

# IPR: Key to hurdling Section 337 investigations

2012 年在美遭遇 13 起“337 调查”, 对中国企业来说——

## 应对“337 调查”, 提升知识产权能力是关键

At the beginning of 2013, two Chinese enterprises Huawei Technologies Co Ltd (Huawei) and ZTE Corp (ZTE), which once topped the list of international patent applications under the Patent Cooperation Treaty (PCT), encountered troubles in the US.

On February 1st, the US International Trade Commission (USITC) initiated a Section 337 investigation into Huawei and ZTE on the ground of patent infringement. This is the 3rd time for the two companies which have broken into the top 5 of the global telecommunication equipment suppliers to encounter Section 337 investigations in a single year.

“Obviously, products from high and new technology enterprises have been the new targets of section 337 investigations.” As far as Chinese experts are concerned, intellectual property (IP) has become a tool for American enterprises to set up a barriers in the market and make competitions. In the face of the new situation, Chinese enterprises should attach more importance to patent layout and speed up to enhance its IP capability.

Events: continuous investigations

“We have been aware of the investigation and are preparing to respond to the suit lawfully.” On February 2, both Huawei and ZTE made response to the investigation, which is based on a complaint lodged by Huawei and ZTE’s rival InterDigital Communications Inc., an American local enterprise on wireless network software and chip development, and other 3 US companies for patent infringement. The four companies asked the USITC to start the Section 337 investigation to issue an exclusion order as well as cease and desist orders on Huawei and ZTE’s wireless devices with 3G and 4G capabilities including smartphones and laptops, etc.

Sino-US trade has flourished since the establishment of diplomatic ties between China and the US. For several years, they have been the largest trading partners for each other. Along with the rapid growth of the bilateral trade over the past 20 years, Section 337 investigations into Chinese enterprises have been gradually increase. According to statistics from the USITC, the number of investigations that China is involved in has been the largest for ten years.

According to the data released by the USITC, it instituted forty Section 337 investigations in 2012, thirteen of which involved Chinese enterprises, accounting for 1/3. More than thirty enterprises from Guangdong, Shanghai, Zhejiang, Fujian, Shandong, Jiangsu, Anhui, ect. including well-known Chinese enterprises Huawei, ZTE, Haier were concerned in the investigations. Huawei was involved in three investigations, and ZTE twice.

Twelve in the thirteen investigations were initiated on the ground of patent infringement. The products involved were mainly electronic products, including integrated circuits and chips, physical therapy equipments, Blu-ray players, electronic imaging devices, wireless consumer electronics devices, protective cases for portable electronic devices, etc.

Analysis: upgrading targets

“Patent infringement, high and

new technology as well as emerging enterprises are three new targets for Section 337 investigations.” said CaoXinming, executive deputy director of the IPR research center of Zhongnan University of Economics and Law. Instead of the low end products, processed products, and daily consumer goods, 96% of the thirty-four investigations now happened in the high and new technology sectors, with China’s top high-tech enterprises Huawei, ZTE, Haier, Lenovo, etc. being their targets.

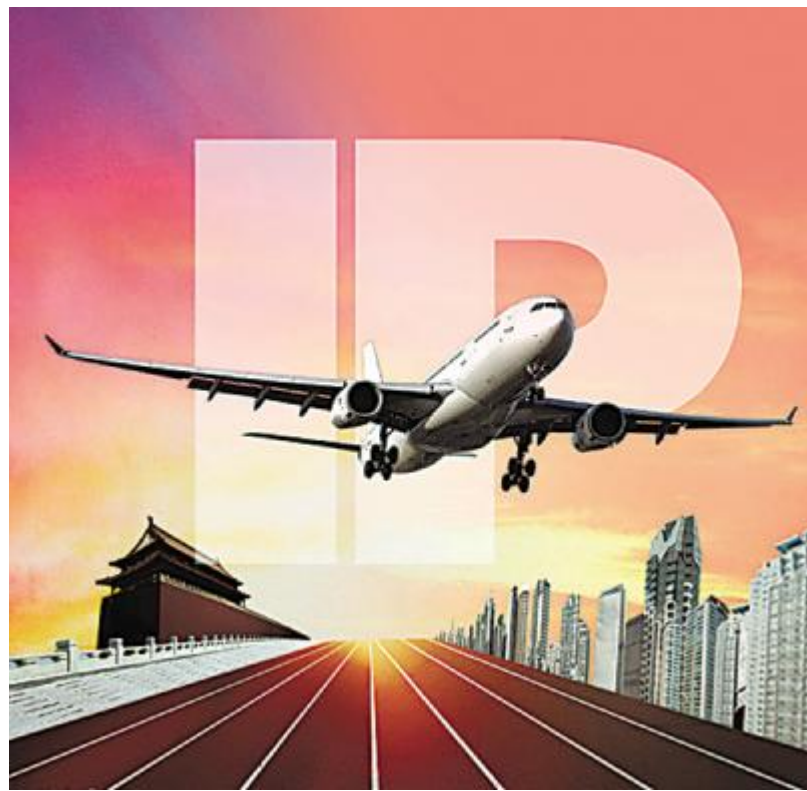
“From the change of targets, it is obviously to see the achievements of Chinese enterprises’ transformation and upgrading.” A representative in business expressed that the export to the US were mostly middle and low clothing, labor protection supplies, textiles, toys, daily necessities and other low-tech primary and processed products more than a decade ago. However, such high-tech products as consumer electronics, advanced wireless devices with 3G and 4G capabilities, medical devices, integrated circuits, computer technology, image display now become the mainstream of export. This reflects the achievements of Chinese enterprises’ transformation as well as upgrading. Encountering competitors in the US market demonstrates that Chinese high-tech enterprises are moving closer to their US peer. According to the public opinion, the fast growth of Huawei, ZTE and other Chinese companies in the international market start to impose pressure on American local tech companies.

