



China's Anti-Monopoly Law

US Patent and Trademark Office Program on
"Challenging the United States: Intellectual Property Issues in China"

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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
- Facially 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

- Preceding slide: the chapters in DOJ & FTC, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (2007)
- 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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