LICENSING IN CHINA:
The New Anti-Monopoly Law, the Abuse of IP Rights and Trade Tensions

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I. Introduction

The People's Republic of China represents almost one-quarter of the world's population, and it has one of the world's fastest growing economies. Any international licensing strategy cannot afford to simply ignore such a market.

But for most licensors, whose international experience is primarily in countries with developed legal systems, China represents something of a "black hole" about which they know little more than what they read in the press. And much of that press coverage they consider worrisome.

What is less written about is that China has been building a modern legal system and improving the transparency of its policy and law making processes. It started to adopt a civil law system based on the German *Bürgerliches Gesetzbuch* (BGB or Civil Code) in 1902 during the reign of the last emperors of the Qing Dynasty.[1] As part of its process of adopting a modern civil code it adopted the Contract Law in 1999[2] and the Property Rights Law in 2007.[3] These are two of the three primary books that make up a civil code.[4]

China has also adopted a set of intellectual property laws and has continued to update and amend them, seeking comments from foreign organizations in the process.[5] Although

[1] Philip C.C. Huang, Code, Custom and Legal Practice in China: The Qing and the Republic Compared (Stanford: Stanford University Press, 2001) at 16.
[2] *Zhonghua Renmin Gongheguo Hetong Fa* ("Hetong Fa"), adopted at the Second Session of the Ninth National People's Congress on March 15, 1999 and came into force on October 1, 1999.
[3] *Zhonghua Renmin Gongheguo Wuquan Fa* ("Wuquan Fa"), adopted at Fifth Session of the 10th National People's Congress on March 16, 2007 and came into force on October 1, 2007.
[4] The third book is "Of Persons" and deals with matters such as civil rights and incorporation. China has a draft in progress.
[5] These include the Patent Law, *Zhonghua Renmin Gongheguo Zhuanli Fa* ("Zhuanli Fa"), adopted at the 4th Session of the Standing Committee of the 6th National People's Congress on March 12, 1984 and amended in 1992 and 2000 (proposed amendments prepared in consultation with foreign organizations such as the American Bar Association Intellectual Property Section are now before the State Council for consideration); the Copyright Law, *Zhonghua Renmin Gongheguo Zhuzuoquan Fa* ("Zhuzuoquan Fa"), adopted at the 15th Session of the Standing Committee of the 7th National People's Congress on September

many enterprises in China's "Wild West" economy have yet to learn to respect these intellectual property laws, the Chinese courts have made considerable effort to both understand and enforce the intellectual property laws. Most major courts now have specialized intellectual property benches for such cases and many courts are now posting their decisions online.[6] Chinese courts do enforce intellectual property rights. And some might even say that they favor foreign parties. After the patent ran out on Lego's "brick" it was able to protect the design on two grounds in China whereas in most other countries, including the United States and Canada, it obtained no further protection.[7]

The most recent addition to the development of China's legal system is the Anti-Monopoly Law[8] (or "AML") scheduled to come into force on August 1, 2008. How it will affect intellectual property rights is one of the major questions confronting foreigners doing business in China. Beyond the issues related to counterfeiting there have been significant trade tensions between China and primarily U.S. entities over standard setting procedures, particularly with respect to electronic goods and software, and the licensing fees charged by patent pools formed in developed nations to Chinese manufacturers who compete with many of these entities on price.

The AML is widely described by Chinese officials and academics as China's "Economic Constitution"[9] and it has accordingly been argued that it should provide the dominant principles for interpreting laws related to market behavior. But Article 55 of the AML sets out the basic relationship between competition law and intellectual property rights thus:

7, 1990 and amended in 2001; the Trademark Law *Zhonghua Renmin Gongheguo Shangbiao Fa* ("Shangbiao Fa"), adopted at the 24th Session of the Standing Committee of the 5th National People's Congress on August 23, 1982, as amended in 1993 and 2001 (proposed amendments are now being circulated for discussion and the author is part of the ABA group preparing comments); and the Anti-Unfair Competition Law, *Zhonghua Renmin Gongheguo Fan Bu Zhengdang Jingzheng Fa* ("Fan Bu Zhengdang Jingzheng Fa") adopted at the 3rd Session of the Standing Committee of the 8th National People's Congress on Spetember 2, 1993 and effective as of December 1, 1993.

[6] The Supreme People's Court has a section of its web site devoted to IPR decisions at: http://ipr.chinacourt.org/ ; the Beijing Court system has a special page at: http://bjgy.chinacourt.org/cpws/?LocationID=0901020000 ; decisions from Jiangsu Province may be found at: http://www.jsfy.gov.cn/cps/site/jsfy/ ; Zhejiang Province posts its decisions at: http://www.zjcourt.cn/portal/ ; and Guangzhou City posts its decisions at: http://www.gzcourt.org.cn/ .

[7] See for China -Yingte Laige Gongsi (Interlego S.A.) v. KeGao (Tianjin) Wanju Youxian Gongsi (KeGao (Tianjin) Toy Company), Beijing Higher People's Court, File No. 279, 2002-12-18; for Canada - Kirkbi AG *v.* Ritvik Holdings Inc., [2005] 3 S.C.R. 302 • (2005), 259 D.L.R. (4th) 577 • (2005), 43 C.P.R. (4th) 385; for the U.S. – Tyco Industries, Inc. v. LEGO Systems, Inc. and INTERLEGO A.G., Tyco Industries Inc. v. Lego Systems Inc., 5 U.S.P.Q.2d 1023 (D.N.J. 1987); affd 853 F.2d 921 (3d Cir. 1988); cert. denied 488 U.S. 955 (1988) .

[8] *Zhonghua Renmin Gongheguo Fan Longduan Fa* ("Fan Longduan Fa"), Presidential Decree No. 68, adopted at the 29th Session of the Standing Committee of the 10th National Peoples Congress and promulgated on August 30, 2007 to come into effect August 1, 2008.

