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.

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. 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.

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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”).