Doing business in the market does not only need to compete for the market position, but also for IP. In 2009, four Chinese sucralose manufacturers won the Section 337 investigation. Sucralose involved in the case is a food sweetener, which is at the highest level in the world. With patents in the production process, the four makers responded to the complaint filed by Tate & Lyle without fear, one of the world’s largest sugar companies dominating the marketplace, and finally won. Accordingly, their products were allowed to enter the U.S. market. Both Huawei and ZTE are new Chinese enterprises in the U.S. market. According to the statistics, the overseas revenue of Huawei which enters American earlier accounted for approximately 66% of the total in 2012; ZTE also plans to gain profit in the first quarter of 2013.

Countermeasures: enhancing capacity

“Chinese enterprises have suffered a lot from inadequate patent layout and IP capacity”, an expert from China Chamber of Commerce for Import and Export of Machinery and Electronic Products said that Chinese enterprises were not familiar with international competition rules and were lack of the awareness of patent layout and IP dozen years ago. Once encountering the Section 337 investigation, they dare not make response and often lost foreign markets, with some small and medium-size enterprises (SMEs) closed down.

The investigation was rooted from Section 337 of the Tariff Law of 1930, which was amended for several times. According to the article, the USITC has the authority to



### Link 相关链接

1. On Jan.4, ITC initiated a Section 337 investigation into certain integrated circuits and chips from China. 1月4日, 针对中国输美集成电路与芯片产品, ITC 发起“337 调查”
2. On Jan.4, ITC launched a Section 337 investigation into certain physical therapy equipments from China. 1月4日, 针对中国输美运动疗法设备, ITC 发起“337 调查”
3. On Jan.5, ITC instituted a Section 337 investigation into certain Blu-ray players from China. 1月5日, 针对中国输美蓝光碟播放器, ITC 发起“337 调查”
4. On Jan.13, ITC started a Section 337 investigation into certain electric fireplaces from China. 1月13日, 针对中国输美电火炉, ITC 发起“337 调查”
5. On Feb.22, ITC initiated a Section 337 investigation into certain toner cartridges from China. 2月22日, 针对中国输美激光打印机硒鼓生产企业, ITC 发起“337 调查”
6. On Feb.22, ITC instituted a Section 337 investigation into certain dimmable compact fluorescent lamps from China. 2月22日, 针对中国输美可调节能灯生产企业, ITC 发起“337 调查”
7. On Feb.29, ITC started a Section 337 investigation into certain ink application devices from China. 2月29日, 针对中国输美油墨应用设备生产企业, ITC 发起

institute investigations based upon allegations of infringement of patent, registered trademark, trade secret, packaging, etc. If the USITC finds a violation of Section 337, it will issue an exclusion order and cease and desist orders, which mean the exclusion of articles from the US market. Meanwhile, the statute prescribes that the respondent will definitely lose the lawsuit if he does not response to it, an ace in the hole for America to prevent competitors from entering the US market. In the aforementioned sucralose case, eleven Chinese SMEs were sentenced to “infringement” with products banned from the US market because they chose not to respond to the investigation.