[9] Guo Xiaoyu, "Jingji Xianfa" Jian Zhi Longduan Xingwei, Fazhi Ribao (Guo Xiaoyu, "The Economic Constitution" A Sword Pointed at Monopoly Behavior, Legal Daily), 2007-08-26, available online at: http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=370729&pdmc=110106 .

> Article 55 This Law does not apply to action taken by undertakings to protect their legitimate intellectual property rights in accordance with the intellectual property laws and regulations; however, this Law does apply to action taken by undertakings that eliminates or restricts competition by abusing intellectual property rights.

There are two important principles in this short provision. The most important one is that it implies that the laws governing intellectual property rights are considered to be equivalent in status to the AML. So long as the intellectual property rights holder complies with their respective laws the provisions of the AML do not apply. Thus China's "Economic Constitution" does not appear to apply directly to the interpretation of intellectual property rights, as is the case in the United States.

Secondly the AML does apply to abuses of intellectual property rights. For licensors doing business in China or contemplating doing business in China the issue of what will be considered an abuse of intellectual property rights becomes a key question in formulating a business strategy.

This article will give an overview of the new AML with an emphasis on how it will be developed and enforced and how it deals with issues related to innovation and intellectual property rights. It will then review the existing guidelines for technology license contracts under the Contract Law, as contained in a 2004 Interpretation issued by the Supreme People's Court and their relationship to the AML and equivalent European regulations. Finally it will discuss the larger intellectual property and trade issues affecting China. These have been summarized in a 2005 report commissioned by the State Intellectual Property Office ("SIPO").[10] Finally some brief practical suggestions will be provided on how to proceed while China is developing its approach to the intersection between intellectual property rights and competition law.

II. The New Anti-Monopoly Law

The new AML is the result of some 13 years of discussion. The discussion included consultation drafts and comments from groups in both the United States and Europe. It also included considerable debate within the Standing Committee of the National People's Congress that reflected the concerns of vested interests within the Chinese government and proponents of the new market economy.

As one perceptive Chinese commentator, Professor Huang Yong, has written, in the major developed countries a free market economy had been well established by the time

[10] Zhang Ping Ed., Rushihou Woguo Zhishi Chanquan Zhongda Shewai Anjian Yanjiu,(Research on Major Foreign-related Intellectual Property Cases in China after Entry into the World Trade Organization) Beijing Daxue Zhishi Chanquan Xueyuan – Beijing University Intellectual Property Institute, October 31, 2005, available at: www.ipr.gov.cn/cn/zhuanti/zhangpingzhuanlan/rushihouwoguoIPzhongdashewaianjianyanjiu.doc .

the first competition laws were adopted in the late 19th and early 20th centuries.[11] The laws were adopted primarily to preserve the free market from threats of distortion by private interests.

The economic conditions in China today are not the same. As part of an overall transition from a planned economy to a market economy the government is trying to develop more private enterprise. In these circumstances the intervention of the AML is seen not as the threat of "government intervention" but as a relief from the previous dominant role of the government in the planned economy. Thus one of the most welcomed chapters in the AML is Chapter 5 on the abuse of administrative powers to eliminate or restrict competition. Such restrictions have met considerable resistance from the established State-Owned Enterprises ("SOEs").

Another perspective to be kept in mind when evaluating the AML is that, as mentioned earlier, China is a civil law jurisdiction. In civil law jurisdictions statutes are general statements of legal principles rather than precise and narrowly read restrictions on freedoms. In such statutes the prohibitions need not be as precisely stated as in common law statutes and it is acceptable to allow the lawmakers (through regulation or judicial interpretation) to elaborate on the general principles.

Thus the AML is basically a map of the general principles for the development of the market economy in China. Although it represents the wish of the government to guide the development of the economy, it also represents what China has considered to be the best of the competition law developments in Europe and America. Overall William Blumenthal, the General Counsel for the Federal Trade Commission in Washington, has said that he considers the AML to be quite mainstream in its text.[12]

1. Chapter I – General Provisions

Article 1 of the AML sets out the purposes of the law. They may be summarized as (1) stopping monopolistic conduct; (2) safeguarding fair competition; (3) improving economic efficiency; (4) protecting consumer and public interests; and (5) promoting the healthy development of the "socialist market economy." Aside from the choice of nomenclature in the last provision none of these would be out of place in a competition statute outside of China.

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[11] Huang Yong, "Renshi Zhongguo Fan Longduan Fa," Caijing Zazhi (Huang Yong, Understanding China's Anti-Monopoly Law," Caijing Magazine) 2007-11-28.

[12] Lisl Dunlop, Interview with William Blumenthal, General Counsel, Federal Trade Commission, 7(2) The Antitrust Source, December 2007; available online at: http://www.abanet.org/antitrust/at-source/07/12/Dec07-Blumenthal12-17.pdf . Similar sentiments were also expressed in William Blumenthal ; Stuart Chemtob (Special Counsel, International Trade, Department of Justice, Antitrust Division); Paul Jones and Jun Wei (Hogan & Hartson LLP, Beijing), "Understanding the New Antitrust Law in China: Implications for U.S. Companies and Investors," Teleconference Program presented by Strafford Publications, Atlanta, Georgia, October 25, 2007.

