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The recent Chinese 'Anti-Monopoly Guidelines' on Standard Essential Patents

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A judicial and academic debate on standard essential patents (SEPs) in China has recently arisen. The issuance of anti-suit injunctions (ASIs) by Chinese courts in a relatively short period of time (between 2019 and 2020) and the ensuing TRIPS/WTO dispute between the EU and China over the TRIPS compatibility of such ASIs, exemplify such debate.

China has been a WTO member since 2001, and obviously needs to comply with TRIPS obligations on patent and other intellectual (IP) rights. The country is well aware of this, and in general even supportive of a functioning patent system, if only because Chinese businesses are currently those who apply the most at patent offices around the world. Numbers showing the pace of PCT and EPO patent applications filed by Chinese entities, especially in the ICT sector, are quite telling.

But Chinese authorities are also aware of the need to balance patent rights with the interests of other non-right holding stakeholders, particularly in the ICT sector. The SEP context provides a perfect example where such balance is needed, especially to curb possible anti-competitive behaviours by patent owners. Indeed, in June 2023, China's antitrust authority, the State Administration for Market Regulation ('SAMR'), published the draft *Anti-Monopoly Guidelines in the Field of Standard Essential Patents* ('Guidelines') – a document which aims to provide a comprehensive framework to regulate the SEPs landscape.

The Guidelines have been issued to receive public comments. And just a few days before their publication, SAMR had released its 'Provisions on Prohibiting the Abuse of Intellectual Property Rights to Eliminate or Restrict Competition' ('Provisions'), which address monopolistic behaviours in the IP area and also deal with SEPs (Article 19).

SAMR's intent to address the potential abuse of SEPs (considering their susceptibility to anti-competitive effects) is reflected in Article 1 of the Guidelines. The Guidelines have also laid down several measures to tackle such effects. Article 19, for example, requires patent holders to disclose their patents in a timely and sufficient manner during the standard setting process. Non-compliance with this obligation and the assertion of patent rights after promulgation of the standard would be seen as an essential factor in determining the anticompetitive effects in the market.

The Guidelines also focus on understanding the abuse of market dominance within the SEP's

ecosystem (Articles 11-17). First and foremost, the market share of a SEP holder is relevant in assessing market dominance. But the Guidelines list other factors useful to establish market dominance, including SEP owners' financial resources and technological conditions; the degree of dependence of downstream markets on SEPs; and the ease with which patent holders are able enter the licensing market.

Moreover, as also provided by laws and jurisprudence in many other countries, Article 7 of the Guidelines requires SEPs owners to negotiate in good faith terms which are Fair, Reasonable and Non-Discriminatory ('FRAND'). This turns into a duty of patent owners to provide implementers with a clear and specific FRAND offer. The Guidelines further note that while SEPs owners must receive reasonable licensing fees that are reflective of their R&D costs (provided they have negotiated in good faith, and the fee is significantly higher than the R&D costs and comparable historical or standard license fees), they may also impose unreasonable trading conditions and thus abuse their dominant position (Article 11). This is likely to be so, for example, where patent holders undertake practices like requiring a mandatory royalty free cross license; demanding free grant-backs; limiting the choice of the dispute resolution forum; and forcing or prohibiting standard implementers to conduct transactions with third parties (Article 15).

The Guidelines also instruct standard-setting organizations not to support what are called 'monopoly agreements' related to SEPs, and not to provide substantial assistance in concluding them (Article 8). They moreover outline criteria for identifying these agreements in the context of standard setting activities and patent pool arrangements (Article 8). These criteria include assessing whether SEP owners block or restrict others from participating in standard setting or implementation; exchange sensitive information through patent pools; set or alter licensing fees; or constrain implementers' manufacture and sale of products (Articles 9-10).

Finally, the Guidelines highlight key factors for analysing the concentration of undertakings elated to SEPs (Article 18). These include factors such as the type and duration of the licensing arrangements, and whether SEPs constitute independent business assets and generate an independent and measurable revenue stream. Additionally, the Guidelines reaffirm that SAMR has the authority to investigate SEPs-related anticompetitive behaviours that fall below the thresholds but could still harm competition – with entities like SEPs owners themselves, licensees and implementers having the option to voluntarily report such transactions.

Overall, the Guidelines as issued by SAMR seem a commendable step, also considering they are broadly in line with Chinese recent case law on FRAND terms and conditions. They give some much-needed clarifications on competition issues surrounding SEPs. This obviously does not mean that China is not committed to patent protection. Quite the contrary, as mentioned earlier. After all, Chinese corporations own the lion's share of SEPs in communication systems, reaching 34% worldwide (e.g., Huawei for example has more than 240,000 patents globally).

Time will tell if the Guidelines will be eventually confirmed. If so, they will certainly have a reference role for both SEPs holders and implementers, especially in the ICT and related sectors.

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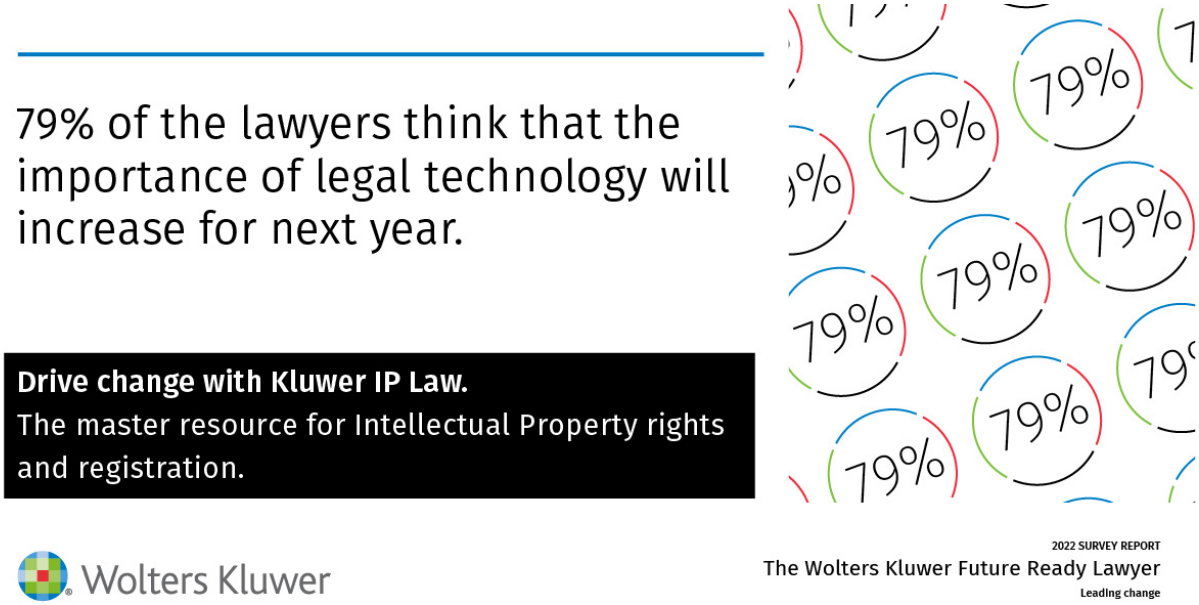

This entry was posted on Tuesday, November 21st, 2023 at 10:24 am and is filed under China, EPO, European Union, FRAND, PCT, SEP, TRIPS
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