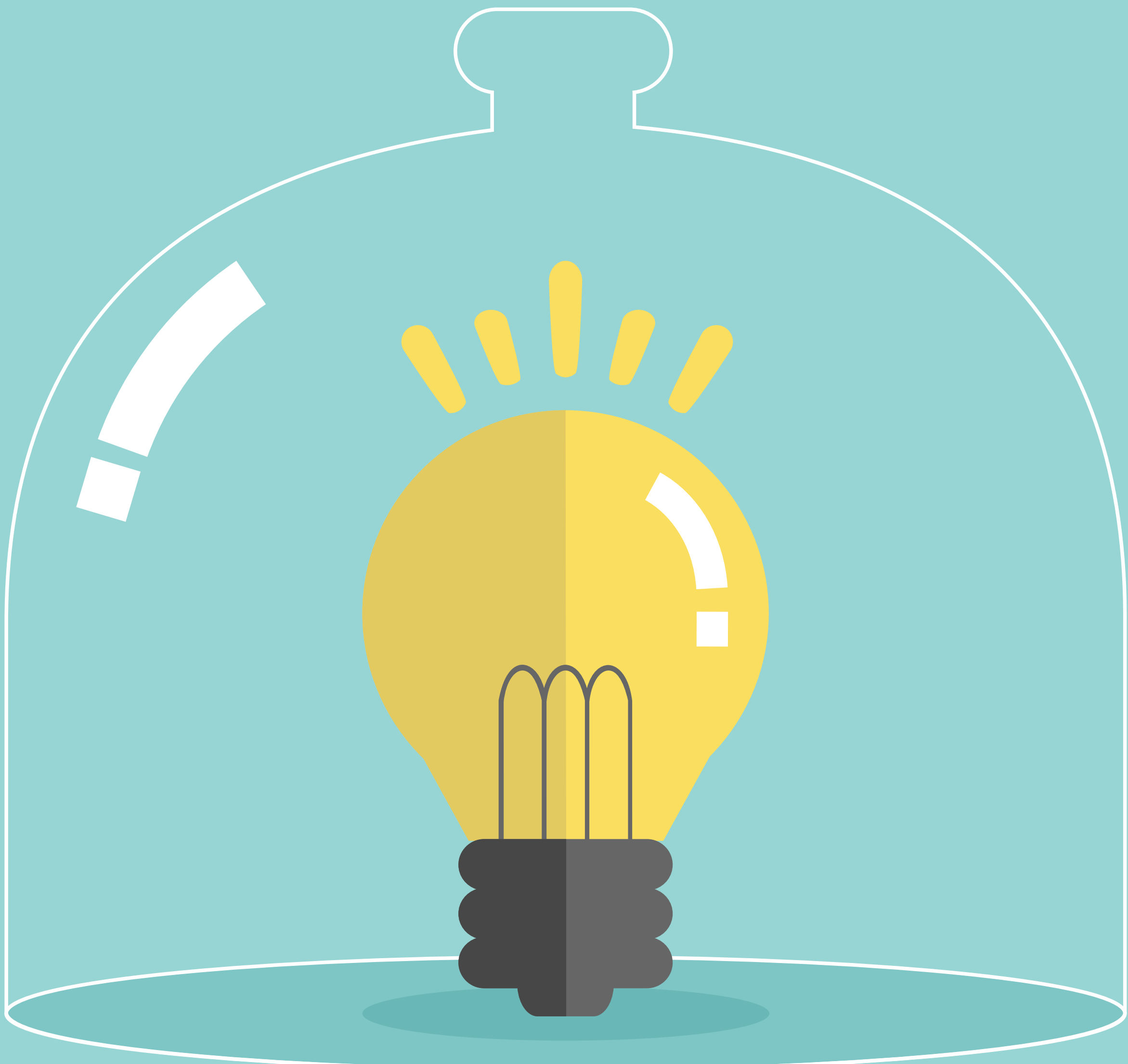
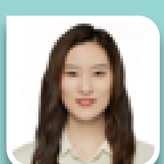


BY HAO ZHAN, YING SONG & RUICHEN LIU[1]





1 Hao Zhan, Partner of AnJie Broad Law Firm. Ying Song, Partner of AnJie Broad Law Firm. Ruichen Liu, Associate of AnJie Broad Law Firm.