Patent layout and IP capability are foundation for Chinese enterprises to explore the international mar-

### “337 调查”

8. On May 18, ITC launched a Section 337 investigation into electronic devices having a retractable USB connector from China. 5月18日, 针对中国输美伸缩 USB 连接头生产企业, ITC 发起“337 调查”

9. On June 20, ITC instituted a Section 337 investigation into certain rubber resin from China. 6月20日, 针对中国输美橡胶树脂生产企业, ITC 发起“337 调查”

10. On June 25, ITC initiated a Section 337 investigation into certain electronic imaging devices from China. 6月25日, 针对中国输美电子图像设备产品, ITC 发起“337 调查”

11. On Aug.21, ITC started a Section 337 investigation into certain wireless consumer electronics devices from China. 8月21日, 针对中国输美无线消费性电子设备生产企业, ITC 发起“337 调查”

12. On Sep.18, ITC launched a Section 337 investigation into certain sintered rare earth magnets from China. 9月18日, 针对中国输美烧结稀土磁体, ITC 发起“337 调查”

13. On Nov.9, ITC initiated a Section 337 investigation into certain protective cases for portable electronic devices from China. 11月9日, 针对中国输美便携式电子设备保护套产品, ITC 发起“337 调查”

ket, both of which reflect the competitiveness of enterprises. Ten years after China’s access to the WTO, connecting the world, economic integration and openness brought Chinese enterprises challenges and opportunities. Against the background, their IP capability and awareness of patent layout were rapidly and significantly enhanced. Huawei leaped to first in PCT filings with 1737 patent applications in 2008 and ZTE reached world’s No.1 with 2826 PCT applications in 2011. Moreover, Haier has been actively establishing overseas research and development centers; Lenovo successfully acquired IBM’s personal computer business in 2005. All these have laid a solid foundation for Chinese patent layout.

“With Chinese enterprises exploring the international market in-

creasing year by year, enhancing IP capability is essential.” Cao Xinming stressed that IP was a good means for Chinese enterprises to cope with Section 337 investigations and other international IP disputes.

(by Zhao Jianguo)

本报记者 赵建国

新年伊始, 两家中国知名企业华为技术有限公司(下称华为公司)、中兴通讯股份有限公司(下称中兴通讯)的产品在美国遇到了麻烦。

2月1日, 美国国际贸易委员会(ITC) 针对中国企业启动以专利侵权为由的“337 调查”, 目标直指中国已跻身世界电信设备行业前 5 强的华为公司、中兴通讯, 这已经是这两家企业一年之中第三次遭遇“337 调查”。

“可以看出, ‘337 调查’ 出现新动向, 矛头指向中国高新技术企业产品。” 中国国内有关专家认为, 知识产权已经成为美国企业进行市场竞争和构筑非贸易壁垒的工具。面对这种市场竞争的新形势, 中国企业更应该强化专利布局意识, 加快提升自身知识产权能力。

事件: 调查接连不断

“我们已关注到此项调查, 并将基于公平合理的原则依法积极应对。” 2月2日, 华为公司、中兴通讯均对此次“337 调查”作出回应。此次“337 调查”, 是由这两家公司的市场竞争对手、美国本土的无线网络软件及芯片开发企业国际数据通信公司(Intel Digital Communications Inc.) 等 4 家美国公司向 ITC 提出起诉, 其称华为公司、中兴通讯等公司的 3G 和 4G 无线设备, 其中包括移动电话、移动电脑网卡、笔记本电脑和其他具有移动功能的网络设备产品违反了相关法律规定, 并侵犯了 4 家美国公司的专利权, 要求 ITC 启动“337 调查” 并发布排除令和禁止进口令。

事实上, 自中美建交以来, 两国的贸易额不断增长, 已经连续数年互为最大的贸易伙伴。近 20 多年来, 伴随着贸易量的不断增长, 中国企业遭受的“337 调查” 也逐渐开始增多。ITC 公布的数据显示, 中国已经连续 10 年成为遭受“337 调查” 案件数量最多的国家。

中国知识产权报记者在 ITC 官方网站上查询到, 根据 ITC 公布的数据, 仅 2012 年, 在 ITC 启动的 40 起“337 调查” 案中, 有 13 起是涉及中国企业的, 占比为 1/3。中国广东、上海、浙江、福建、山东、江苏、安徽等地 30 多家企业涉案, 其中包括华为公司、中兴通讯、海尔电器等中国知名企业, 华为公司涉案 3 起, 中兴公司涉案 2 起。

在上述 13 起“337 调查” 案件中, 有 12 起是以专利侵权为案由而发起的。涉案产品以电子信息类产品为主, 包括集成电路与芯片、运动疗法设备、影碟播放器、电子图像设备、无线消费性电子设备、便携式电子设备保护套等产品。

