China’s Anti-Monopoly Law

US Patent and Trademark Office Program on

July 11, 2007

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Status of the Law

• Under development for more than a decade
• Extensive consultations with the international community
• “Second reading” just completed before NPC
• Passage likely this session
Competition Provisions

• Generally consistent with international mainstream
  – Restraint of trade
  – Monopolization and dominance
  – Mergers

• Facialy neutral as to IP
Until Recently . . .

• Bottlenecked over –
  – Structure of enforcement agency
  – Relationship to sectoral regulation
  – Role of administrative monopolies

• Increasingly caught in broader PRC policy questions
  – Role of markets
  – Relationship to foreign investment
Recent NPC Revisions

• Still analyzing text of revised draft
• New provisions address –
  – Macroeconomic compatibility
  – National security
  – Limited application to state-owned enterprises
  – Semi-regulatory role for industry associations
Implications for IP

• Have always depended on implementation

• PRC assurances –
  – Sensitivity to legitimate role of IP
  – Will not use AML to undermine IP

• Recent revisions not necessarily inconsistent
But there are always issues in reconciling IP rights and competition policy.
Illustrative Issues

- Strategic refusals to license
- Collectively set standards
- Patent pools and portfolio cross-licenses
- Grantbacks, non-assertion clauses, and other provisions
- Tying and bundling
- Provisions outlasting patent term
And That’s Just the US


- Frequent debate on nuances within US antitrust community
And There’s Europe

- Compulsory licensing
- Mandated disclosure of interfaces
- IP in standards development
  - Patent ambush
  - Consideration of total royalty cap
  - Constraints of RAND commitments
Leading Concerns with Application of AML to IP

- Compulsory sharing of “essential facilities”
- Royalty caps and other prohibitions on “exploitation”
- Rules of standard-setting bodies
- “Openness” of standards
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