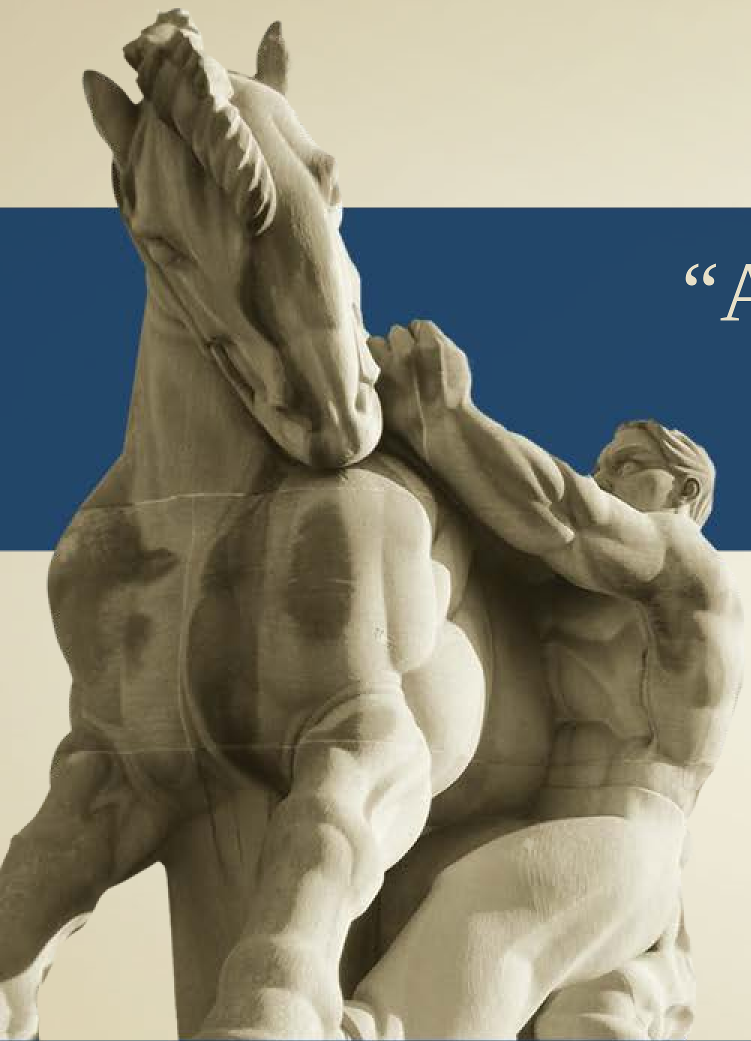

"Antitrust Enforcement in China"
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Introduction: China’s Anti-Monopoly Law

- China’s Anti-Monopoly Law (AML) came into effect on August 1, 2008.
- Its three substantive chapters cover:
  - monopoly agreements,
  - abuse of dominant market position, and
  - concentrations (mergers).
- These chapters are roughly analogous to Sections 1 and 2 of the Sherman Act, which prohibit anticompetitive agreements and monopolization, and Section 7 of the Clayton Act, which prohibits anticompetitive mergers.

Introduction: China's AML Agencies

- The AML is enforced by three agencies:
  - The Ministry of Commerce (MOFCOM), which is responsible for merger review;
  - The National Development and Reform Commission (NDRC), which is responsible for price-related conduct (agreements and abuse of dominance); and
  - The State Administration for Industry and Commerce (SAIC), which is responsible for non-price related conduct.

The AML and Non-Competition Factors

In contrast with the United States and elsewhere, China's AML explicitly provides for the consideration of non-competition factors in competition analysis. For example:

- Article 1 provides that the AML was enacted "for the purpose of preventing and restricting monopolistic conduct, protecting ***fair*** competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and ***social public interest, promoting the healthy development of the socialist market economy***."

- Article 4 states that "[t]he state constitutes and carries out competition rules that accord with the ***socialist market economy***, ***perfects macro-control***, and advances a ***unified***, open, competitive and ***orderly*** market system."

