ALAMY

A new dawn for China?

After years of debate and consultation, China has recently introduced its hotly anticipated Anti-Monopoly Law. Jones Day's **H Stephen Harris Jr**, **Peter J Wang** and **Yizhe Zhang** outline how this is likely to affect IP Rights in the territory

On 1 August 2008, 14 years of debate and consultation with foreign governments, academics and practitioners culminated in the entry into force of China's new Anti-Monopoly Law (AML), the first comprehensive antitrust law enacted in China.

In broad terms, the text of the new law resembles antitrust laws of many other countries, though there are some provisions that are unique to the Chinese law. For example, the AML prohibits anti-competitive agreements such as those enabling price-fixing between competitors and agreements between suppliers and purchasers restraining resale prices. It also prohibits abuses of a dominant position; for example by companies with such a strong competitive position in the relevant market that they can control prices or output. It also contains a fairly typical pre-merger review process, requiring parties to proposed mergers and acquisitions (M&A) to request approval for the proposed deal.

The AML also created a new two-tier antitrust enforcement regime, consisting of a policy body known as the Anti-Monopoly Commission (AMC), under the State Council, the highest-ranking executive body; and a day-to-day enforcement body, the Anti-Monopoly Enforcement Authority (AMEA).

The effect on IP Rights

Not only does the AML contain rather ambiguous provisions regarding abuses of IP Rights, but there are other provisions which raise concerns about whether the law may provide grounds to attack IP Rights that are regarded as legitimate, and even beneficial, in other jurisdictions. One promising development is that court cases brought under the AML have been categorised within a broad category of causes of action that includes IP. This means that the IP Tribunal that is most familiar with the IP will have jurisdiction.

One of the most hotly debated clauses in the new law is Article 55, which reads as follows: 'This law shall not apply to undertakings' conduct that exercise their IP Rights in accordance with the provisions of laws and administrative regulations related to IP Rights. However, this law shall apply to undertakings' conduct that eliminates or restricts competition by abusing their IP Rights.'

No definition of 'abuse' is provided in the law, though it is hoped that regulations or guidelines will be provided in the future. In the absence of such clarification, commentators have tried to understand this clause in light of some other provisions in the AML that may be used in conjunction with the IP article. One of these is a provision that states that one category of conduct that may constitute an abuse of a dominant position is 'refusing to deal with trading partners without valid justification'.

Some have expressed concerns that this provision could result in the courts finding that a mere refusal to license IP Rights constitutes a violation of Article 55, conceivably leading to the imposition of compulsory licences of patents and other IP Rights. This is particularly so in light of the draft Amendment to Patent Law which has been approved by the State Council and is expected to be adopted by the National People's Congress in 2009. This provides that a compulsory licence may be granted if it is judicially or administratively determined that the patent owner used the patent right in an anti-competitive manner.

Other provisions are sparking debate as to whether the AML may be used to constrain China investment, joint venture or licensing strategies of companies with valuable IP. For example, the law prohibits agreements between competitors that 'limit the purchase or development of new technology'. It is not clear whether this provision will be used to restrict the ability of IP Rights owners to license their IP Rights on terms that may seem reasonable to them but not to potential Chinese licensees or the Chinese Government.

Upholding your rights

Article 50 of the AML creates a cause of action for those that have suffered losses caused by violations of the new law. The AML does not, however, explain whether such suits can be filed in court without a prior finding of a violation by the AMEA. Nor does it state which court or courts have jurisdiction over antitrust cases. The Supreme People's Court, however, has sought to answer those questions through two recent documents: the Regulation on Cause of Action in Civil Cases (SPC Regulation); and the Notice on Study and Adjudication of AML Disputes (SPC Notice).

These documents categorise the 361 causes of action recognised in Chinese law into 10 broad groups and four sub-levels. The Court has included causes of action under the new AML within the existing rules for unfair competition and monopoly disputes, as set out in the 1993 Anti-Unfair Competition Law. This is in line with the law's existing provisions, as it has been used principally to attack the manufacture and sales of counterfeit goods and other types of consumer deception.

The SPC Notice appears to confirm that the IP Tribunal will handle civil cases under the AML. It states that the AML has a close relationship with abuses and protection of IP Rights and that the AML and the Anti-Unfair Competition Law belong to the field of competition law.

The SPC Notice also notes that antitrust cases are highly complex, involving both economics and legal issues, and that outcomes of antitrust cases will have significant influence both on the enterprises concerned and the industry. The Notice encourages courts to prepare to handle these cases and to report new issues to the SPC. The tone of the SPC Notice seems to recommend that the courts take a cautious approach to lawsuits under the AML.

In addition to AML cases that can be filed *ab initio* with the courts, which would fall within the jurisdiction of the IP Tribunal, other cases, including those involving IP Rights, will begin as administrative investigations within the AMEA. Most IP-related violations of the law will likely be abuses of a dominant market position, and thus will be handled by one of AMEA's sub-agencies, the State Administration for Industry & Commerce (SAIC). If the parties are dissatisfied with the reconsideration decision, they may apply for a final administrative order by the State Council or file an administrative suit. The AML makes clear, that, except for AMEA decisions in cases of M&A, parties can file administrative suits without first seeking reconsideration by the AMEA. These suits come within the jurisdiction of the Administrative Disputes Tribunal in accordance with Administrative Litigation Procedure Law and other relevant laws. Not surprisingly, that tribunal does not have the extensive experience with IP concepts and legal issues as does the IP Tribunal.

As is true with other jurisdictions, China continues to develop its IP policies and to wrestle with the proper way to reconcile antitrust and IP concepts and enforcement goals. The AML creates new tools to attack anti-competitive uses of IP Rights. Further clarification through AMEA regulations and guidelines, and years of agency and court decisions, will be required to assess whether China's new antitrust law will enhance or undermine proper protection of the rights of IP owners. ■