For example, Canada's Competition Act,[13] has a purpose clause that was inserted in 1986. The purposes in the Canadian Act may be summarized as (1) maintain and encourage competition; (2) to promote the efficiency and adaptability of the economy; (3) to expand opportunities in world markets; (4) to ensure that small and medium-sized enterprises have equitable opportunities; and (5) to provide consumers with competitive prices and product choices.[14] Arguably the reference in the Canadian statute to opportunities for small and medium-sized enterprises is not quite in keeping with modern notions of competition law as having consumer welfare as its purpose.[15]

The AML also provides that businesses may grow through fair competition and voluntary mergers in accordance with the law to expand their scale and increase their competitiveness.[16] In other words, being a large and dominant business is not prohibited. But such positions shall not be used to eliminate or restrict competition.[17]

In addition the AML specifies that the State Council shall create two new entities to develop and enforce the law; namely the Anti-Monopoly Commission[18] (the "Commission") and the Anti-Monopoly Enforcement Agency (the "Agency").[19] Some observers question whether the Agency will be a truly independent body under the State Council or will be part of a particular Ministry.[20] This too will become clear over the coming year.

Article 4 provides that "The State shall formulate and implement competition rules which are suitable to the socialist market economy, improve macroeconomic control, as well as improve a unified, open, competitive and orderly market system."

The rules that will be developed and implemented by the State, presumably acting through the Agency and the Commission, will give guidance as to what is meant in Article 55 by "abuse of intellectual property rights."

2. **Chapter II – Monopoly Agreements**

This Chapter is organized into three basic sets of provisions. Article 13 lists six types of agreements that are prohibited between competitors. Article 14 lists three types of agreements that are prohibited in vertical relationships. Finally Article 15 lists seven

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[13] R.S.C., c. C-34 as amended.
[14] Ibid., Section 1.1.
[15] See for example Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself (New York: The Free Press, 1978) Chapter 4.
[16] Article 5.
[17] Article 6.
[18] Fan Longduan Weiyuanhui; in Article 9. The Chinese word "weiyuanhui" can also be translated as "committee."
[19] Fan Longduan Zhifa Jigou; in Article 10. The Chinese word "Jigou" can also be translated as a state "authority."
[20] Andrew Batson and Jason Leow, Beijing's Antitrust Plan Raises Questions, Wall Street Journal Online, August 30, 2007.

purposes for which the agreements prohibited by Articles 14 and 15 would be exempt from the restrictions.

The majority of the prohibitions listed in Article 13 are what one would expect to see; fixing prices, restricting output or sales, dividing up the markets, and boycotts. But of note to licensors is the prohibition on the "restriction of the purchase of new technology or new equipment, or restrictions on the development of new technology or new products."[21]

The final prohibition in Article 13 has probably raised some concerns amongst foreign lawyers, and particularly amongst common law lawyers who expect statutes to precisely set out the boundaries of the prohibitions. It reads "Other monopoly agreements as otherwise determined by the Anti-Monopoly Enforcement Agency under the State Council."[22]

However as noted earlier in civil law jurisdictions statutes are general statements of legal principles rather than precise and narrowly read restrictions on freedoms. In such statutes the prohibitions need not be as precisely stated as in common law statutes and it is acceptable to allow the lawmakers (through regulation or judicial decision) to elaborate on the general principles.

In other regulations China has used the word "deng" which can be translated as "so on and so forth, etcetera (etc.)" to indicate that the requirements listed are not exhaustive.[23] This has not found much favor with foreign commentators from common law jurisdictions and phrases similar to those used in Article 13(6) have replaced the use of "deng."[24]

Article 14 has prohibitions against fixing resale prices and setting minimum resale prices, and a similar provisions regarding other agreements as determined.

The exemptions listed in Article 15 are also illustrative of the general principles prohibiting restrictions of competition. Two of the seven exceptions are based on the achievement of efficiencies in the economy or the sector.[25] One is where the agreement is for the purpose of "technology improvement or the research and development of new

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[21] Article 13(4).

[22] Article 13(6). The Anti-Monopoly Enforcement Agency under the State Council is established in Article 10. See note 16, *supra.*

[23] See for example the *Shangye Texujingying Guanli Banfa* (Measures for the Regulation of Commercial Franchising), Ministry of Commerce Order No. 25 of 2004, in effect February 1, 2005, Article 19 in general and 19(9) in particular.

[24] See the author's discussion of the reaction to the Measures for the Regulation of Commercial Franchising in The Regulation of Franchising in China and the Development of a Civil Law Legal System , 2(1) Chinese Law & Policy Review, 60-80, July 2007, University of Pennsylvania, http://www.law.upenn.edu/groups/clsa/clr/articles/volume2.html ; and Article 22 of the new *Shangye Texujingying Guanli Tiaoli* (Commercial Franchise Administration Regulation) Decree No. 485, adopted on January 31, 2007 at 167th Regular Meeting of the State Council, in effect from May 1, 2007.

[25] Articles 15(2) and (3).

products,[26] and three more are based on broader public interests such as disaster relief, environmental protection, and mitigating economic depression; and in implementing foreign trade agreements.[27] Arguably the objective of the exemptions continues to be overall consumer welfare, albeit in the later case with the government stepping in and setting priorities in areas where market failure is likely.

Clearly intellectual property and innovation policies have been taken into account in the AML, in both the prohibitions and in the exemptions. But it appears that the current restrictions on grantbacks without consideration, as discussed later in this article, will become part of the new policies under the AML.

3. **Chapter III – Abuse of Dominant Market Position**

This Chapter of the AML consists of just three Articles and would primarily be of concern to licensors who are dominant in their sector. One article sets out the prohibitions on unilateral conduct; the second sets out the basis for finding that a firm is in a dominant market position; and the third sets out when market dominance may be presumed, subject to the submission of evidence to the contrary.

Most of the prohibitions contained in Article 17 are common in any law on competition; predation, refusal to deal, exclusive dealing, tied sales and price discrimination.[28] Each of these is qualified by a requirement that the conduct must be "other than competition on the merits."

For licensors the most relevant provisions whose guidelines will need to be studied closely are the provisions on refusal to deal, tied selling and exclusive dealing. The courts and agencies of the United States and the European Union have developed different approaches as to when such provisions in intellectual property license agreements constitute improper restrictions on competition.