The AML and IPRs

- Article 55 of the AML provides that the law does not apply to the legitimate use of intellectual property rights (IPRs), but does apply to the abuse of IPRs that eliminates or restricts competition.
- Open issues include:
  - What constitutes "legitimate use" of an IPR?
  - What constitutes an "abuse" of an IPR?
  - Whether AML violations involving IPRs are limited to those that eliminate or restrict competition (e.g., does the excessive pricing provision require a showing of anticompetitive effects?)

SAIC AML/IP Rules

- On April 7, 2015, SAIC issued its long-awaited AML-IP Rules (after 9 draft versions over more than 5 years), entitled "Regulation by the Administration for Industry and Commerce on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights."

- Significantly, in the final version, SAIC took into account a number of recommendations (from the USG and others) on prior drafts, including clarifying that conduct will be found to violate the AML only when it eliminates or restricts competition.

- Speaking at the ABA Section of Antitrust Law's Spring Meeting, SAIC Official Song Yue stated that SAIC will be "extremely cautious" in its application of the new Rules and will apply a rule of reason approach to licensing restraints.

SAIC AML/IP Rules (cont.)

<u>Similarities to the U.S. Antitrust Agencies' Approach:</u>

- Article 1, like the 1995 DOJ-FTC IP Guidelines, recognizes that antitrust and IP are complementary bodies of law that share the common goals of promoting innovation and enhancing consumer welfare.

- SAIC's IP Rules seem to apply a rule of reason approach to licensing restraints. Similarly, as set forth in the 1995 DOJ-FTC IP Guidelines, in the "vast majority of cases," the U.S. Antitrust Agencies will evaluate licensing restraints under the rule of reason.

SAIC AML/IP Rules (cont.)

Troubling Provisions Include:

- Application of the “essential facilities” doctrine to IPRs (Article 7);
- AML liability for failure to disclose essential patents, without requiring that the patent holder be an active voting participant in an SSO with a written disclosure policy (Article 13(1)); and
- AML liability for failure to license patents found to be essential on FRAND terms, even in the absence of a voluntary commitment to do so (Article 13(2)).

SAIC AML/IP Rules – Article 7

- Article 7 prohibits an IP owner from refusing to license an "essential facility" on "reasonable conditions" in the absence of a "legitimate reason" when such a refusal would "eliminate or restrict competition."

- The following three factors must be taken into consideration:
  - (1) whether the IPR can be "reasonably substituted" in the relevant market and is "necessary" for other business operators to compete in the relevant market;
  - (2) whether the refusal to license will have a "negative impact on competition or innovation in the relevant market to the detriment of consumer welfare or public interest"; and
  - (3) whether licensing such IP will cause "unreasonable harm" to business operators.

Essential Facilities Doctrine – U.S. Comparison

- The U.S. Supreme Court has made it clear that it will treat so-called "essential facilities" claims with great skepticism, stating that courts should be cautious in recognizing exceptions to the general rule that even monopolists may choose with whom they deal, and that enforced sharing of assets is in "some tension with the underlying purpose of the antitrust laws."—*Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-08 (2004).

- The U.S. Antitrust Agencies have stated that "[a]ntitrust liability for mere unilateral, unconditional refusals to license patents will not play a meaningful part in the interface between patent rights and antitrust protections."—2007 Joint DOJ-FTC IP Report at 30.

Essential Facilities Doctrine – Concerns

Concerns include:

- Applying the essential facilities doctrine to IPRs would substantially impinge upon IPR holders' core right to exclude, create disincentives for competitors to develop their own competing IPR, and create long-term disincentives to innovate in general.
- While forced sharing of IPR may seem to increase competition in the short run since more suppliers could offer a downstream product, over the long run, the economy and consumer welfare suffer as fewer resources are invested in innovation.
- In addition, a facility is rarely truly essential, and it has often been the case that those advocating forced sharing have underestimated the ability of determined competitors to compete around the facility, with resulting benefits to consumers.

SAIC AML-IP Rules – Article 13(1)

- Article 13(1) prohibits a dominant firm from, without "legitimate reasons," "deliberately failing to disclose" essential patents while participating in a standard-setting process, and then asserting such patents against implementers after the patent has been adopted by the standard.

