

The Empirical Study on FTC Regulating Warning Letter and its Effect
— The Suspense Effect

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Abstract

To monitor and regulate the conduct of sending warning letters to other entities that may be suspected of infringing copyrights, trademarks and patents by the obliged entity in an efficient and effective manner, the Fair Trade Commission of the Executive Yuan (“FTC”) has published the “Guidelines on the Reviewing of Cases Involving Enterprises Issuing Warning Letters for Infringement of Copyright, Trademark, and Patent Rights” to set up its regulatory and administrative mechanism in relation to the conduct. Although the constitutionality of this Guideline has been affirmed by the No. 548 Interpretations of the Justices of the Constitutional Court, this Guideline has still incurred many disputes both in the areas of jurisprudence and the practice of Antitrust Laws. From our research on the relative legal literature and records, we have found that most studies criticize this Guideline mainly by way of the methods of literature analysis, comparative jurisprudence or case studies.

This paper argues that those criticisms do not touch the core issue of the Guideline. As to whether the antitrust law shall govern and be involved in the management of the issued conduct, the preliminary presumption on the part of the FTC in regard to the antitrust law is that the conduct may result in possible damage to market competition. This paper also challenges this presumption. In practice, is it possible that the receiver of this warning letter might be threatened by possible infringement liability and remove the suspected infringing products from the shelf or refuse to sell such goods anymore? That is, what is the probability of the so-called “suspense effect”? Our paper indicates that this

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issue has not been verified in existing studies and records. This paper thus adopts an approach in order to actually investigate and find out the probability of the suspense effect of the warning letter and thereby verify the legitimacy and soundness of the involvement of the antitrust authority in the issued conduct. I therefore discuss the following topics in this paper in sequence on the description of conduct in intellectual property rights infringements: 1. Does the evidence related to this infringement form a compulsory attachment to the warning letter? 2. What is the emotional impact on the receiver? Based on the research results obtained, I verify the effectiveness of the control mechanism adopted by the FTC.

This essay shows that the probability of a “suspense effect” is really high in most warning letter cases. Even large enterprises nowadays have built up a standard operating process to deal with possible infringement issues when they receive a warning letter. However, this kind of management cannot be applied to most medium and small enterprises in Taiwan. From the aspect of the legal purposes of the Fair Trade Act to maintain fair market competition, there is a room for the involvement of the Fair Trade Act in the conduct. This paper also shows that Clause 4 of the Guideline has stipulated that the sender of the warning letter has to clearly define the content, scope and specific facts regarding the infringement and to notify the possible infringers prior to or simultaneously with the sending of the warning letter, for these will help to reduce the suspense effect. From the above-mentioned assessments, the Guideline still can fulfill its regulatory purpose. However, one thing that should not be ignored is that the due process of sending warning letters as specified in the Guideline will not be chosen by most senders, which will thus give rise to a question mark as to the actual regulatory effect of this Guideline. This essay suggests that the FTC initiate a more complete and broad practical investigation and collect more data related to actual economic activities. Only then can proper legal suggestions be provided for future amendments.

Keywords: Warning Letters, Fair Trade Act Article 45, Judicial Yuan Interpretation No. 548, Suspense Effect, Content Analysis