This is perhaps best illustrated by the decision of the E.U. Court of First Instance in the Microsoft case on September 17, 2007.[29] This was ironically a little over two weeks after the adoption of the AML. The court found Microsoft guilty of abusing its dominant position by refusing to supply its competitors with 'interoperability information' and by tying its Windows Media Player with the Windows PC operating system.

For a variety of reasons it is anticipated that China will follow the developments in Europe in this area rather than those in the United States. The relationship between the European regulations and the current Chinese ones will be discussed again later in this article.

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[26] Article 15(1).
[27] Articles 15(4), (5), and (6).
[28] Articles 17(2), (3), (4), (5), and (6) respectively.
[29] Microsoft Corp. v. Commission of the European Communities, Court of First Instance of the European Communities, Case No. T-201/04.

4. Chapter IV - Concentrations of Firms

These are the provisions on mergers. Ordinarily these are not of significant concern to owners of intellectual property, however in China's emerging economy many of the intellectual property assets held by Chinese firms were developed at least in part when these were controlled and funded by the state. Problems have developed when foreign firms choose to enter the Chinese market by entering into a joint venture with a Chinese firm and the primary contribution of the Chinese firm to the joint venture is its intellectual property.[30] In these cases, the registration to effect the transfer of the intellectual property rights may be denied by the relevant authorities.

The concern of the Chinese government is that the state assets be disposed of at fair market value and not be used to support the development of private wealth. Initial pronouncements suggest that one of the priorities of the AML Enforcement Agency will be to scrutinize foreign mergers and acquisitions to determine whether the domestic firms were fairly priced.[31]

China intends to more fully legislate on this issue. A draft law on the protection of state assets was tabled for discussion at the December 2007 meeting of the Standing Committee of the National People's Congress. The "WAHAHA" dispute was specifically mentioned in the debates as an example of the type of problem that they seek to avoid.[32]

One of the major policy concerns for the AML, as expressed in the press and in the hearings of the Standing Committee and in the full session of the National People's Congress,[33] was that foreign firms were using their superior access to capital to acquire dominant positions in certain industries. While security concerns were frequently cited, these were not always clearly articulated, and it now appears that they may include concerns about privatization of state-owned assets at appropriate prices.

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[30] A recent example is the dispute between Group Danone and Hangzhou Wahaha where the transfer of the Chinese trademark "WAHAHA" was refused by the State Intellectual Property Office on the grounds that as the well-known mark of a state-owned enterprise, the trademark belonged to the state and Wahaha Group did not have the right to transfer it to a private company. For further discussion see Micah Schwalb, Wahaha as Pedagogy, (Dec. 15, 2007). Available at SSRN: http://ssrn.com/abstract=1073622 ; and Steven M. Dickinson, Danone v. Wahaha, China Economic Review, September 2007 available online at: http://www.chinaeconomicreview.com/cer/2007_09/Danone_v_Wahaha.html .

[31] Legislator: China to unveil 20 regulations governing foreign M&A, People's Daily Online – English Edition, November 25, 2007, available at: http://english.peopledaily.com.cn/90001/90776/90884/6308922.html . The article quotes Cheng Siwei, the Vice Chairman of the current Standing Committee of the National People's Congress.

[32] *Guanxi Guoyou zichan Chuziren Quanyi De Zhongda Shixiang* (The Major Issues of the Rights and Interests of Investors who have State-Owned Assets) 2008-01-03, available on line at: http://www.npc.gov.cn/npc/xinwen/lfgz/lfdt/2008-01/03/content_1388171.htm . The law under discussion is the *Zhonghua Renmin Gongheguo Guoyou Zichan Fa* - State-Owned Assets Law.

[33] See for example: Yang Fan, Are M&As Suffocating Chinese Businesses?, Beijing Review, June 4, 2007 http://www.bjreview.com.cn/expert/txt/2007-06/04/content_65184.htm ; Chinese lawmakers call for cautious handling of foreign mergers, People's Daily Online, March 4, 2007; Improved laws sought on M&A by foreign firms, Shanghai Daily, March 5, 2007; Wang Jun, A Law to Curb Monopoly-Finally, Beijing Review, July 13, 2006.

It was sometimes suggested that Chinese industries still needed protection in order to grow.[34] Such sentiments are not new in China, and China had previously issued two sets of regulations on acquisitions and mergers by foreign firms.[35]

The merger provisions of the AML however apply to both foreign and domestic firms, except for Article 31. Article 31 provides that mergers, acquisitions and other forms of concentration involving foreign investors that raise security concerns shall also be examined "in accordance with the relevant provisions of the State for national security review."

While some view the addition of a national security review as an indication of an "industrial strategy" component to what should be a law regulating competition, China has found itself subject to such concerns in Western nations. The Chinese state-owned firm CNOOC faced strong opposition from U.S. lawmakers when it made a bid for Unocal, and ultimately withdrew the bid.[36] Canada has issued guidelines under the *Investment Canada Act* for the review of investments by state-owned enterprises.[37]

Foreign firms may take some comfort in the release of the 2007 China Foreign Investment Report by the Ministry of Commerce. The English language news reports state that China "does not face an imminent risk of monopoly by foreign companies in any industry."[38]

This Chapter provides for notification[39] of mergers, acquisitions of shares or assets, or acquisitions of control[40] to the Anti-Monopoly Enforcement Agency and a decision by the Agency as to whether or not the proposed transaction "has or may have the effect of eliminating or restricting competition"[41] based on a review that must include consideration of the factors set out in Article 27.

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[34] People's Daily Online, *Id.*

[35] *Guanyu Waiguo Touzizhe Binggou Jingnei Qiye de Guiding* - "Regulations on Acquisitions of Domestic Enterprises by Foreign Investors," issued jointly by the Ministry of Commerce, the State Assets Supervision and Administration Commission, the State Taxation Administration, the Sate Administration for Industry and Commerce, the China Securities Regulatory Commission and the State Administration of Foreign Exchange on August 6, 2006 to take effect on September 8, 2006; which superseded the *Waiguo Tuozizhe Binggou Jingnei Qiye Zanxing Guiding (Quanwen)* - "Temporary Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors issued on March 7, 2003.

