The Third Revision of the Chinese Patent Law —

Compulsory Licensing for Standards

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Outline

- Conflicts and compatibility between standards and patents
- Compulsory patent license in China
- Could Standards Setting Organization obtain essential patents through compulsory license?
- Could standards users get patent licenses in reasonable terms by means of compulsory license?
- Conclusion
1. Conflicts and compatibility between standards and patents

- Trend of standardization
- Trend of patenting standards
- Conflicts and compatibility between standards and patents
- Involvement of compulsory patent license in two cases:
  - Could SSOs obtain essential patents through compulsory license?
  - Could standards users get patent license in reasonable terms by means of compulsory license?
2. Compulsory patent license in China

- **Purpose of compulsory patent license:**
  - To promote exploitation of patent, and to restrict abuse of patent rights

- **Reasons for issuing compulsory patent license:**
  - Refusal to license by the patentee (Art. 48)
  - Emergencies or public interests (Art. 49)
  - Exploitation of a dependent patent which relies on an existing patent (Art. 50)
  - Being in conformity with the Paris Convention and the TRIPS(+)
3. Could standards organization obtain essential patent through compulsory license?

- Can setting standards be construed as public interests?
  - Definition of public interests (revised Art.49)
  - Setting compulsory standards in China can be construed as public interests
  - Can setting non-compulsory standards be construed as public interests?
Do standards organizations qualify as applicants for compulsory licenses? 

- should an applicant be an entity or institute? 
  (revised Art.48)
Compulsory patent license should only be granted on certain essential patents:

- the Rule on National Standards involving Patents (Draft): mandatory national standard should not include patent, while in principle it is not opposed for recommended national standards to include patents
- What are the “essential patents”?  
  - Criterion of determining essential patent  
  - Procedure of determination
Should mandatory standards organizations be granted compulsory license ex post?

- Disputes resulted from mandatory national standards in recent years
- Legal problems arising due to standard organizations adopting patent into the mandatory national standards without license
- Standard users have been trapped in dilemma: it's difficult to determine on the nature of the action of standard organizations

Granting compulsory license to standards organizations ex post is not recommendable
4. Could standards users obtain patent license in reasonable terms by means of compulsory license?

- Chinese enterprises recently encountered with standards barrier abroad
- Should restriction on competition be one reason for compulsory patent license?
  - practices in other countries
  - Be in conformity with TRIPS
- What actions of the standard patentees could be recognized as restriction on competition?
  - Intersection between Patent Law and Antitrust Law
- Standards users who can apply for compulsory license
  - Shall applicants be ENTITIES?
  - Shall applicants be qualified for exploitation?
- What are the reasonable terms?
  - Criterion
  - Procedure of determination
5. Conclusion

- Patent rights are to be respected – SSOs should obtain patent licenses when possible
- Patent abuse is not allowed – the public are entitled to benefit from technological innovation and standardization
- Article 48,49 should be revised to make the issuance of compulsory license for patent more feasible