美国律师协会反托拉斯法部和国际法部关于最高人民法院起草的《最高人民法院关于审查知识产权与竞争纠纷行为保全案件适用法律若干问题的解释（征求意见稿）》的联合意见

2015 年 3 月 27 日

本意见书中的观点代表美国律师协议反托拉斯法部和国际法部的观点。这些意见并未经美国律师协会会员代表大会或者美国律师协会理事会的批准，因此不应被视为代表美国律师协会的政策。

美国律师协会反托拉斯法部和国际法部（“二部门”）很荣幸就最高人民法院所起草的《最高人民法院关于审查知识产权与竞争纠纷行为保全案件适用法律若干问题的解释（征求意见稿）》提出意见。二部门的意见反映了其从事知识产权法和竞争法工作成员的专业知识和经验。

二部门对最高人民法院通过发布征求意见稿来提高透明度和指导性所做的努力表示赞赏，同时感谢这个提出意见的机会。二部门的意见集中在讨论第 7 条和第 8 条中关于涉及到授予如诉前保全等保全措施时所需考虑的“难以弥补的损害”这一因素。

第 7 条

征求意见稿第七条中列出了决定是否采取保全措施时所考虑的因素。特别是，第七条第二款提出了一个相关因素，即“因被申请人一方的行为或者其他原

因是否可能造成将来的判决难以执行或者造成申请人其他损害，或者使申请人的合法权益受到难以弥补的损害”。二部门谨注意到第七条第二款中的申请者对“损害”的两个考量似乎造成一个潜在的歧义。特别是，在考虑哪种类型的损害是“造成申请者的其他损害，”但不“使申请人的合法权益受到难以弥补的损害”时，就会出现问题。如果“其他损害”被解读得比“难以弥补的损害”更广泛的话，那么授予保全措施的标准可能太宽泛和开放。因此，各部门谨建议最高人民法院删除第七条第二款中的“或者造成申请人的其他损害”，以消除歧义。

第 8 条

征求意见稿第 8 条对知识产权争议和竞争纠纷中“难以弥补的损害”进行了定义，并且举例说明了“一般认为属于…造成难以弥补的损害”的情况。二部门谨建议最高人民法院就其中一些情况提供进一步的明确说明。

例如，第 8 条第一款规定，当“被申请保全行为的发生或者持续，将抢占申请人的市场份额或者迫使申请人采取不可逆转的低价从事经营，从而严重削弱申请人的竞争优势的”情况发生时，一般被认为属于造成了难以弥补的损害。针对涉及知识产权的侵权行为，该条款的规定是适宜的，例如，在专利所有人寻求保全措施以防止侵权者对其业务的进一步侵害时。但是，在有效具可强制执行的知识产权领域以外，该条款就显得不适宜了。在竞争充分的市场中，某竞争者从其他竞争者手中夺取市场份额或者某竞争者迫使其他竞争者降低价格的情况很常见，这种行为并不应当被认为是造成了法定意义上可救济的损害。[1]其造成的

[1] 参见，例如 Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 906 (2007) (“反垄断法的目标. . . 是“为了保护竞争，而非竞争者。”) (引自 Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338 (1990)); 经合组织政策摘要第 1 页, Organisation of Econ. Co-operation & Dev., “What is Competition on the Merits?”

结果并不应当被认定为不可弥补的损害，反而应当是对竞争有益的。正如中国和美国在最近的中美第六轮战略与经济对话会议中所认同的，“制定竞争政策的目标并非是为促进单个竞争者或者产业，而是提高消费者福利和经济效率”[2]

二部门注意到该条款中的法律风险，即某些申请人可能会试图滥用中国的反垄断法或其他法律提起诉讼，并引用第 8 条第一款作为其法律依据，试图对那些并未真正有损整体竞争而仅仅造成了其市场份额损失的市场竞争行为申请保全措施。为避免产生类似的策略行为，美国法院就竞争法所针对的对市场竞争的损害和对竞争者的损害进行了区分。[3]为避免在中国发生类似的法律滥用，二部门谨建议最高人民法院对第 8 条进行修改，表明其仅适用于知识产权争议领域，而不包括竞争纠纷领域。

第 8 条也对“一般认为不属于…造成难以弥补的损害”的情况进行了认定。其中情况（2）规定：“知识产权权利人作为申请人无合理理由未使用或者实施相关知识产权且未计划使用或者实施的”。二部门谨建议，其实质审查应当是该知识产权权利人是否能获得合适的经济赔偿（正如情况（3）所规定的），而非知识产权权利人是否使用或者应用了该技术。在某些情况下，申请人就某些其未使用或者未应用的技术所提起的诉前保全申请对于避免产生不可弥补的损害是

(2006 年 6 月) (“经合组织各国竞争执法机构已形成广泛共识，即竞争政策的目的在于保护竞争，而非竞争者。”)，见 http://www.oecd.org/competition/mergers/37082099.pdf; 经合组织全球竞争论坛, Organisation for Econ. Co-operation & Dev.，“竞争政策，产业政策和国家龙头企业之间的关系”第 2 页（2008 年 12 月 8 日）（“一个经常被阐述的竞争政策目标，就是对竞争的保护，而非对竞争者的保护。”，见 http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2008)15&docLanguage=En.

