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China Policy on Standards Involving Patents As of April 2016



CENELEC



China Policy on Standards Involving Patents

Background:

The rise of knowledge-based industries promoted the patent intensity and increased the complexity on standards drafting process when the IPR issues were involved. When patented technology constitutes technical solution that can't be replaced, the standards drafting processes, the patents disclosure and licensing rules should be considered. In China the Standards drafting organizations and standardization administration authorities like China Standardization Administration (SAC), started to think about patents in standards issues since 2000. Some national level regulations and documents, and ministry level regulations were published in several years.

Legal framework in China on Standards Involving Patents

There are three Chinese laws related patents in standards issues.

1. *China Standardization Law*¹, It regulates how to make standards in China. However, in the 1988 version, it did not mention the patents issues. China Standardization Law is under modification. On 22nd March 2016, State Council issued the *China standardization Law (draft for public comments)*, but there is no “patent” issue either.
2. *China Patent Law*², was released in Dec 2008 and is under modification as well. Its 2008 version did not mention standards and patents in standard, but the 2015 draft added one clause, Clause 85, where it regulates how to process the “essential” patents in the standards.
3. *China Anti-Monopoly Law*³, was released in 2007.

These three laws regulate the general issues on standards drafting, patents and antitrust, but the current versions did not mention “standards involving patents” or “patents in the standards”. In China, national standards involving patents are regulated by 2 ministry level regulations and one national standard.

- In Dec 2013, SAC and State Intellectual Property Office (SIPO) jointly released *Regulatory Measures on National Standards Involving Patents (Interim)*.⁴ It is the very first legal document in China for national standards involving patents, and SAC also recommended the ministry level technical committees and other standards drafting organizations (SDO) to use or refer this regulation.
- In July 2015, China State Administration for Industry and Commerce (SAIC) released “*Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Eliminate or Restrict Competition*”⁵, where its Clause 13 regulates “ An undertaking shall not, in the course of exercising intellectual property rights, use the standards (including mandatory requirements contained within the state technical specifications, the same below) setting or implementing process to engage in any conducts that eliminates or restricts competition.
- To support the implementation of *Regulatory Measures on National Standards Involving Patents (Interim)*, SAC published a national standard in April 2014, *GB/T 20003.1 Special procedures for the development of standard, part 1: Standards Related to Patents*.⁶

Regulatory Measures regulate the general principles and processes on dealing with IPR and Standards issue while GB/T 20003.1 is about specific requirements and procedure in practice. GB/T 20003.1 is cited by the *Regulatory Measures*.

¹ The Chinese website links and English translation please see the annex of this report

² The Chinese website links and English translation please see the annex of this report

³ The Chinese website links and English translation please see the annex of this report

⁴ The Chinese website links and English translation please see the annex of this report

⁵ The Chinese website links and English translation please see the annex of this report

⁶ The Chinese website links and English translation please see the annex of this report

With the three strategic and operational documents, other SDOs or Ministries can have their own IPR policies, which should not be conflicting to the above legal framework.

Figure 1 on the right showed the legal framework of Standards involving patents in China



Fig 1 the legal framework of Standards involving patents in China

General Review on *Regulatory Measures on National Standards Involving Patents (Interim)*

SAC started the research on IPR and Standards issue from 2000. In March 2006, and March 2007, ISO/IEC/ITU published *ISO/IEC/ITU Common Patent policy* and *Guidelines for Implementation of the Common Patent Policy for ITU-T/ITU-R/ISO/IEC* respectively. SAC referenced the two documents and made the first draft of *Regulatory Measures on National Standards Involving Patents* in 2009. However, as there were many objections and concerns for some clause like “patent license fee should be cheaper than market price if the patents are in the national standards”, or “compulsory free licensing if the patents are included in the compulsory standards”, etc., the first draft was not published.

In April 2012, ISO/IEC/ITU published modified version of *Guidelines for Implementation of the Common Patent Policy for ITU-T/ITU-R/ISO/IEC*. SAC and SIPO referenced this documents plus the common practices of international SDOs and published *Regulatory Measures on National Standards Involving Patents (Interim)* in Dec 2013. The published document is much simpler than the previous ones.

China Policy Makers’ Principle or Concepts of on Standards involving Patents

During the processes of policy making on standards involving patents issues, the Chinese policy makers always had the mindsets as these.

- Chinese policy makers think that “Patents in the Standards Make the procedure for development and revision of standard more complicated. So sometimes some TCs do not encourage the patents to be included in the standards.
- The standards with patents can enhance the competitiveness of industries, and also may lead to monopoly
- It can promote innovative fruits to be widely implemented, and also may have the possibility of restraining innovation.

Therefore, at this moment the *Regulatory Measures* are much simple and with fundamental principles for SDOs, No-intervention, Disclosure and Licensing declaration.

Main contents of *Regulatory Measures on National Standards Involving Patents (Interim)*

The Measure has 5 Chapters and 24 articles in total.

- Chapter 1 “General Principles” prescribes the purpose, legal basis and the application scope of the Measure, and describes the specific scope of patent covered in the Measure.
- Chapter 2 “Disclosure of Patent Information” clarifies the different requirements on the patent disclosure and notification for the “organizations or individuals participating in the formulation or revision of national standard” and the “organizations or individuals who

have not participated in the formulation or revision of national standard, and yet have knowledge of patents essential to the standard” , as well as the requirements on the information of patents submitted by the technical committee and the requirements for the Standardization Administration of China on publishing such information.