[36] David Teather, Washington opposition forces Chinese to withdraw oil offer, Guardian, August 3, 2005. Later a Dubai based corporation was forced to sell off its U.S. operations when it acquired London based Peninsular and Oriental Steam Navigation Co. See Jonathan Weisman and Bradley Graham, Dubai Firm to Sell U.S. Port Operations, Washington Post, March 11, 2006.

[37] Industry Canada, Guidelines – Investment by State-owned Enterprises – Net Benefit Assessment, announced December 7, 2007, available at: http://www.ic.gc.ca/epic/site/ica-lic.nsf/en/lk00064e.html#state-owned.For .

[38] Jiang Wei, No threat of foreign monopoly in any industry – Report, CHINAdaily, September 10, 2007, available online at: http://www.chinadaily.com.cn/china/2007-09/10/content_6092203.htm . Interestingly the Chinese language news articles on the release of the Report are silent on this aspect.

[39] Article 21.

[40] As defined in Article 20.

[41] Article 28.

The factors that must be considered in reviewing a proposed merger include items such as market shares of the participants, degree of concentration in the relevant market and the effect on consumers.[42] Once again the Agency is given the authority to take other factors into consideration.[43] Concerns about the relationship between intellectual property and competition have been built into the basic review through the requirement to consider "the effect of the proposed concentration on market access and technological progress."[44] The Agency is also required to consider the effect on the "development of the national economy." This might be generally described as a public interest consideration beyond the usual scope of competition law. This is also an example of what some have described as the "industrial policy" taint to the AML.

5. Remaining Chapters and Summary

The three remaining chapters of the AML, namely Chapters 5, 6 and 7, deal with the abuse of administrative powers to restrict competition, the investigation of suspicious conduct and the administrative penalties. Except for the aspects noted below these chapters are not of direct concern to owners of intellectual property.

As will be discussed later in this article, internationally China has concerns about the operation of standard setting bodies and their incorporation of intellectual property rights into standards. Internally Article 33 of the AML lists various types of prohibited conduct by administrative agencies. Article 33(2) prohibits the imposition of technical requirements or inspection standards that are different from those imposed on local products.

Article 50 of the AML in the chapter on Legal Liability makes it clear that the penalties and fines specified in this chapter do not preclude the right of the parties harmed to bring an action in contract, tort or as otherwise provided in Chinese law. In civil law generally and in Chinese law there is no right to an interim injunction unless the statute has a specific provision for such a remedy. There is no such provision in the AML.

In summary China has attempted to integrate issues at the intersection of intellectual property law and antitrust law into the basic structure of the AML, yet at the same time through the structure of Article 55, as discussed earlier, to not make the intellectual property laws subordinate to the AML.

However in order to articulate the boundaries between the two concepts the AML Enforcement Agency will need guidelines to make its enforcement in this area reasonably transparent. Thus China will have to produce state council regulations (generally known as "tiaoli") and/or lower-ranked agency or ministry regulations (generally known as "banfa") on such areas as licensing, refusals to license to third parties, disclosure of interoperability protocols in software, and cross-licensing and pooling arrangements.

[42] Articles 27(1), (2), and (4).
[43] Article 27(6).
[44] Article 27(3).

These will be the Chinese equivalent of the U.S. Federal Antitrust Guidelines for the Licensing of Intellectual Property[45] or the European Union's new *Technology Transfer Block Exemption Regulation*[46] ("TTBER") and Guidelines.[47]

III. Current Definitions of IP Abuse in Contract Law

One of the major starting points for the drafting of these new regulations will naturally be China's existing laws and regulations governing technology contracts. Prior to the adoption of the Contract Law[48] in 1999, China's Technology Contract Law and the regulations on technology transfer[49] required that all agreements be approved by the government before they could take effect; agreements had a maximum term of ten years, including any confidentiality obligations; and the agreement could not prohibit the licensee from using the technology after expiration. Such terms were also found in some other developing countries.

The Technology Contract Law was repealed[50] on the coming into force of the Contract Law and Chapter 28 of the Contract Law deals with Technology Contracts as a form of nominate contract.[51] Many of the restrictions were thus removed, but Article 329 of the Contract Law provided that "Any technology contract that illegally monopolizes technologies, impedes technological progress or infringes upon the technological results of others is null and void."

After China's entry into the WTO on December 11, 2001 new regulations were also put in place as of January 1, 2002.[52] These regulations divided technologies into

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[45] U.S. Department of Justice and the Federal Trade Commission, issued April 6, 1995.
[46] Commission Regulation (EC) No. 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ No. 123, 27.04.2004, p.11.
[47] Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements (OJ No. C 101, 27.04.2004, p.2.
[48] *Supra* note 2.
[49] Technology Contract Law – *Zhonghua Renmin Gongheguo Jishu Hetong Fa*, adopted June 23, 1987 by the 21st Session of the Standing Committee of the 6th National People's Congress; Administrative Regulation on Technology Import Contract – *Zhonghua Renmin Gongheguo Shuyin Hetong Guanli Tiaoli*, promulgated by the State Council on May 24, 1985; Implementing Rules for the Administrative Regulation on Technology Import Contract – *Zhonghua Renmin Gongheguo Shuyin Hetong Guanli Tiaoli Shihang Xize*, promulgated by the then Ministry of Foreign Trade and Economic Cooperation ("MOFTEC") on January 20, 1988; and the Provisions Regarding Administration of Importation of Technology and Equipment – *Jishu Yinjin He Shebei Jinkou Maoyi Gongzuo Guanli Zanxing Banfa*, promulgated by MOFTEC on March 22, 1996.
[50] Article 428 of the Contract Law, *supra* note 2.
[51] In civil law statutes on contracts and obligations there are general provisions that apply to all contracts and particular provisions that apply to certain types of named or "nominate" contracts. For these nominate contracts the particular provisions apply over the general provisions in case of conflict.
[52] Regulation on the Administration of Technology Imports and Exports – *Zhonghua Renmin Gongheguo Shujin Chukou Guanli Tiaoli*, adopted at the 46th Executive Meeting of the State Council on 31 October 2001; Administrative Measures on the Regulation of Technology Import and Export Contracts – *Zhonghua Renmin Gongheguo Jishu Jin Chukou Hetong Dengji Guanli Banfa*, adopted by MOFTEC on November 16, 2001; Administrative Measures on Import of Prohibited or Restricted Technology – *Jinzhi Jinkou Xianzhi*

