

CHINA LEGAL BRIEFING* 226

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Notice of the General Office of the State Council on Forwarding Several Opinions of the State Intellectual Property Office and Other Departments on Strengthening the Work of Intellectual Property Rights in Strategic Emerging Industries

国务院办公厅转发知识产权局等部门关于加强战略性新兴产业知识产权工作若干意见的通知

【Issued by】	General Office of the State Council
【Subject】	Intellectual Property Rights
【Promulgated on】	April 28, 2012
【Effective from】	April 28, 2012
【Source】	http://www.gov.cn/zwgk/2012-05/02/content_2127881.htm

For purposes of improving the capability of strategic emerging industries¹ to create, utilize, protect, and manage intellectual property rights and promoting the cultivation and development of strategic emerging industries in China, general office of the State Council forwarded the Opinions on Strengthening the Work of Intellectual Property Rights in Strategic Emerging Industries issued by State Intellectual Property Office and other departments (“Opinions”) on 28 April 2012. This Opinions is a sequel of the Decision of the State Council on Accelerating the Cultivation and Development of Strategic Emerging Industries (No. 32 [2010] of the State Council) and the Notice of the General Office of the State Council on Issuing the Plan for the Division of Major Work for the Implementation of the Decision of the State Council on Accelerating the Cultivation and Development of Strategic Emerging Industries (No. 58 [2011] of the General Office of the State Council).

Highlights:

1. By acknowledging the significance of intellectual property rights (“IPRs”) in the sense of cultivating and developing strategic emerging industries, the Opinions sets ambitious targets:

By 2015:

- The quantity of invention patents and of international patent applications in strategic emerging industries is two-fold in comparison with those in

¹ According to the “12th Five” Development Plan for State’s Strategic Emerging Industries issued by State Council on 9 July 2012, seven industries, i.e. new information technology, biology, high-tech equipment, new energy, new materials and new energy automobile, are specifically identified as strategic emerging industries. See: http://www.gov.cn/zwgk/2012-07/20/content_2187770.htm

2010. A group of trademarks, software, and copyrights that are internationally renowned will be created.

- The application level of IPRs will be significantly improved. The capability of enterprises and R& D institutions to manage IPRs will be generally strengthened.

By 2020:

- The IPRs will effectively support the development of strategic emerging industries; a group of enterprises with strong international competitiveness, substantial industrial influences, and advantages in IPRs will emerge; and distinct comparative advantages in IPRs in strategic emerging industries will be formed.

2. So as to achieve the aforesaid targets, the following measures will be adopted:

- Boost the creation of IPRs

The state will periodically update the news of IPRs in strategic emerging industries and guide the companies and research institutes to apply for or introduce IPRs. The state will establish a mechanism for reviewing IPRs in key economic and technological activities as well as an effective evaluation indicator system. Particularly, the state will simplify the IPRs application procedure coming from strategic emerging industries by establishing green channels for registration.

- Foster the market utilization of IPRs

The state will actively expand the investment and financing means for IPRs, e.g. IPRs related equity and debt financing; explore new forms of IPRs transfer and transaction in association with strengthen the connection between patent and trademark; establish tight cooperation amongst enterprise, research institute and university.

- Strengthen the capacity of enterprise in managing and utilizing IPRs

The state will promote the collective IPRs management in industrial cluster, i.e. a cluster management model which is leaded by the eminent enterprises, based on the technology related enterprises and the match of technology and industrial chain; found a statistic system for IPRs in strategic emerging industry and establish relevant service agencies.

- Improve the IPRs protection

The state will improve the IPRs laws, regulations and policies, particularly the internet IPRs protection; improve the standards for patent

examination; strengthen the IPRs protection in strategic emerging industries, inter alia, via introducing the IPRs safeguard in emerging industries as the core work of national right safeguard institutions.

