

## **The IPR Impact of China's Antitrust Law: What more to expect?**

The National People's Congress has adopted the long awaited *Antitrust Law*.  
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assess the IPR impact of China's newly adopted *Antitrust Law*.

On August 30, 2007, the National People's Congress adopted the long awaited *Antitrust Law* which will enter into force as of August 1, 2008. This law has 57 articles primarily intended to cover, among other things, monopolistic conduct having or likely to have the effects of eliminating or restricting competition, such as: (a) monopoly agreements; (b) abuse of dominant market positions; and (c) concentration of business.

It is noteworthy that Article 55 deals with monopolistic conduct abusing intellectual property rights ("IPR") to eliminate or restrict competition. Thus, this legislation has drawn wide attention from and poses great uncertainties to many IPR owners from China and abroad since it was promulgated. In this article, the authors discuss the possible impact of China's Antitrust Law on IPR from a comparative law study perspective.

Article 55 of China's Antitrust Law provides that "*Where undertakings exercise intellectual property rights pursuant to stipulations in laws and administrative regulations relating to intellectual property, this Law is not applicable. However, this Law is applicable to conduct by undertakings that eliminates or restricts competition by the abuse of intellectual property rights.*" Although Article 55 is rather short and concise, it deals with three basic, but very key legal issues, i.e.:

- What is the relationship between the IPR law regime and Antitrust Law regime;
- What are the scenarios concerning the "abuse of intellectual property rights"; and
- How to define "eliminating or restricting competition".

### **The relationship between the IPR law regime and Antitrust Law regime**

The first sentence of Article 55 seemingly defines the principal relationship between the IPR law regime and Antitrust Law regime. It states that, "*Where undertakings utilize intellectual property rights pursuant to stipulations in laws and administrative regulations relating to intellectual property, this Law is not applicable.*"

The above clause acknowledges that there are tensions between the antitrust law and IPR laws, but if IPR is exercised within legal boundaries, the two legal regimes are complimentary. IPRs in essence are rights of exclusivity for a certain amount of time. This time-limited monopoly right is created for innovators to protect their innovations and prevent free rides or unjust exploitation by imitators. It is ultimately aimed at creating incentives for innovation. Antitrust law, on the contrary, is aimed at discouraging monopoly and anti-competitive behavior. However, such

punishment on exclusionary conduct is aimed at improving market accessibility for all competitors and thereby safe guarding innovation in the long run. The antitrust legal system complements the IPR system by ensuring fair and reasonable use of IPR during product marketing and distribution stages. Moreover, the normative foundation of both antitrust and intellectual property laws has been interpreted to promote efficiency, thus encouraging the production of higher quality products at lower costs.

During the two decades since enacting its first Patent Law in 1984, China has established a relatively comprehensive and sophisticated IPR law regime. In comparison, China's Antitrust law regime is still far from being mature. Even in the European Union ("EU") and the United States ("US") where there is a longer history of antitrust law, balancing the relationship between antitrust and IPR laws has never been an easy task. It will take a long time for the dust to settle before we can clearly see how these two legal regimes interact in China.

### **Scenarios of IPR abuse**

In addition to the Antitrust Law, the legal authorities for determining scenarios concerning IPR abuse can be found in many laws and regulations in China. These authorities primarily include:

1. International Treaties to which China is a member country:
  - (1) TRIPS;
  - (2) Paris Convention for The Protection of Industrial Property
2. Domestic legislation:
  - (1) Contract Law of the People's Republic of China <sup>1</sup>(Articles 329 and 343), which deals with technology contracts that are considered to "illegally monopolize technology" and hinder technology development;
  - (2) Interpretation of the Supreme People's Court concerning Some Issues on Application of Law for the Trial of Cases on Disputes over Technology Contracts<sup>2</sup> (Article 10), which further defines the types of unfair provisions in technology contracts that may be regarded as "illegally monopolizing technology and hindering technological development;"
  - (3) Foreign Trade Law of the People's Republic of China<sup>3</sup> (Articles 30 and 32), which provisions are modeled on TRIPS and specifically prohibits three types of IPR abuse, i.e., covenants not to challenge the validity of a patent, exclusive grant-backs, and forced package licensing;

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<sup>1</sup> It was adopted by the National People's Congress on March 15, 1999, and came into force on October 1, 1999.

<sup>2</sup> It was adopted by the Judicial Committee of the Supreme People's Court on November 30, 2004, and came into force on January 1, 2005.

<sup>3</sup> It was adopted by the National People's Congress on May 12, 1994, and it was amended on April 6, 2004.