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THE INTERACTION OF IPRs AND ANTITRUST: FROM THE PERSPECTIVE OF CHINESE PRIVATE ANTITRUST LITIGATIONS

By Hao Zhan, Ying Song & Ruichen Liu

In recent years, the complicated relationship between intellectual property rights and antitrust have drawn increasing attention of Chinese courts in private antitrust litigations. China's Supreme People's Court has made great efforts trying to find a balancing approach when assessing antitrust behaviors in the form of exercise of intellectual property rights, by considering both the factors of market competition and innovation in the individual case. Two representative cases, the Transformer Charger Case and the Hitachi Metals Case, can provide some guidance to better understand Chinese courts' attitudes towards the interaction between antitrust law and intellectual property law, against the backdrop of patent settlement agreements and non-SEPS. This article summarizes the development of related legislation in China regarding the interaction between IPRs and antitrust law at first, then introduces in detail the recent judicial precedents reviewed by the Supreme People's Court, to highlight those fiercely disputed issues, the court findings, and various views thereon, with the hope to shed some light on the understanding of this topic.

I. ANTITRUST LEGISLATION RELATED TO IP IN CHINA

A. The AML

The AML contains only one provision to set up the basic principle on how to deal with IPR-related antitrust issues, namely the Article 55 of the AML 2008 (Article 68 of the AML revised in 2022). The article reads "[t]his Law shall not apply to undertakings' conduct of exercising IPRs in accordance with laws and administrative regulations on IPRs; however, this Law shall apply to undertakings' conduct of abusing intellectual property rights to exclude or restrict competition." As the general vague stipulation on the relationship between IPRs and the AML, it is very often difficult for businesses to figure out the fine line of two different law systems. It could be more complicated in patent-related cases because of the complexity and edge-cutting nature of patent claims. For instance, it is not an easy job to define the relevant market of IPRs due to the nature of intangibility and potential competitive constraints from newly created IPs. In these cases, traditional factors to assess market power and competitive effects may not be able to draw a whole picture of competitive landscape in the relevant market either. Moreover, regular activities of exploring the IPRs, such as licensing or not licensing and seeking for injunctions, may also be determined as having stepped into the prohibitive zone of antitrust law, when some specific criteria are met. In short, the sole provision under the AML is far from sufficient.

B. Provisions on Prohibiting the Abuse of IPRs to Exclude or Restrict Competition

Through recent decades, China has made a great deal of efforts to elaborate the sole general provision of the AML by formulating supplementary regulations and guidelines. These supplementary rules not only serve as a good legal basis for antitrust public enforcement, but also become significant references to Chinese courts in private antitrust litigations.

Specifically, back to the year of 2015, the former State Administration for Industry and Commerce (hereinafter "SAIC"), one of the three former antitrust regulators of China, published the *Provisions of the State Administration for Industry and Commerce on Prohibiting the Abuse of Intellectual Property Rights to Exclude or Restrict Competition* (hereinafter *"SAIC Provisions"*), which took effect on July 1, 2015. It is commendable that the *SAIC Provisions* set up the basic analysis approach of defining a relevant market and an abuse of dominance based on the attributes of IPRs. The *SAIC Provisions* also introduced the "safe harbor" in the field of IPRs. However, as there were three central-level authorities in charge of the AML enforcement and the former SAIC only governed non-price related antitrust enforcement at that time, the *SAIC Provisions* did not touch upon any facet in connection to price related antitrust violations and concentrations of undertakings.

After China's antitrust institutional reform in 2018, the newly established and uniform antitrust authority in China, namely the State Administration for Market Regulation (hereinafter "SAMR"), published new *Provisions on Prohibiting the Abuse of Intellectual Property Rights to Exclude or Restrict Competition (2020 Revision)* (hereinafter "SAMR Provisions") to replace the *SAIC Provisions*. Compared with the rules its predecessor made, the *SAMR Provisions* made only with minor amendments; in particular, having supplemented provisions on price-related monopolistic acts and concentrations of undertakings.