- Article 13(1) is explicitly limited to circumstances when such conduct results in the elimination or restriction of competition.

Failure to Disclose – U.S. Comparison

In the United States, under *Rambus* and *Dell*, liability for failure to disclose essential patents requires the following elements:

1. that the patent holder or applicant be an active voting participant in an SSO;
2. that the SSO has a published written policy that creates certain disclosure obligations as a condition of participation;
3. that the patent holder or applicant fraudulently or intentionally breached the SSO's disclosure obligations;
4. after adoption of the standard, the patent holder or applicant asserts its essential patents against implementers of mandatory portions of the standard;
5. but for the patent holder's or applicant's failure to disclose, a different technology would have been incorporated into the standard; and
6. that the patent holder's or applicant's conduct causes or is likely to cause an adverse effect on competition in the relevant market.

Failure to Disclose – Concerns

Concerns include:

- Article 13(1) is not limited to SEP holders that are ***active voting participants*** in an SSO with a ***published written disclosure policy***, and does not require that, but for the SEP holder's failure to disclose, a different technology would have been incorporated into the standard.
- Contrary to U.S. law and international norms, Article 13(1) seems to impose a general duty to disclose, which may discourage patent holders from participation in standard-setting activities because they will be deprived of the option to participate only in SSOs that have disclosure policies that meet their needs.
- Article 13(1) could have the effect of imposing disclosure obligations that go beyond the requirements agreed to by members of the relevant SSO. Each SSO is in the best position to determine the appropriate level of disclosure requirements for its own standard-setting activities.

SAIC AML-IP Rules – Article 13(2)

- Article 13(2) prohibits a dominant firm whose patent has become essential to a standard from, “without reasons,” engaging in conduct that “eliminates or restrict competition” in violation of the FRAND “principle.”

- Article 13(2) lists the following examples:
  - Refusing to license,
  - Tying,
  - Attaching other “unreasonable trading conditions.”

FRAND Commitments – U.S. Comparison

Concerns:

- Article 13(2) seems to impose an obligation on the holders of patents found to be essential to abide by FRAND “principles,” even in the absence of a voluntary commitment by the patent holder to license on such terms.

- A mandatory FRAND commitment on all essential patents eliminates the right to exclusivity, thereby harming incentives to innovate.

The U.S. Approach:

- In the United States, a FRAND commitment is an agreement that patent holders ***voluntarily*** enter into, i.e., whether to make a FRAND commitment is a voluntary decision on the part of the patent holder.

Conclusion

- Overall, SAIC's new AML-IP Rules, at least as written, appear largely consistent with the approach taken by the U.S. Antitrust Agencies, as set forth in the 1995 Joint DOJ-FTC IP Guidelines.
- However, there are a number of troubling provisions, including the application of the essential facilities doctrine to IPRs and provisions on standard-essential patents.
- In addition, in contrast with the U.S. approach, there appears to be a tendency in China to see a more expansive role for antitrust in matters involving IPRs, which perhaps reflects a view that IPRs such as patents provide the right to "fair" or "reasonable" compensation as opposed to the right to exclude.

Resources

- DOJ-FTC, Antitrust Guidelines for the Licensing of Intellectual Property (1995), http://www.justice.gov/atr/public/guidelines/0558.pdf.
- FTC Decision and Order in *Dell*, http://www.ftc.gov/system/files/documents/cases/960617delldo.pdf.
- *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).
- Chairwoman Edith Ramirez, "Standard-Essential Patents and Licensing: An Antitrust Enforcement Perspective," 8th Annual Global Antitrust Enforcement Symposium, Georgetown University Law Center (Sept. 10, 2014), http://www.ftc.gov/system/files/documents/public_statements/582451/140915georgetownlaw.pdf.
- Koren W. Wong-Ervin, "Standard-Essential Patents: The International Landscape," PUBLIC DOMAIN (Spring 2014), http://www.ftc.gov/system/files/attachments/key-speeches-presentations/standard-essential_patents_the_intl_landscape.pdf.