

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 that 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