With the amended AML entering into force in August 2022, the necessity to renew the practical regulations in the field of IPRs became a realistic issue. For that reason, shortly after the announcement of the AML 2022, the SAMR published several drafts of supplementary antitrust regulations, including the new *Provisions on Prohibiting Abuse of Intellectual Property to Exclude or Restrict Competition) (Draft for Comments)* (hereinafter *"Draft Provisions"*). The *Draft Provisions* properly reflected the modifications of the AML and also refined the rules based on the experience accumulated from the practices. Though the SAMR has not published the official version yet, it is expected to be wrapped up and released soon.

C. The Anti-Monopoly Guidelines in the Field of IPRs

In order to make the antitrust enforcement in the field of IPRs by three former antitrust authorities coherent with each other, the Anti-Monopoly Committee of the State Council (hereinafter "AMC") has commissioned the former SAIC, the National Development and Reform Commission, the Ministry of Commerce and National Intellectual Property Administration to draft a more universal guidelines in the field of IPRs. In January 2019, the AMC has published the Guide of the *Anti-Monopoly Committee of the State Council for Countering Monopolization in the Field of Intellectual Property Rights* (hereinafter *"IPR Guidelines"*).

In general, these guidelines encompass basic principles and approach for determining the monopolistic abuse of IPRs and detailed analytical approaches for market definition, assessment of anti- and pro-competitive effects, and determination of unlawful behaviors under the AML, in the field of IPRs. Notably, the *IPR Guidelines* also recognize the antitrust risks of patent pooling activities, activities related to

SEPs and collective management of copyrights. Compared to the *SAMR Provisions*, the *IPR Guidelines* provide more detailed and applicable guidance. For instance, there is only one clause governing the monopoly agreements in the field of IPRs in the *SAMR Provisions*, while the *IPR Guidelines* institute a whole chapter (7 clauses) to frame how to assess the competitive effects of IPR-related agreements in several particular scenarios including joint R&D, cross-licensing, sole and exclusive grant-back, non-assertion clauses, standard development and so on.

II. RECENT JUDICIAL PRACTICE IN CHINA AND KEY ISSUES

The Chinese courts have started their judicial review on the interaction of IPRs and antitrust issues for a while, and one representative case regarding abuse of SEPs, is *Huawei v. IDC*. In recent years, more patentees have been involved in the abuse of market dominance litigations and the courts have begun to play a role when conducting the antitrust assessment in the non-SEPs scenario. The *Hitachi Metals Case* is a notable example. Furthermore, novel issues have also been brought forward in monopoly agreement cases. For example, the SPC made its leading judgment in finding the patent settlement agreement as cartel in the *Transformer Switch* Case. The SPC also voluntarily examined the legality of a settlement agreement with the suspicion of pay-for-delay in the drug sector. Thus, a deep insight into these leading cases will facilitate a better understanding of how the monopolistic abuses of IPRs are assessed and dealt with in China's judicial practice.

A. The Transformer Switch Case: Pitfall of IP Settlement Agreement

The parties in the IP disputes may reach a settlement agreement to avoid the enormous amount of costs in the long-standing litigations and the risks of the disputed IP being invalid. Notably, the agreements are very often with a horizontal nature, particularly in patent cases, for the firms are either actual or potential competitors in the market for the ultimate products or in the innovation market itself. As a result, IP settlement agreements sometimes raise significant antitrust issues.[2]

After exploring the preliminary criteria of determining the monopoly agreement in the drug pay-for-delay case, the *AstraZeneca v. Jiangsu Aosaikang Pharmaceutical* case,[3] the SPC began to review whether other kinds of patent settlement agreements other than reverse payment agreements constitute monopoly agreements in other industries. The *Monopoly Agreement Dispute Concerning Transformer Charger* (hereinafter the *"Transformer Charger Case"*)[4] should be the first one in China's private antitrust enforcement up to date, having discussed in much detail how the elements of a horizontal monopoly agreement should be determined, and how to solve the conflict between the adjudicative documents of the previous patent dispute and that of the latter anti-monopoly civil litigation. The SPC's reasoning in this case could help people figure out under what conditions may a patent settlement agreement constitute an unlawful monopoly agreement.