- Enhance the international cooperation and support the enterprises in strategic emerging industries to go global

The state will support the application of IPRs in foreign countries and encourage the R&D outsourcing and the R&D in association with foreign partners; strengthen the legal remedy for Chinese enterprises overseas.

- Provide favorable tax policy and financial support

Exit-Entry Administration Law of the People's Republic of China

中华人民共和国出境入境管理法

【Issued by】	Standing Committee of the National People's Congress
【Subject】	Exit-Entry Administration
【Promulgated on】	June 30, 2012
【Effective from】	July 01, 2013
【Source】	http://www.gov.cn/flfg/201206/30/content_2174944.htm

The Exit and Entry Administration Law of the People's Republic of China has been adopted at the 27th meeting of the Standing Committee of the Eleventh National People's Congress of the People's Republic of China on 30 June 2012, and it will enter into force on 1 July 2013. This law is to address the new challenges of exit and entry situation in China which is especially reflected by the drastic increase of personnel of exit and entry. The new law is to serve the purposes of safeguarding China's sovereignty, security and social order in conjunction with promoting the level of opening-up.

As opposed to the repealed laws in this regard, i.e. the Law of the PRC on the Entry and Exit Administration of Foreigners and the Law of the PRC on the Entry and Exit Administration of Chinese Citizens, several highlights are particularly noteworthy:

1. aggravate the punishment for the “three illegal” foreigners in China

“Three illegal” refers to illegal entry, illegal residence and illegal employment. The new law sets strict control over the issuance of visa so as to prohibit the occurrence of “three illegal” from the scratch; strengthens the oversight over the foreigner residing in China; regulates the foreigner to get employed in China by expressly providing for the situations deemed as illegal employment, i.e. (1) foreigners who work in China have not obtained work permits or residence permits for work in accordance with relevant regulations; (2) foreigners work in China beyond the limited scope of work permits; and (3) foreign students work in China in violation of the regulations on work-study administration, or beyond the prescribed scope of jobs or time limits. Accordingly, the new law also stipulates the disclosure of “three illegal” and liability. It states where citizens, legal persons or other organizations find any foreigners are involved in circumstances of illegal entry, illegal residence or illegal employment, they shall duly report it to local public security organs. The liability for the “three illegal” foreigner could be fine, detention, repatriation and no entry within 1–5 years since repatriation.

2. add a category “talent introduction” for issuing ordinary visa

According to article 16, ordinary visa shall be issued to foreigners who enter China due to non-diplomatic or official reasons including work, study, family visit, travel, business activities and talent introduction. This new regulation is envisaged to attract more talents to work in China. In addition, it provides for the permanent residence could be issued to foreigner in the circumstances of prominent contribution to China’s economic or social development or other suitable situations which are subject to the further regulation from relevant authorities.

3. set up a shared information platform for different authorities

The present information platform of exit and entry is founded separately by public security organ and foreigner administrative organ. But a new uniform information platform to oversee the exit and entry will be established so that different government organs can access and share the information.

4. adhere to two principles – oversee and provide service

The administrative regulations on exit and entry, on the one hand, shall safeguard the national security, sovereignty and social order; on the other hand, shall serve for the social development. Hence, in addition to overseeing, it is crucial for the related authorities to promote their capacity to provide better service to realize the smooth and convenient exit and entry, e.g. Chinese citizen residing abroad could use passport as a valid ID to handle issues such as finance, education, medical treatment, transport.

Provisions of the Supreme People's Court on Certain Issues Relating to the Application of Law in Hearing Cases Involving Civil Disputes Arising from Monopolistic Acts

最高人民法院关于审理因垄断行为引发的民事纠纷案件应用法律若干问题的规定

【Issued by】	Supreme People's Court
【Subject】	Civil Disputes Arising from Monopolistic Acts
【Promulgated on】	May 03, 2012
【Effective Date】	June 01, 2012
【Source】	http://www.court.gov.cn/qwfb/sfjs/201205/t20120509_176785.htm

In line with the Contract Law, the Tort Liability Law, the Anti-Monopoly Law and the Civil Procedure Law of the PRC, the Supreme People's Court released the Provisions on Certain Issues Relating to the Application of Law in Hearing Cases Involving Civil Disputes Arising from Monopolistic Acts on 3 May 2012, with the date of entering into force on 1 June 2012. It is the first judicial interpretation since the Anti-Monopoly Law became effective on 1 August 2008, signaling the judicial practice of the People's Court with regard to civil dispute arising from monopolistic acts enters into a new phase.