分析: 目标逐步升级

“专利侵权、高新技术、新兴企业是‘337 调查’ 矛头指向的 3 个新目标。” 中南财经政法大学知识产权研究中心常务副主任曹新明教授在接受中国知识产权报记者采访时分析认为, 近年来, 针对中国企业的“337 调查” 目标出现新变化, 与前些年所涉及的是低端产品、加工产品、生活日用消费品不同, 近两年涉及中国企业产品的 34 起“337 调查” 案中, 96% 集中在高新技术产品的专利侵权上; 而且针对的是中国开拓国际市场的高新技术领军企业, 如华为公司、中兴通讯、海尔集团、联想集团等。

“从‘337 调查’ 目标的变化中, 人们不难看出中国企业的转型升级之路成果已经显现。” 中国企业界有关人士表示, 十几年前, 中国企业向美国出口最多的是加工的中低档服装、劳动保护用品、纺织品、玩具、生活日用品等技术含量较低的初级产品和加工产品, 而如今, 更多的是消费电子、先进的 3G 和 4G 无线设备、医疗器械、集成电路、计算机技术、图像显示等高新技术、新兴产业产品, 这是中国企业转型升级的成果。在美国市场上遭遇竞争对手, 也意味着中国企业与美国企业的技术水平差距在逐步缩小。国际舆论分析认为, 华为公司、中兴通讯等中国企业在国际市场上快速壮大, 让美国本土科技公司感到了市场竞争的压力。

市场竞争, 不仅是市场地位的竞争, 更是知识产权的竞争。2009 年, 中国的 4 家三氯蔗糖生产企业在美国“337 调查” 中赢得胜利。涉案的三氯蔗糖是一种高倍食品甜味剂, 代表了当今世界甜味剂最高发展水平。中国企业拥有生产工艺专利, 面对一直占据国际市场垄断地位的泰莱公司毫不畏惧, 勇于应诉, 以自主知识产权赢得了“337 调查”, 也赢得了产品进入美国市场的权利。而对于华为公司、中兴通讯来说, 都是新开拓美国市场的中国企业。根据两家公司对外披露的业绩, 进入美国市场较早的华为公司 2012 年销售收入中, 包括美国在内的海外收入占比约为 66%; 而刚刚拓展美国市场的中兴公司也计划在 2013 年第一季度实现盈利。

对策: 重在提升能力

“在专利布局和知识产权能力方面, 中国企业是吃过苦头的。” 中国机电进出口商会一位专家表示, 十几年前一些开拓国际市场的中国企业, 由于不熟悉国际市场的竞争规则, 没有事先做好专利布局, 知识产权意识不足, 结果一旦遭遇“337 调查” 及专利纠纷就不敢应诉, 结果失去了海外市场, 有的中小企业甚至因此被迫倒闭。

美国“337 调查” 依据是《1930 年美国关税法》第 337 条款, 后经历数次重大修订。根据该条款, 美国国际贸易委员会有权调查有关专利和注册商标侵权的申诉, 此外也开展涉及侵犯商业秘密、商品包装侵权、仿制和虚假广告等内容的调查。根据有关法律程序, 如果涉案企业被裁定违反了第 337 条款, 美国国际贸易委员会将发布相关产品排除令和禁止进口令, 这意味着涉案产品将彻底丧失在美国市场销售的资格。同时, 其法律明确规定“不应立即意味着败诉”, 因此成为美国阻挡市场竞争对手的一个“杀手锏”。在上述 13 起三氯蔗糖专利“337 调查” 案中, 有 11 家中国中小企业选择了不应诉, 结果被判“侵权”, 失去了在美国市场销售的良机。

专利布局的有无, 知识产权能力的强弱, 不仅是中国企业开拓国际市场的基础, 更是中国企业自身竞争能力的标志。中国加入世界贸易组织(WTO) 十几年来, 与世界接轨, 经济一体化、开放格局都给中国企业带来了全新的挑战和机遇。在这样的背景下, 中国企业的知识产权能力迅速提升, 专利布局意识有了显著增强。2008 年, 华为公司以 1737 件 PCT 国际专利申请位居全球企业首位; 2011 年, 中兴通讯以 2826 件 PCT 国际专利申请夺得世界企业冠军。同时, 海尔集团还积极建设海外技术研发中心, 联想集团 2005 年成功收购美国 IBM 公司的个人计算机 PC 业务, 这些都使中国企业在专利布局方面有了一定的基础。

“开拓国际市场的中国企业逐年增多, 其知识产权能力的提升至关重要。” 曹新明强调, 这是中国企业应对“337 调查” 等国际知识产权纠纷的良策。

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