"prohibited," "restricted" and "unrestricted" categories with only contracts dealing with the restricted category requiring approval. However registration of contracts for the restricted and unrestricted categories with the relevant authorities is still required. The parties may now negotiate their own provisions regarding the length of the term, confidentiality, and use after expiry of the license.

Notwithstanding these regulations technology contracts are still subject to the restrictions of Article 329 of the Contract Law as quoted above. The meaning of the rather vague phrases of Article 329 should eventually become part of the law and regulations on competition and monopoly, but at that time that the Contract Law was adopted the AML was still being drafted and discussed.

Accordingly in 2004 the Supreme People's Court issued an "Interpretation"[53] on a number of issues concerning technology contracts that included a section on the meaning of Article 329 of the Contract Law. While there has been some discussion outside of China as to the status of such interpretations,[54] they are regularly cited by Chinese courts in deciding cases, in a manner similar to that of a European court citing what is known in civil law as doctrine.[55]

Article 10 of the Interpretation specifies that the act of "illegally monopolizing technology and impairing technological progress" as described in Article 329 includes the following:

1. (a) Restricting one party from undertaking new research and development on the technology that is the subject of the contract;

   (b) Restricting a party from using improvements on the technology that is the subject of the contract;[56]

   (c) Having terms for the exchange of the improved technologies developed under the agreement that are not reciprocal; including

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Jinkou Jishu Guangli Banfa , Decree No. 18 of MOFTEC and the State Economic and Trade Commission promulgated on December 28, 2001; and Administrative Measures for Export-Prohibited Technology or Export Restricted Technology – *Jinzhi Chukou Xianzhi Chukou Jishu Guanli Banfa*, Decree No. 14 of MOFTEC and the Ministry of Science and Technology promulgated December 12, 2001.

[53] Interpretation of the Supreme People's Court concerning Some Issues on the Application of Law for the Trial of Cases on Disputes regarding Technology Contracts – *Zuigao Renmin Fayuan Guanyu Shenli Jishu Hetong Jiufen Anjian Shiyong Falv Ruogan Wenti de Jieshi*, Interpretation 20 of 2004 adopted at the 1335th Meeting of the Judicial Committee of the SPC on November 30, 2004.

[54] Randall Peerenboom, Courts as Legislators: Supreme People's Court Interpretations and Procedural Reforms (Oxford: Foundation for Law, Justice and Society in collaboration with the Centre for Socio-Legal Studies, University of Oxford, 2007) available online at: http://www.fljs.org/images/Peeremboom.pdf .

[55] In civil law "doctrine" refers to legal scholarship and authoritative writings and is considered a superior source of law to case law.

[56] The Chinese text does not distinguish between technologies that are improved by the licensee through its use or improved technologies that may be acquired by the licensee from a third party.

(i) requiring one party to provide the other party with voluntary improvements to the technology without consideration;

(ii) requiring transfers of the improved technology to the other party non-reciprocally; and

(iii) requiring that the intellectual property rights in any improvements to the technology be held solely or jointly without consideration.

2. Restricting one party from obtaining, from other sources, technology that is similar to or competitive with that of the technology provider.

3. Impeding one party's reasonable and full exploitation of the technology that is the subject of the contract in accordance with market demand; including restricting the technology recipient in a clearly unreasonable manner from implementing the technology that is the subject of the contract in the manufacturing of products or the provision of services with respect to quantities, varieties of products or services, prices, marketing channels or export markets;

4. Requiring the technology recipient to accept technology that is not essential to the implementation of the technology that is the subject of the license, including the purchase of non-essential technology, raw materials, products, equipment, services or employment of non-essential personnel, and other similar goods and services.[57]

5. Unreasonably restricting the channels or sources through which the technology recipient may purchase raw materials, parts and components, products or equipment, or similar items.

6. Prohibiting the technology recipient from challenging the validity of the intellectual property in the technology that is the subject of the agreement, or attaching conditions to any such challenge.[58]

Those familiar with the European TTBER[59] of April, 2004 will recognize some provisions as being substantially the same. The TTBER has among its hardcore restrictions prohibitions on exclusive grant-back obligations of a licensee's own severable improvements,[60] no-challenge clauses in respect of the validity of the intellectual property rights[61] and where the license is granted to a non-competitor, restrictions on the licensee's ability to exploit its own technology or on its ability to develop new

[57] Note that the list of potentially tied items is not determinate; see notes 20 and 21 *supra* and the accompanying text on civil law drafting. This provision and the next provision contain the Chinese character "deng."
[58] Translation by the author.
[59] *Supra* note 46.
[60] TTBER, Article 5, Section 1(a) and (b).
[61] *Id.,* Article 5, Section 1(c).

technology.[62] In contrast the U.S. Federal Antitrust Guidelines for the Licensing of Intellectual Property consider that grant-backs have pro-competitive effects and that they should therefore be evaluated under the rule of reason.[63]

But the provisions in the Interpretation are more restrictive than those in the TTBER. For example, item 1(a) of the interpretation, the restriction on the licensee taking new research and development on the technology, is not limited to licenses between non-competitors, as it is in the TTBER.