Pursuant to the Supreme People's Court², the features of the monopolistic civil dispute cases in the past three years are: (1) the disputes involve broad sectors and the modern technology complicates the disputes; (2) the types of existed disputes include that arising from abusing market dominant position as well as that from monopoly agreements and the former accounts for the majority in terms of

² See the speech of the spokesman of the Supreme People's Court in the press release of this new judicial interpretation:
<http://www.dffy.com/fazhixinwen/lifa/201205/28701.html>

number; (3) the stake is inclined to increase with the biggest one amounting to 200 million RMB; (4) it is still rare for plaintiff to prevail due to the fact that plaintiff hardly fulfill the high requirement of burden of proof; (5) in terms of the geographic allocation, the disputes are inclined to occur beyond the major cities, such as Beijing, Shanghai and Chongqing.

In view of the status quo of the judicial practice in addition to the inherence of monopolistic dispute (strong professionalism involving economic, statistic and legal aspects is imperative), this judicial interpretation advances several important regulations:

1. define the monopolistic civil dispute cases

Article 1 provides for that the monopolistic civil dispute cases refer to the civil lawsuits filed by natural persons, legal persons or other organizations concerning the losses suffered from monopolistic acts, or arising from the violations of the Anti-Monopoly Law by contracts, article of association of industrial association, etc. The former can be attributed as tort suit; while the latter could be contractual or other in nature.

2. initiate the lawsuit

There are two means for plaintiff to initiate the suit: either file the case directly to the competent People's Court, or file the case after the implementing agency of the Anti-Monopoly Law affirms the existence of monopolistic acts. In short, no administrative procedure prior to lawsuit is required.

3. jurisdiction of the People's Court

Akin to the situation in intellectual property rights cases, special jurisdiction rules for the monopolistic civil dispute case are laid down for the purpose of meeting the professionalism demand in the course of the proceedings. Article 3 stipulates that first instance monopoly civil dispute case shall be subject to the jurisdiction of Intermediate People's Court designated by the Intermediate People's Court of cities separately designated in the State plan, those of cities where the people's governments of provinces, autonomous regions and municipalities directly under the central government are located, and by the Supreme People's Court. Upon approval by the Supreme People's Court, Basic-level People's Courts may exercise jurisdiction over first-instance Monopoly Civil Dispute Cases.

4. special rules regarding the burden of proof

In the event of dispute arising from the monopoly agreements, the defendant concerned shall bear the burden of proof to show that the relevant agreement has no effect of excluding or restraining competition. In the event of dispute arising from the acts of abusing market dominant position, the plaintiff concerned shall bear the burden of proof to show that the defendant is dominant in the relevant market and has abused its market dominant position. Where the monopolistic act sued falls under the circumstance of abusing one's market dominant position by a public utility enterprise or other business operators with lawful exclusive status, the relevant people's court may determine that the defendant is dominant in the relevant market according to the specific circumstances of the market structure and competition situations, unless there is sufficient evidence to the contrary. Beside, the expert witness and expert opinion are also introduced.

5. civil liability

As far as the suit redressing the losses suffered from the monopolistic acts is concerned, the civil liability is that the defendant stops infringement and compensates for the damage caused, etc. Regarding the lawsuit contending the violation of the mandatory provisions in Anti-Monopoly Law and other law, administrative regulations by contract or article of association of industrial association, the People's Courts concerned shall rule such contents as invalid in accordance with the law.

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