- (4) Regulations of the People’s Republic of China on Administration of Import and Export of Technologies<sup>4</sup> (Article 29), which lists restrictive provisions in technology import contracts that are prohibited;
- (5) Anti-Unfair Competition Law of the People's Republic of China<sup>5</sup> (Article 12), which regulates tie-in sales;
- (6) Patent Law<sup>6</sup> (Articles 48 and 49), which allows compulsory licensing as potential remedies for abuse of IPR.

In summary, the above legal sources essentially deal with the following acts of “abusing intellectual property rights”:

- Price restrictions;
- Quantity restrictions;
- Geographical area restrictions;
- Cross license and patent alliance arrangements;
- Exclusivity (exclusive grant-backs, covenants not to challenge the validity of a patent and forced packaging, etc.);
- Restrictions on resale;
- Tie-in sales.

In addition, under China’s Antitrust Law, provisions regarding the definition of dominant market position and abuse of dominant market position are drafted in broad and general terms. They could potentially be interpreted to equate IPR with market power and punish certain uses of IPR as “abusing dominant market position.” For example, Article 18 of China’s Antitrust Law provides that an undertaking’s “technology condition” may be a factor for determining dominant market position. Also, Article 17 of the Antitrust Law enumerates the prohibited abuses of a dominant market position, and one such prohibited exclusionary conduct, for example, is “refusing to trade with relative trading parties without any justification.” This provision could potentially apply to refusals to license proprietary technology.

### **Defining “eliminating or restricting competition”**

Neither the current Antitrust Law nor any other Chinese laws and regulations provide an interpretation or lay down any guidelines concerning “*eliminating or restricting competition by the abuse of intellectual property rights*”. However, the competition laws and policies of the EU and U.S. may provide some clues on how China might deal with this issue:

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<sup>4</sup> It was adopted by the State Council on October 31, 2001, and came into force on January 1, 2002.

<sup>5</sup> It was adopted by the National People’s Congress on September 2, 1993, and came into force on December 1, 1993.

<sup>6</sup> It was adopted by the Standing Committee of the National People's Congress on March 12, 1984, and amended for the first time on September 4, 1992 and for the second time on August 25, 2000.

### *EU's Regulation*

The EU competition law provisions are embodied in Articles 3, 81, 82, 85 and 86 of the European Commission Treaty. The more specific rules on IP licensing are the Technology Transfer Block Exemption Regulation established in 1996 and the Commission Regulation (EC) No 772/2004 of 27 April 2004 on the Application of Article 81(3) of the Treaty to Certain Categories of Technology Transfer Agreements (the "Regulation 772/2004").

In the EU, Articles 81 and 82 of the EC Treaty contain competition provisions that govern the use, and potential abuse, of IPR. Article 81 prohibits agreements that adversely affect trade between member states through restriction of competition. It is intended to prevent alliances that may preclude the entrance or viability of other market participants. In analyzing the competitive effects of IP licensing, EU law simultaneously looks at the effects of the IPR itself and its licensing. Article 82 of the EC Treaty prohibits abuses associated with those who have already achieved dominant market positions. The antitrust authorities may find that the refusal to license an IPR constitutes an abuse of a dominant position within the meaning of Article 82 of the EC Treaty. Cases in which the EU Courts or the European Commission have found an obligation to deal have been based on Article 82(b) of the EC Treaty, which states that it is an abuse, and accordingly prohibited, for a dominant company to "[limit] production, markets or technical development to the prejudice of consumers". Thus, protecting the interests of consumers seems to be the primary concern of the Article 82 of the EC Treaty.

However, the EU Courts have also made it clear that companies have the freedom to deal or not to deal, as they see fit, and that it is only in exceptional circumstances that a refusal to deal, in its own right, constitutes an abuse of a dominant position and accordingly is prohibited under Article 82 of the EC Treaty. In applying this principle, which has come to be known as the "exceptional circumstances test", EU courts will consider the following factors in determining whether a legitimate IPR owner with dominant market position who refuses to license is regarded to abuse such position: (1) whether he is found to be the exclusive holder of a raw material or input essential to run a certain business on the market and such input is not duplicable; (2) whether his behavior prevents the entry of a product into the market for which there is potential consumer demand; (3) whether the refusal to license has any legitimate business justification; (4) whether his behavior deliberately pursued the goal of reserving to himself a downstream market by foreclosing competition to other potential rivals.