[2] U.S. Dep’t of the Treasury,中美联合共识，第六轮战略与经济对话（2014 年 7 月 11 日），见 http://www.treasury.gov/press-center/press-releases/Pages/jl2561.aspx.

[3] 见 Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-89 (1977).

必要的，例如经济损失难以通过货币计算的时候。[4] 因此，二部门认为不应排除未使用或者未应用的技术的知识产权所有人申请诉前保全救济的权利,谨建议将情况（２）的规定删除，或者至少将“无合理理由”进一步明确。事实上，知识产权所有人不实施应用其所拥有的知识产权的合理原因有很多。例如(但不限于), 当权利人是某学术研究机构或者是只能通过对外授权许可方式而非自行应用技术的时候,诉前保全措施就可能很合适。举例说，在后一种情况中，某知识产权所有人可能已决定停用较陈旧的技术而采用更先进的新技术,因而不再实施应用其拥有的老技术。如果其与采用老技术的竞争者间发生竞争,则由于其利润损失难以计算,为避免不可弥补的损失,该知识产权所有人对侵权者未获授权使用其老技术的行为申请诉前保全措施就显得必要了。

结论

二部门感谢最高人民法院给予我们对其所发布的征求意见稿提供意见的机会。我们非常乐意回答最高人民法院对我们的意见提出的任何疑问,或者进一步提供任何有助于最高人民法院的评论和信息。

[4] 见，例如 East St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co., 414 F.3d 700, 705 (7th Cir. 2005) (“假如该损失的性质属于无法通过货币计算的，则原告将承受不可弥补的损害。”); Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 404 (2d Cir. 2004) (“但是，当损害难以证明或衡量的时候，可能产生不可弥补的损害。”) ; Hoover Transp. Services, Inc. v. Frye, 2003 WL 22128759, *8 (6th Cir. 2003) (“当损害难以通过货币方式计算时，禁令救济应当适用。”).

COMMENTS OF THE AMERICAN BAR ASSOCIATION'S SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON THE PUBLIC COMMENT DRAFT INTERPRETATIONS OF THE SUPREME PEOPLE'S COURT ON ISSUES RELATED TO THE APPLICATION OF LAWS IN REVIEWING ACT PRESERVATION CASES OF DISPUTES OVER INTELLECTUAL PROPERTY RIGHTS AND COMPETITION

March 27, 2015

The views stated in this submission are presented on behalf of the Sections of Antitrust Law and International Law of the American Bar Association. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Sections of Antitrust Law and International Law of the American Bar Association ("the Sections") are pleased to submit comments on the Draft Interpretations of the Supreme People's Court on Issues Related to the Application of Laws in Reviewing Act Preservation Cases of Disputes over Intellectual Property Rights and Competition ("the Consultation Draft"). The Sections' comments reflect the expertise and experience of its members with competition and intellectual property law, and litigation involving those laws.

The Sections welcome the Supreme People's Court's ("SPC's") efforts to provide increased transparency and guidance through issuing the Consultation Draft and appreciate the opportunity to provide comments. The Sections' comments focus on discussion in Articles 7 and 8 regarding "irreparable damage" in relation to granting a preservation measure such as a preliminary injunction.

Article 7

Article 7 of the Consultation Draft sets forth factors to consider in determining whether to take a preservation measure. Specifically, Article 7(2) provides as a relevant factor "[w]hether it is possible for the act of the respondent or other reasons to make it difficult to implement any future judgment or otherwise damage the applicant, or cause irreparable damage to the legitimate rights and interests of the applicant." The Sections respectfully note that the two references to "damage" to the applicant in Article 7(2) appear to create a potential ambiguity. Specifically, there is a question as to what type of damage would "otherwise damage the applicant" but not be "irreparable damage to the legitimate rights and interests of the applicant." If "otherwise damage" were construed more broadly than "irreparable damage," then the standard for granting preservation measures may be unduly permissive and open-ended. Thus, the Sections respectfully recommend that the SPC delete the clause "or otherwise damage the applicant" in Article 7(2) to remove the ambiguity.

Article 8

Article 8 of the Consultation Draft defines "irreparable damage" in the context of intellectual property and competition disputes, and gives examples of situations when "[i]rreparable damage is generally believed to have been caused." The Sections respectfully suggest that the SPC further clarify some of these situations.