1. <u>Case Background</u>

In the *Transformer Charger Case*, the agreement in question is a settlement agreement entered by the parties to settle patent disputes therebetween. The defendant, a transformer charger company named Wuhan Taipu Transformer Changer Co. Ltd. (hereinafter "TTCC") filed a patent infringement lawsuit (hereinafter "Patent Dispute") against the plaintiff, a power equipment company named Huaming Power Equipment Co. Ltd. (hereinafter "HPEC") in 2015, on the ground that the technical features of the shielding cover of a certain type of transformer tap changers (hereinafter "Transformer Charger") produced and sold by HPEC had infringed TTCC's patents. As a counter measure, HPEC soon after applied to National Intellectual Property Admission for a declaration of invalidity of the patent in question and also applied to the court hearing the case, Wuhan Intermediate People's Court, for a stay of proceeding.

In 2016, to solve their IP disputes, both parties entered a settlement agreement. In the settlement agreement, the parties agreed that:

> (i) The transformer charger in question was divided by type, and except for the type of the transformer charger in question, HPEC shall not manufacture or commission any third party (or purchase from it) other than TTCC to manufacture all other types of transformer charger bodies and related parts in question. Meanwhile, HPEC shall be the overseas market agent for TTCC's shareholding company and undertakes not to manufacture on its own in the overseas market, nor to act as agent for similar products of other enterprises.

2 Herbert Hovenkamp, Mark Janis & Mark A. Lemley, Anticompetitive Settlement of Intellectual Property Disputes, 15 Minn. J. L., Sci. & Tech. 3 (2014).

3 *AstraZeneca v. Jiangsu Aosaikang Pharmaceutical*, (2021) Zui Gao Fa Zhi Min Zhong No. 388.

4 *Monopoly Agreement Dispute Concerning Transformer Charger*, (2021) Zui Gao Fa Zhi Min Zhong No. 1298.

(ii) HPEC should first confirm with TTCC on TTCC's price of main part of transformer charger before deciding the quotation by itself, and then quote the price to TTCC with the purchase of the main part. In addition, the parties agreed that, for substitutable imported chargers and special chargers, if one party informs the other party of the price information, the transaction price of the informed party cannot be lower than that of the actively informed party.

(iii) If HPEC breaches the above agreement, it shall compensate TTCC all losses incurred therefrom and additionally pay high liquidated damages.

However, HPEC did not fulfill the said settlement agreement, and TTCC thereby sued HPEC for its violation of the settlement agreement twice respectively in January 2017 and June 2018. In May 2019, HPEC filed a lawsuit to the Wuhan Intermediate People's Court (hereinafter the "Court of First Instance"), requesting to declare that the settlement agreement in question was void due to its violation of the AML. Unfortunately, the Court of First Instance dismissed the claims of HPEC. HPEC then appealed to the SPC in 2021 and the SPC in the end overruled the first instance judgment, finding **that the relevant provisions of the settlement agreement in question constituted a horizontal monopoly agreement prohibited by Article 13(1) of the AML 2008, and that the settlement agreement in question was void**.

2. <u>Disputed Issue: What is the boundary between legitimate settlement agreements and Monopoly Agreement</u>

In the final judgment, the SPC discussed in detail how to distinguish an unlawful monopoly agreement disguised by the form of patent settlement agreements, from a legitimate settlement agreement in the following three steps:

<u>**Step 1**: What is the market relationship of the parties of patent settlement agreements</u>

As stipulated in the Article 13(1) of the AML 2008 (Article 17 of the AML 2022), the horizontal monopoly agreements can only be reached among competitors (actual or potential). Thus, it is always the first place to examine the competition relationship between the concerned parties when looking into a claimed horizontal monopoly agreement. In the *Transformer Charger Case*, HPEC and TTCC are both engaged in the production and sales of transformer tap changers and can be regarded as competitors from the perspective of the AML. Then the Step 1 test was satisfied.