### *US Regulation*

The US uses both IPR statutes and antitrust law to regulate IPR abuse. The major antitrust laws applicable to IPR include the Sherman Act, the Clayton Act and the Federal Trade Commission Act. In addition, most states have antitrust laws which are patterned, to varying degrees, upon the federal antitrust laws. To facilitate analyzing antitrust concerns in IPR, the Department of Justice has issued the Antitrust Guidelines for the Licensing of Intellectual Property (the "Antitrust Guidelines"). It includes general statements of enforcement intent, intended modes of analyzing licensing arrangements, statements regarding specific licensing practices, and discussions of

hypothetical fact scenarios. Although the Antitrust Guidelines do not have binding force, they reflect analytical principles refined from existing case law.

Below are three general principles that underlie the Department of Justice and Federal Trade Commission's antitrust enforcement policies:

- (1) Intellectual Property will generally be afforded the same antitrust treatment as other forms of property and "is thus neither particularly free from scrutiny under the antitrust laws, nor particularly suspect under them."
- (2) Intellectual property rights in themselves do not necessarily give rise to a presumption of market power in the antitrust context; and
- (3) Intellectual property licensing is generally regarded as pro-competitive.

Consistent with the view that IPR is generally pro-competitive; the U.S. enforcement agencies intend to evaluate the "vast majority" of licensing arrangements under the "rule of reason" analysis. Under this approach, if the defendant's conduct has both anti-competitive and pro-competitive effects, the court will weigh the economic efficiencies of the defendant's conduct against the actual anti-competitive costs of the conduct. Nonetheless, the agencies will apply the "per se rule" to arrangements that are unlikely to generate "an efficiency-enhancing integration of economic activity" and are of the type that have historically been afforded per se treatment. For such conduct, the court will conclusively presume it to be unreasonable. Such typical per se practices include naked price-fixing, output restraints, and market division among horizontal competitors, as well as certain group boycotts and resale price maintenance. However, it is worth noting that in the past 30 years or so, U.S. courts have moved more toward the "rule of reason" analysis.

Based upon the above comparative law analysis, it is expected that China's future legislation would add some certainty to the process of predicting what kind of behavior may result in an antitrust challenge against IPR owners.

### **What More to Expect**

Through the above analysis, we may draw a preliminary conclusion that the new China Antitrust Law is seemingly far from being mature and thus gives little practical guidance. Thus, unfortunately, a market operator may have to struggle with a lot of uncertainties when litigating a case based on Article 55 of the Antitrust Law and may be unfairly disadvantaged to be the first to test the practical application of this rule. In order to make the law more practical, future legislation is expected to address the following issues at a minimum:

- (1) Administrative liabilities

Articles 46, 47, 49, 51 and 52 of China's Antitrust Law set forth the relevant administrative liabilities against undertakings employing monopolistic conduct by monopoly agreements, dominant market positions and concentration of business. These administrative penalties include monetary fines, revocation of business registration, and injunctions for ceasing violations. However, it is interesting to note that the current law itself does not provide any administrative penalties for violation of Article 55. Although theoretically, IPR abuse may be subject to administrative penalties in cases where they are considered abuses of dominant market position, the fact that Article 55 is a separate provision stipulated in "Supplemental Provisions" of the law makes it unclear whether the relevant enforcement authorities will apply the liability in this way.

## (2) Civil liabilities

Article 50 of the law provides that "Conduct by undertakings that causes damage to others, shall bear civil liabilities". In other words, civil remedies with respect to violations of Article 55 are available in principal under China's Antitrust Law. Under China's Civil Code, civil liabilities generally include: (1) cessation of infringement; (2) removal of obstacles; (3) elimination of dangers; (4) return of property; (5) restoration of original condition; (6) repair, reworking or replacement; (7) compensation for losses; (8) payment for breach of contract damages; (9) elimination of ill effects and rehabilitation of reputation; and (10) extension of apology. Despite this, how China's future legislation delineates specific civil liabilities will remain an interesting issue that many IPR legal practitioners desire to know.

## (3) Evidence Rules

Historically, through the issuing judicial interpretations or guidelines from time to time, China's Supreme People's Court laid down evidence rules for various types of civil and administrative cases. In particular, at present there is a need for the Supreme People's Court to promulgate burden of proof rules. It is expected that in the future, China's Supreme People's Court may lay down some detailed guidelines on evidence rules for cases concerning violations of Article 55 of the Antitrust Law for parties in disputes to follow when filing a case with the relevant people's court.

The Chinese government has been advocating and implementing an ambitious plan for building the country into an "Innovation & Knowledge-Based Country." In the context of China's continued economic growth and further integration into the world's economic system, the impact that the Antitrust Law may have on IPR is expected to be very significant. Hopefully, future legislation will clarify the issues discussed above.