For example, Article 8(1) states that irreparable damage is generally believed to have been caused when "[t]he occurrence or continuation of the act of applied-for preservation will seize the market shares of the applicant or force the applicant to operate by using irreversible low price, thereby seriously weakening the competitive advantage of the applicant." This provision appears appropriate for cases involving the infringement of intellectual property rights, for example, in situations in which a patent holder seeks a preservation measure to prevent further harm to its business. However, the provision may be inappropriate outside the context of valid, enforceable intellectual property rights. In competitive markets, any number of situations may arise in which one competitor takes market share from another, or one competitor forces another competitor to lower its prices. This is not conduct that should be regarded as causing legally redressable harm.[1] The result is not cognizable irreparable harm, but rather the beneficial effect of competition. As China and the United States recognized in the recent U.S.-China Sixth Meeting of the Strategic and Economic Dialogue, "the objective of competition policy is to promote consumer welfare and economic efficiency rather than promote individual competitors or industries."[2]

The Sections note a risk that some applicants might seek to misuse China's Anti-Monopoly Law, or other laws, by seeking preservation measures based solely on the loss of market share resulting from factors that do not harm competition as a whole, possibly citing Article 8(1) to support their claims. To avoid this type of strategic behavior, U.S. courts have distinguished between harm to market competition of the type the competition laws were intended to address, and injury to competitors.[3] To prevent such misuse of China's laws, the Sections respectfully recommend that the SPC revise Article 8 to state that it will apply only in the context of intellectual property rights disputes, and not in the context of competition disputes.

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[1] *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 906 (2007) ("The purpose of the antitrust laws . . . is 'the protection of competition, not competitors.'") (quoting Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338 (1990)); OECD Policy Brief at 1, Organisation of Econ. Co-operation & Dev., "What is Competition on the Merits?" (June 2006) ("There is broad agreement among competition agencies from OECD countries that the purpose of competition policy is to protect competition, not competitors."), *available at* http://www.oecd.org/competition/mergers/37082099.pdf; OECD Global Forum on Competition, Organisation for Econ. Co-operation & Dev., "The Relationship between Competition Policy, Industrial Policy, and National Champions" at 2 (Dec. 8, 2008) ("An often-articulated goal of competition policy is the protection of competition, not competitors."), *available at* http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2008)15&docLanguage=En.

[2] U.S. Dep't of the Treasury, U.S.-China Joint Fact Sheet, Sixth Meeting of the Strategic and Economic Dialogue (July 11, 2014), *available at* http://www.treasury.gov/press-center/press-releases/Pages/jl2561.aspx.

[3] *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-89 (1977).

Article 8 also identifies situations in which "[i]rreparable damage is generally not believed to" exist. Situation (2) states: "[t]he IP right holder as the applicant without reasonable cause does not use or implement the relevant IP and has no plan to the use or implementation thereof." The Sections respectfully suggest that the essential inquiry should be whether the intellectual property right holder can be properly compensated with money damages (as set forth in Situation (3) in this subsection), and not whether the intellectual property right holder uses or implements the technology. There may be circumstances when a preliminary injunction for an applicant that does not use or implement the technology may be necessary to avoid irreparable harm, such as when money damages are difficult to calculate or measure.[4] The Sections therefore advise that there should be no presumption against granting preliminary injunctive relief to an intellectual property right holder that does not use or implement the technology, and respectfully recommend that situation (2) be deleted, or at the very least, that "without reasonable cause" be defined. Indeed, there may be many sound reasons why an intellectual property right holder would not itself practice the intellectual property. For example (but without limitation), a preliminary injunction may be appropriate when the rights holder is an academic institution or otherwise is not itself in a position to exploit the technology other than through licensing. An example of the latter circumstance is when an intellectual property right holder that otherwise practices the technology may decide to discontinue using older technology in favor of newer superior technology. If the old technology competes with the new technology, a preliminary injunction may be necessary to enjoin the unauthorized use of the older technology to avoid irreparable harm to the IP holder in the form of lost profits that are difficult to calculate or measure.

CONCLUSION

The Sections appreciate the opportunity provided by the SPC to comment on its Consultation Draft. We would be pleased to respond to any questions the SPC may have regarding these comments, or to provide additional comments or information that may assist the SPC.

[4] *See, e.g.*, East St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co., 414 F.3d 700, 705 (7th Cir. 2005) ("A plaintiff may suffer irreparable harm if the nature of the loss makes monetary damages difficult to calculate."); Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 404 (2d Cir. 2004) ("But, irreparable harm may be found where damages are difficult to establish and measure."); Hoover Transp. Services, Inc. v. Frye, 2003 WL 22128759, *8 (6th Cir. 2003) (injunctive relief is appropriate when money damages are "difficult to calculate").