Further the hardcore restrictions in the TTBER are divided into provisions that apply between competitors and those that apply between non-competitors. Restrictions on territory or allocations of markets or customers are subject to a variety of exemptions that substantially reduce the effect of the prohibitions.

Chinese thinking in these areas appears to have evolved since the 2004 Interpretation because some of the provisions of the Interpretation are now more restrictive than the provisions of the AML that will come into force on August 1, 2008. For example tied selling is prohibited by Article 17(5) of the AML only provided that it is not "without justification" or it is not part of "competing on the merits."[64] In Article 10(4) of the Interpretation as provided above there are no such limitations on the restriction.

A similar situation exists with respect to Article 10(2) of the Interpretation and Article 17(4) of the AML with respect to exclusive dealing. Also the prohibitions on restricting output or on allocating markets in Articles 13(2) and (3) of the AML has the benefit of an exemption in Article 15 of the AML where such activity is undertaken for the purpose of technology improvement, or the research and development of new products. The corresponding prohibitions in Articles 10(3) and (5) of the Interpretation do not have the benefit of such an exemption.

It appears from this analysis that it is clearly intended that the new regulations or guidelines that may be developed to assist in the interpretation of Article 55 of the AML as to what constitutes an abuse of intellectual property rights will not literally follow the provisions of the 2004 Supreme People's Court Interpretation. Chinese law on the intersection of competition and intellectual property rights will continue to evolve.

IV. Trade Tensions and Other Factors Likely to Affect the New Regulations

[62] *Id.,* Article 5, Section 2.
[63] American Bar Association, The 1995 Federal Antitrust Guidelines for the Licensing of Intellectual Property: Commentary and Text (Chicago: American Bar Association, 1996) at 107-108.
[64] The phrase providing the exemption is literally "mei you zhengdang liyou." In the name of China's original competition law, the *Fan Bu Zhengdang Jingzheng Fa* or Anti-Unfair Competition Law, *supra* note 4, the word "zhengdang" is used to indicate unfair or inappropriate competition, which may also be called "competition that is not on the merits."

There is significant agreement that the new regulations are likely to be most strongly influenced by competition law developments from Europe rather than from the United States.[65] Certainly this appears to have been the case with the 2004 Interpretation as it appeared almost directly after the finalization of the TTBER. But such regulations will also be influenced by China's own experience with issues at the interface of intellectual property rights and competition law.

The Chinese leadership has clearly stated that the goal is to make China an innovative nation and that this requires an intellectual property strategy[66] as an incentive to technological development. However there is a growing recognition that intellectual property rights can be abused, and that such rights are also part of the growing trade tensions between China and developed countries. In an article last year the deputy commissioner of the State Intellectual Property Office is quoted as saying that the prohibition of IP abuse is a very important issue in many developed countries. He suggested that with respect to China however the U.S. places its emphasis on the fight against piracy for the benefit of its multinational corporations and is therefore less concerned about IP abuse.[67]

In 2005 a report commissioned by SIPO was released that reviewed the major foreign-related intellectual property cases since China's accession to the WTO.[68] The report reviewed 15 disputes; some of which settled and some of which went to court. They included Cisco System's dispute with Huawei over use of technical standards in telecommunications equipment; the DVD patent pool dispute (also known as the Philips case) regarding the royalties for the use of technical standards in manufacturing DVD players; Pfizer's problems in having its patent for VIAGRA declared valid; four disputes over motor vehicle designs (two patent disputes and two copyright disputes); the use of trademark rights to stop the publishing of "The Tale of Peter Rabbit" by Beatrix Potter;[69] two cases against the producers of karaoke videos brought by Warner Music and the International Federation of the Phonographic Industry; and the case that Intel brought against Shenzhen Dongjin regarding whether the copying of file headers in computer software constitutes copyright infringement.

The report concluded that Chinese enterprises lack a sufficient awareness of intellectual property protection, and lacked strategies for using them competitively. In particular China's participation in international standard setting organizations needed to be improved. It recommended four actions to improve China's use of intellectual property rights. The first action was the improvement of the competition laws. In particular they

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[65] Blumenthal, Chemtob, Jones & Wei, *supra* note 12.
[66] See for example the text of President Hu Jintao's Report to the 17th National Congress of the Communist Party of China delivered October 15, 2007 at: http://news.xinhuanet.com/english/2007-10/24/content_6938749.htm ; and in particular the section entitled "V. Promoting Sound and Rapid Development of the National Economy."
[67] Zhang Qin, quoted in Patent Power, China Daily, 2007-03-13, available online at: http://english.ipr.gov.cn/ipr/en/info/print.jsp?a_no=60360&col_no=928&dir=200703 .
[68] Zhang *supra* note 10.
[69] Beatrix Potter died in 1943 and China's copyright law only grants copyright protection for the life of the author plus 50 years. Copyright protection for the book had ended in China.

recommended clarifying the principle of "exhaustion of rights" and the status of parallel imports.

Over the last few years tensions have developed between China and the United States over the use of intellectual property rights in technical standards.[70] In a number of areas standard setting has not been particularly formalized. The U.S. approach to standard setting is described as decentralized, pluralistic and market-based, in contrast to a more centralized, coordinated regulated, subsidized and inclusive approach in Europe and a more top down approach in China.[71] And in some cases the standards are *de facto*, arising out of the dominance of a firm or firms in the marketplace or voluntary consensus.

Clearly China feels that some standards put its industries at an economic or technological disadvantage. In response it has started to formulate national standards in some areas that other nations consider to be protectionist. Arguably it is using the size of its market as a bargaining chip in the evolution of these technical standards. There have also been actions brought against the participants in patent pools such as the action against the participants in the DVD3C pool.[72] In particular one of the patents in the pool was alleged to be invalid. The suit was settled by the withdrawal of the patent,[73] but the licensing fee did not decrease.