<u>**Step 2**: Whether the agreements contain any hardcore restrictions stipulated by the AML regardless of whether it is patent-related</u>

After examining the contents of the settlement agreement at dispute, the SPC reached a conclusion that it contained market division, production and sales restriction and a high chance of price cartel, and any of them constitutes a per-se illegal horizontal agreement for the reasons set out below:

- First of all, the transformer chargers in question were divided by type, and HPEC was prohibited by the settlement agreement from manufacturing all other types of transformer charger bodies and related parts in question. It meant that the agreement set a clear dividing line of what could be manufactured and sold by the two parties.
- Second, the settlement agreement also limited the production and sales of HPEC's products by stopping production and restricting the sales of specific types of products.
- Third, as the settlement agreement had stipulated that HPEC should not manufacture all other types of transformer charger bodies and related parts in question, when there was only one manufacturer or supplier, the cost and profit margin of HPEC were largely fixed, which directly led to the dependency of HPEC's sales price on the price HPEC paid to TTCC for those products commissioned to TTCC. In the overseas market, as HPEC could not sell products from any third party other than TTCC and the actual sales price of HPEC to users was the price HPEC paid to TTCC, the sales price of HPEC had, as a matter of fact, been limited by TTCC.

<u>**Step 3**: Whether the patent settlement agreement have anti-competitive effects</u>

According to the Article 13(2) of the AML 2008, a monopoly agreement is an agreement, decision, or other concerted act to exclude or restrict competition. The SPC concluded that as for the five types of horizontal agreements explicitly prohibited by Article 13(1) of the AML 2008, they are typical horizontal monopoly agreements that can be deemed as having effects of eliminating or restricting competition, where the per se illegal rule should applies. In this case, the burden of proof shifts to the defendant to prove that the agreement has the effects of promoting competition and the pro-competitive effects outweigh its effects of eliminating and restricting competition. Moreover, the SPC also pointed out in its final judgment that the context or purpose of the settlement agreement and the subjective intention of the parties in entering into the settlement agreement are only reference factors rather than decisive, and it is not sufficient to determine or deny the effect of the settlement agreement on market competition.

Key arguments from the side of TTCC: Whether the settlement agreements fall into the scope of a legitimate exercise of patent right

In the first hearing, TTCC argued that 1) the settlement agreement involved was a general civil and commercial contract instead of a monopoly agreement; 2) the agreement at dispute was reached by the two parties to resolve the patent infringement dispute and preventing subsequent patent infringement, whose validity was confirmed by previous judicial judgments.

To respond to the abovementioned arguments of TTCC, the SPC concluded that according to Article 55 of the AML 2008, what the court will consider when assessing if a patent settlement agreement constitutes a monopoly agreement is whether the settlement agreement is a necessity to lawfully exercise the patent rights. The approach adopted by the SPC in the *Transformer Charger Case* is quite similar to the patent scope test adopted by U.S. courts which emphasizes the consideration of the exclusivity of patent rights when conducting antitrust review of reverse payment agreements. Assuming that the patent in dispute is valid, it is necessary to determine the scope of protection of the patent rights in dispute and the scope of exclusivity of the agreement, compare and determine whether the agreement exceeds the necessary scope for protection of the patent rights. If it does, the monopoly should be found; otherwise, it does not constitute monopoly. Moreover, the SPC distinguished basic patents and secondary patents in the *Transformer Charger* Case. The SPC maintained, in general, the infringers may hold a more favorable position in the patent infringement dispute regarding secondary patents as it is more possible to challenge the validity of secondary patents; and in this case the patentees are more motivated to reach a settlement agreement outside the scope of the patent to prolong the period of exclusive rights of the secondary patents and maintain their monopolistic interests.