- Chapter 3 “Patent Licensing Declaration” regulates the licensing of the patentee/patent applicant on the essential patents involved in the national standards.
- Chapter 4 “Special Requirements for Mandatory National Standards Involving Patents” describes the special requirements on the patents involved in the mandatory standards, and the principles and ways to deal with such patents.
- Chapter 5 “Supplementary Rules” prescribes the licensing and the implementing fee required of the patents involved in the national standards, the way to deal with the patents involved in the referenced standards and the national standards identically adopted from international standards, as well as the specific processes of the disclosure of patent information and patent licensing declaration, and the compilation requirements for patent information in the text of national standards.

IPR policies of other Ministry level TCs and SDOs

Besides SAC, some other ministries in China or other SDOs, also made their own IPR Policies. For example, China Communication Standardization Association (CCSA), CESI, (China Audio Video Standards Alliance) AVS, also made their IRP policy based on the *Regulatory Measures on National Standards Involving Patents (Interim)* and internal common practices like IPR policies in ETSI, ITU, IEEE or others.

In Nov 2014, MIIT also published Draft Template for Intellectual Property Rights (IPR) Policies in Industry Standards Organizations (Draft Template). It is also a recommended document for the TCs, ministry level SDOs, and other SDOs for their IPR policy making. It caused some concerns from THE AMERICAN BAR ASSOCIATION and European delegation in China. However, the observation on it is that this document was not published by MIIT. It is only a document made by MIIT IP Center and uploaded on their own website.

Analyses and Conclusions

IPR policies in the SDOs are very complicated topics. China current policy on these issues are pretty much following the International SDOs like IEC ISO and ITU. The only tricky part is the Compulsory standards involving standards. As China standardization Law and Patent law are all under revision, the relevant regulations on IPR and standards issues will be modified after the China standardization Law be published in 2016.

Annex - The links of the legal documents in this report

1. China Standardization Law (1988 version)

Chinese version <http://zqyj.chinalaw.gov.cn/draftNotice?DraftID=1002>

China Standardization Law (Draft for public Comments) (2016 version)

Chinese version:

<http://zqyj.chinalaw.gov.cn/draftDetail?listType=1&DraftID=1002&1461045801093>

Unofficial translation can be obtained from SESEC by request

2. China Patent Law (2008 version)

Chinese version http://www.gov.cn/flfg/2008-12/28/content_1189755.htm

English version

http://english.sipo.gov.cn/laws/lawsregulations/201101/t20110119_566244.html

China Patent Law (Draft for Public Comments) (2015 version)

Chinese version http://www.gov.cn/xinwen/2015-12/03/content_5019664.htm

Unofficial translation: <http://chinalawtranslate.com/scpatentdraft/>

3. China Anti-Monopoly Law (2007 version)

Chinese version http://www.gov.cn/flfg/2007-08/30/content_732591.htm

Official English version

<http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml>

4. Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Eliminate or Restrict Competition

Official Chinese and English version

http://www.saic.gov.cn/zwgk/zyfb/zjl/flld/201504/t20150413_155103.html

5. Regulatory Measures on National Standards Involving Patents (Interim)

Chinese version: http://www.sac.gov.cn/sxxgk/gkml/flfg/gnflfg/201512/t20151218_198752.htm

Unofficial translation can be obtained from SESEC by request

6. GB/T 20003.1 Special procedures for the development of standard, part 1: Standards Related to Patents

Chinese version can be bought from

<http://www.cssn.net.cn/>

http://www.cssn.net.cn/pagesnew/search/search_base_EN.jsp

<http://www.bzcbs.cn/>

Unofficial translation can be obtained from SESEC by request

Introduction of SESEC Project

The Seconded European Standardization Expert in China (SESEC) is a visibility project co-financed by the European Commission (EC), the European Free Trade Association (EFTA) secretariat and the three European Standardization Organizations (CEN, CENELEC and ETSI).



Since 2006, there has been two SESEC projects in China, SESEC I (2006-2009) and SESEC II (2009-2012). In Dec 2014, SESEC III was officially launched in Beijing, China. Dr. Betty XU was nominated as the SESEC expert and will spend the next 36 months on promoting EU-China standardization information exchange and EU-China standardization cooperation.

The SESEC project supports the strategic objectives of the European Union, EFTA and the European Standardization Organizations (ESOs). The purpose of SESEC project is to

- Promote European and international standards in China;
- Improve contacts with different levels of the Chinese administration, industry and standardization bodies;
- Improve the visibility and understanding of the European Standardization System (ESS) in China;
- Gather regulatory and standardization intelligence.

The following areas have been identified as sectoral project priorities by the SESEC project partners:

- Internet of Things (IoT) & Machine-to-Machine (M2M) communication,
- Communication networks & services,
- Cybersecurity & digital identity,
- Smart Cities (including transport, power grids & metering),
- Electrical & electronic products,
- General product safety, medical devices,
- Cosmetics,
- Energy management & environmental protection (including eco-design & labelling, as well as environmental performance of buildings).