The licensing rate was the real problem, because as competition has driven down the manufacturing costs of a DVD player, the royalty to the patent pool has come to account for 40% of the total manufacturing cost.

Although the DVD3C patent pool was considered by some to be an abuse of intellectual property because of the inclusion of the invalid patent, in reality the problem was the economic leverage of the entire pool of patents, and therefore there does not appear to have been an abuse of IP rights. In the same spirit some have questioned whether the FTC action against Rambus Inc.[74] regarding its failure to disclose its patents to a standard setting body is truly an antitrust case under Section 2 of the Sherman Act or is merely an unfair or deceptive practice.[75] The issues around patent pools and standard setting are not well understood or settled in the U.S. and China, and this is likely to exacerbate the trade tensions.

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[70] Christopher S. Gibson, Globalization and the Technology Standards Game: Balancing Concerns of Protectionism and Intellectual Property in International Standards, Berkeley Technology Law Journal, Forthcoming Available at SSRN: http://ssrn.com/abstract=1010125 .

[71] *Id.,* at 13.

[72] The participants include Sony Corp., Philips, Pioneer Corp. and LG Electronics.

[73] Zhan Ying and Zhu Xuezhong, Intellectual Property Rights Abuses in the Patent Licensing of Technology Standards from Developed Countries to Developing Countries: A Study of Some Typical Cases from China, Journal of World Intellectual Property (2007) pp. 1-14, at 10.

[74] In the Matter of Rambus, Inc., Federal Trade Commission, Docket No. 9302, Opinion of the Commission released August 2, 2006; available online at: http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf ; under appeal to the United States Court of Appeals for the District of Columbia Circuit, Docket Nos. 07-1086, 07-1124.

[75] This would assume that the patent rights held by Rambus are valid and were properly obtained.

These kinds of trade tensions and misperceptions of the standard setting or patent pooling activity may well affect the drafting of any regulations or guidelines under the AML as to what constitutes intellectual property abuse. On the one hand, as discussed earlier, the wording of the AML suggests that some of the more restrictive aspects of the 2004 Supreme People's Court Interpretation may be eased.

On the other hand the trade tensions over standard setting and the associated patent pools may cause some hesitancy to liberalize the restrictions of the Interpretation significantly. Rather China may, as it has done in other sectors, adopt provisional regulations under the AML both to evaluate their effect in preventing cases of abuse, and in this case to possibly serve as bargaining tools with international trading partners who have some influence over standard setting procedures.

V. Summary and Practical Suggestions

The AML is an important step forward in the development of China's legal system and in its regulation of its market economy. But it is still a work in progress and the regulations and guidelines will be a significant part of the initial implementation of the AML. This is particularly true with respect to the provisions affecting intellectual property rights and licensing.

Licensors who are currently developing a business strategy for China will need to review their proposed strategies against the existing 2004 SPC Interpretation keeping in mind that the wording of the AML suggests that a less restrictive approach may be coming.

But it is unlikely that the regulations and guidelines eventually developed under the AML will be as permissive to licensing as the U.S. Federal Antitrust Guidelines for the Licensing of Intellectual Property, and at a minimum licensors should consider adapting the strategy that they may have developed for the European Union's TTBER for use in China, at least until the actual regulations are known.

Licensors whose intellectual property is or may become part of a technical standard should consider their strategies more carefully and be prepared for regulations that may require a change of strategy. They may wish to consider approaching the Chinese government or industry associations in advance to consider the appropriateness of the standard and its proposed licensing terms in light of China's "special conditions."

The unveiling of the Anti-Monopoly Law (the AML) on August 30, 2007, marked a symbolic commencement of a new era of competition for China. Since the law was enacted in 2008, every move made by the Chinese antitrust authorities has been closely watched by the international community. Although much attention has been devoted to second-guessing the political motives behind each of the Chinese government's decisions, little effort has been directed to studying problems in the institutional framework for implementing the AML. This article identifies three problems in the institutional design o The Anti Monopoly Law of China (Chinese: åå„æ–æ³•; pinyin: FÃ n LÇ'ngduÃ n FÇŽ) is the People's Republic of China's major legal statute on the subject of competition law (or antitrust law). It was passed by the National Peopleâ€™s Congress in 2007 and came into effect on 1 August 2008. The Anti-Monopoly Law (AML) of China in a narrow sense refers only to the Anti-Monopoly Law of the Peopleâ€™s Republic of China, passed by the National Peopleâ€™s Congress on 30 August 2007, and implemented as of 1 August 2008. In a The Anti-Monopoly Law prohibits three types of monopolistic conduct, namely: â€œmonopoly agreementsâ€ (i.e. anti-competitive agreements) made between business operators; abuse of a dominant market position; and. concentration of business operators (i.e. mergers and acquisitions) that may have the effect of eliminating or restricting competition. In addition, Chapter V of the AML prohibits the abuse of administrative powers to restrict competition â€“ a highly controversial subject during drafting of the AML. From 2011 to 2018, Chinaâ€™s competition laws have been enforced by three separate government China has drafted guidelines to curtail monopolistic behavior in its platform-based online economy, in line with proposed reforms of the anti-monopoly law.Â The new legal framework is expected to have a direct impact on internet giantsâ€™ behaviors, who will face penalties in case of violations. Concentration of undertakings. Monopolistic behaviors.Â In the event of suspected abuse, the anti-monopoly authorities will conduct investigations according to the AML and other applicable laws and regulations. During an investigation, the investigated persons shall cooperate with anti-monopoly authorities and shall not refuse or hinder the investigation. The Guidelines and the reform of the Anti-Monopoly Law.