Back to the *Transformer Charger* Case, the SPC found that the disputed patent in the previous patent dispute between HPEC and TTCC as the context of the disputed settlement agreement was a secondary patent to improve the stability of the transformer chargers, instead of an unavoidable basic patent. The patent in question was about the transformer chargers with a specific structure but nothing about the shapes or types of transformer chargers. Thus, the division of transformer chargers by type had already exceeded the protected claims under TTCC's patents in the previous patent dispute. For the overseas markets, the settlement agreement in question divided the products into chargers produced by the transformer charger company's participating companies and chargers produced by other companies, to the effect of limiting the scope of chargers produced by HPEC, while this limitation was not substantially related to the scope of protection of the patent in question. As the SPC concluded in its final judgment, the concerned settlement agreement lacked substantial relevance to the scope of protection of the patent right in question, and the agreement had the effect of excluding and restricting competition, consequently constituted a horizontal monopoly agreement under the AML.

To conclude, the *Transformer Charger Case* is a milestone for Chinese courts to set up a clear way to assess whether an IP-related agreement constitute a horizontal monopoly agreement. It also makes explicit that it will not escape from the governance of the AML even if the agreement is in disguise of the protection of IPRs. The reasoned assessment made by the SPC does not only provide a definitive analytical approach for assessment of the monopoly agreement in similar cases, but also set a reference modal for the self-assessment of businesses in the practice of settlement negotiation, IP licensing and cooperation talks with competitors.

B. The Hitachi Metals Case: Controversial Extension of "Essential Facilities" Doctrine into Non-SEPs

As mentioned above, the Chinese courts have made efforts to deal with the complex interaction between lawful exclusive patent rights and antitrust law requirements of non-refusal to deal. For example, in the case of *Huawei v. IDC*,[5] the court concluded that as for a SEP holder, failure to license on the FRAND basis and compelling the licensees to accept unfair high licensing fees by means of bringing about infringement injunctions against others could be regarded as an abuse of dominance, as SEP holders could be deemed as holding naturally the dominant position in each SEP market.

Where the disputed patent is not a SEP, to assess whether refusal of license constitutes an abuse of dominance can be a more difficult matter for the courts. It took more than six years for China's Ningbo Intermediate People's Court to render the first instance judgment in a dispute between four Ningbo magnetic material manufacturers and Hitachi Metals, Ltd. (hereinafter the "HML"), which has aroused hot debates on the application of "essential facilities" doctrine by the Ningbo Intermediate People's Court to define abusive refusal to license in the case of non-SEPs (hereinafter the *"Hitachi Metals Case"*).[6] As the doctrine of "essential facilities" itself is controversial, it has been seldom applied by antitrust authorities worldwide even in the case of SEPs, let alone non-SEPs. Furthermore, it was even the first time that Chinese courts applied the "essential

5 *Huawei v. IDC*, (2013) Yue Gao Fa Min San Zhong No. 306.

6 *Ningbo Ketian Magnetic Industry Co., Ltd. v. Hitachi Metals, Ltd., (2014) Zhe Yong Zhi Chu No. 579; Ningbo Permanent Magnetic Industry Co., Ltd. v. Hitachi Metals, Ltd., (2014) Zhe Yong Zhi Chu No. 580; Ningbo Tongchuangqiang. Magnetic Materials Co., Ltd. v. Hitachi Metals, Ltd., (2014) Zhe Yong Zhi Chu No. 581; Ningbo Huahui Magnetic Industry Co., Ltd. v. Hitachi Metals, Ltd.*, (2014) Zhe Yong Zhi Chu No. 582.

facilities" doctrine. Thus, it is meaningful to look into details of the reasoning and conclusion made by the Ningbo Intermediate People's Court's application of the "essential facilities" doctrine in the first instance judgment and its appropriateness.

1. Case Background

In August 2013, an Alliance established by seven Chinese companies including the four plaintiffs in the *Hitachi Metals Case*– i.e. Ningbo Tongchuangqiang. Magnetic Materials Co., Ltd., Ningbo Permanent Magnetic Industry Co., Ltd., Ningbo Ketian Magnetic Industry Co., Ltd. and Ningbo Huahui Magnetic Industry Co., Ltd. (hereinafter "Four Plaintiffs"), filed a complaint to the U.S. Patent Office against HML for invalidation of its core patents of sintered neodymium-iron-boron (hereinafter "sintered NdFeB"), a type of rare earth magnets. In May 2014, the Alliance and HML negotiated in San Francisco yet failed to reach an agreement; the seven companies have not obtained the relevant licenses. Therefore, four plaintiffs sued HML for abuse of dominance to Ningbo Intermediate People's Court; the case was officially accepted on December 11, 2014.

The first hearing was held on December 17, 2015, and the second one on March 10, 2017. And then, the dormant case was back to life in early 2021. The regional court handed down all four decisions on April 23, 2021, in favor of Four Plaintiffs. The Ningbo Intermediate People's Court has extended the "essential facilities" doctrine to licensing of non-SPEs in its ruling and compelled HML to license its non-SEPs. HML then appealed the case to the SPC and the SPC has already held the hearing in November 2021.

2. The "Radical" Application of "Essential Facilities" Doctrine in the Hitachi Metals Case

The Ningbo Intermediate People's Court in the *Hitachi Metals Case* mainly relied on the "essential facilities" doctrine to create a brand-new concept of "essential patent" and concluded that HML held a dominant position in the market of its sintered NdFeB patents and had abused its dominant position by refusing to license its patents to Four Plaintiffs.

Nonetheless, as mentioned above, the application of the "essential facilities" doctrine to a non-SEP by the Ningbo Intermediate People's Court has been criticized as an excessive misapplication of this carefully balanced legal concept after the judgment was rendered for several grounds. Firstly, some people criticized that the concept of "essential patents" was neither a well-accepted concept of patent law nor a concept under the antitrust law; secondly, it was argued that the application of "essential facilities" doctrine has strict conditions and the first instance judgments made by the Ningbo Intermediate People's Court did not give a detailed explanation to support why it applied such a doctrine; and thirdly, concerns rested on that it might flip the balance between the exclusive nature of IPRs and the intervention of antitrust law embodied in the "essential facilities" doctrine.

Indeed, the "essential facilities" doctrine usually refers to a duty imposed on a monopoly that controls access to an important resource "essential" or "bottleneck" facility to deal with its competitors by providing access to such a "facility" that it controls and is deemed necessary for effective competition, at a reasonable price.

i) The strictness of the "essential facilities" doctrine

It is widely agreed that strict standards need to be met before applying the doctrine of "essential facilities," because it restricts the rights of property owners. Specifically, if the "essential facilities" doctrine is applicable, the owners of essential facilities bear the responsibilities to share their essential facilities with other competitors. Otherwise, the antitrust law must respect the freedom of business operators to choose their trade counterparties. Article 7 of the *SAMR Provisions* lays out the preconditions for the application of essential facilities: (1) the IPRs cannot be reasonably substituted, and it is indispensable for other operators to participate in the competition in the relevant market; (2) refusal to license the IPRs will adversely affect competition or innovation in the relevant market and harm the interests of consumers or public interests; (3) licensing the IPRs will not cause unreasonable harms to the right holders. The Ningbo Intermediate People's Court also summarized the conditions of applying the doctrine as follows: (1) the facilities are indispensable for other business operators to participate in competition; (2) the monopolist has control of the essential facilities; (3) the competitor cannot duplicate the same facilities within a reasonable effort; (4) the monopolist unreasonably refuses the competitor to utilize the essential facilities; (5) it is possible for the monopolist to provide the essential facilities. In addition to the above five conditions, it should also be taken into consideration whether the refusal to license the IPR will have negative influence on competition or innovation on the relevant market and thus harm consumer or public interests.[7]

7 Ningbo Ketian Magnetic Industry Co., Ltd. v. Hitachi Metals, Ltd., (2014) Zhe Yong Zhi Chu No. 579.

In the foreign practices, at least three tests should be considered to see whether the IPRs in question were indispensable for competition in the market: (1) the refusal is preventing the emergence of a new product for which there is a potential consumer demand; (2) the refusal is not justified by an objective consideration; (3) the refusal will exclude any or all competition or will eliminate any or all competition in a secondary market.[8] As the preconditions to apply the "essential facilities" doctrine are hard to satisfy, such doctrine applies in rare cases in practice. In fact, this is the first time for Chinese courts to apply the "essential facilities" doctrine in real antitrust civil litigations.

ii) The balance between IPRs and antitrust law

Many scholars stressed, when applying the "essential facilities" doctrine in the case of IPRs, it is necessary to balance different legal interests under different legal systems. As the "essential facilities" doctrine sets limitations of the holders' abilities to choose trade counterparties at their discretion and even the exercise of IPRs in full, a balance needs to be reached to avoid interest conflicts among legal systems of antitrust law, contract law and IP laws. Regarding the relationships between contract law and antitrust law, it is well acknowledged that an undertaking shall "freely to exercise his own independent discretion as to parties with whom he will deal";[9] antitrust and competition law "does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business."[10]

Undoubtably, as the first "essential facility" doctrine case, the first instance judgment in the *Hitachi Metals Case* raised controversies on whether it is appropriate to apply this doctrine where there was not any industrial standard in the manufacture of NdFeB. It has been argued that theocratically, when it comes to non-SEPs, it should be more prudent for antitrust law to intervene the freedom to choose trade counterparties and whether to trade of the holders of non-SEPs, because compared to SEPs, the holders of non-SEPs may bear less responsibilities to share their patents and their legal patent rights may be impeded by compelling them to license.

iii) What the key factor of applying the "essential facilities" doctrine should be

As stipulated by Article 55 of the AML 2008 which reads "[t]his Law is not applicable to undertakings' conduct in exercise of intellectual property rights pursuant to provisions of laws and administrative regulations relating to intellectual property rights; but this Law is applicable to undertakings' conduct that eliminates or restricts competition by abusing their intellectual property rights," the key to define an abuse of IPRs is whether the concerned behavior will actually bring anti-competitive effects to the relevant market involved. It is also the case when applying the "essential facilities" doctrine in the IP-related antitrust litigations.

It is a pity that the Ningbo Intermediate People's Court in the *Hitachi Metals Case* did not provide a detailed assessment of anti-competitive effects having been created by the HML's refusal to license to demonstrate why the "essential facilities" doctrine was applied in the case of HML. It has been argued that the real market conditions of sintered NdFeB business during the litigation proceedings can be a good supporting material to conduct such assessment which might have been neglected by the Ningbo Intermediate People's Court in the *Hitachi Metals* Case.

From the assessment above, it can be revealed that the anticompetitive effects of refusal to license IPRs should not only be the simple summarization of the monopolistic effects of a given exercise of IPRs legally entrusted by IPR laws. Additional conditions, having actual effects of eliminating or severely restricting market competition have to be satisfied. Moreover, when rendering its final judgment, the SPC should consider avoiding the risks of abusive application of the "essential facilities" doctrine to jeopardize its protection of IPRs, so as to render the clauses of AML an empty shell.

III. CONCLUSION

From a deep glance into the recent judicial practices in relation to the interaction of IP and antitrust, it is observed that Chinese courts have formed a basic framework to examine and determine the monopoly agreements in the scenario of settlement agreements. Scrutiny on cartels under the disguise of IP activities has been increasingly reinforced. Although the case of *Huawei v. IDC* clarified a boundary for SEP holders' legitimate licensing, it is less clear that how far antitrust will go to constrain the rights of non-SEP holders. Controversies mainly lie in that the

8 *IMS Health GmbH & Co OHG v. NDC Health GmbH & Co KG*, [2004] E.C.R. I-5039.

9 *United States v. Colgate*, 250 US 300, 39 S. Ct. 465 (1919).

10 *Id.*

over intervention from the antitrust perspective may weaken the IP incentivized innovation in the long run. In particularly, the extended application of the “essential facilities” doctrine in the IP field aroused a lot of debates worldwide. Indeed, a sound balance between IP and antitrust is not an easy mission in any jurisdiction of the world. With the emerging application of the Internet of Things and smart cars in China and worldwide, it is foreseeable that Chinese courts will face increasing disputes with the feature of intersection between IP and antitrust. Because the revision of the AML in 2022 added “encouraging innovation” as one of the aims of the AML, the significance of this topic becomes more remarkable. Chinese courts will have to face such challenges and to properly respond to disputes of this kind, thus it is meaningful to keep a watchable eye on Chinese evolving judicial practices on the vibrant interaction of IP and antitrust.

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