

Guangjie Li

Revisiting China's Competition Law and Its Interaction with Intellectual Property Rights



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Foreword

With the interplay between competition law and IP rights becoming ever more intense in major economies a functioning framework is required to discourage monopolistic behaviour while stimulating innovation and consumer protection.

In this dissertation the author studies issues at the nexus between China's Anti-Monopoly Law (AML) and a fast-evolving IP regime. *De jure* the two legal systems pursue coherent goals of attaining maximum efficiencies in society and enhancing consumer welfare. *De facto* the aims are achieved through seemingly opposite means, i.e. safeguarding free competition for all market players versus granting exclusive rights to IP owners. Competition authorities and judicial bodies face immense challenges as they attempt to strike an optimal balance between the two regimes.

The history of the US and German competition policies which are touched upon in this paper highlights the impact of the socio-economic environment on judicial and administrative decisions. In view of the evolving requirements of competition regime within the boundaries of sovereign states, readers are encouraged to adopt a holistic view when examining the Chinese competition policy. The dynamics of China's competition law and its interrelationship with IP rights is clearly mirrored in recent administrative and court decisions. Though strongly aligned to international rules and doctrines, the latest *Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights* (IP Guidelines) released by the Chinese authorities reflect the leadership's determination to upgrade technological standards by actively promoting high-tech industries and pushing for indigenous innovation as a driving force for sustainable economic development.

Having joined the ranks of the world's leading IP jurisdictions, China has been constantly improving its legal framework to protect the interest of IP owners. At the time of submitting the thesis (September 2017), there were three specialized IP courts and four newly-established IP tribunals in China. By March 1, 2018 the number of specialized IP tribunals had increased to 15. On March 13, 2018 a reform plan was submitted to the 13th National People's Congress for deliberation. The idea is to consolidate the scattered Chinese IP institutions into one single body, which would be re-

sponsible for all IP matters including patents, trademarks, copyrights and geographical indications. The aim of the reform is, *inter alia*, to unify standards and to effectively enforce IP rights.

August 1, 2018 will mark the tenth anniversary of the enactment of China's AML. The introduction of the competition law reflects China's successful transition from a centrally-planned to a market economy. In turn, effective enforcement of competition policies contributes to the enhancement of a free market economy and the increase of consumer welfare. Despite being a relatively young jurisdiction, China's successful adoption of the AML and its careful formulation of the *IP Guidelines* may serve as an example for other emerging economies on the verge of moving in a similar direction.

April 30, 2018

Guangjie Li

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Abstract

China is rapidly moving in the direction of a market-based economy. Consequently, its legal system is continuously adjusted and modernized. This thesis elaborates on latest developments and efforts by the Chinese authorities to bring the country's competition law and its enforcement mechanisms in line with international standards. It also describes the interdependence and mutual impregnation between competition law and intellectual property rights, two aspects which will greatly impact corporate behaviour.

The basic goal of competition law is to protect competition processes in the economy by regulating monopolistic conduct of market participants. The driving force behind a healthy rivalry between companies is to achieve higher sales and profits, and to stimulate new ideas while guaranteeing consumers that they receive the best possible offer in terms of technology and price. Innovation and creativity will give companies the technical advantages required to achieve good performance and eventually market leading positions. In order to overcome market failure and to protect innovators from "free-riders" of intellectual property and make it possible for them to recover their investments, IP regime confers innovators exclusive rights in a given jurisdiction for a certain period of time.

Both competition law and an effective IPR regime are essential to promote and maintain competitive market structures. "Excessive" exercise of IPRs can lead to market distortion, while overly enforcement against IPR holders will discourage innovation. The interaction between these two regimes is a hotly debated topic among scholars, the legal profession and industrial players. Such discussions are heated up depending on different perceptions and viewpoints of fair competition.

Modern competition law evolved within the national boundaries of sovereign states. Country specific features in particular socio-economic and political aspects influence the design of the law and its legal and public enforcement institutions. Numerous judicial and administrative decisions from major jurisdictions such as the US and the EU demonstrated that primary goals of competition law can have a different emphasis and evolve over time. This illustrates the dynamics of competition law, which must be viewed in the context of a country's history and tradition.

Acronyms and Abbreviations

AMC	Anti-Monopoly Commission
AMEA	Anti-Monopoly Enforcement Agencies
AML	Anti-Monopoly Law
Art.	Article
AUCL	Anti-Unfair Competition Law
BRICS	Brazil, Russia, India, China, South Africa
DOJ	Department of Justice
ECJ	European Court of Justice
EPO	European Patent Office
ETSI	European Telecommunications Standardisation Institute
EU	European Union
FRAND	Fair, reasonable, and non-discrimination
FTC	Federal Trade Commission
GDP	Gross domestic product
IC	International Competition Network
IDC	InterDigital Technology Corporation, Inc.
IP	Intellectual property
IPR	Intellectual property right
ITC	US International Trade Commission
JFTC	Japan Fair Trade Commission
JV	Joint venture
KFTC	Korean Fair Trade Commission
MOFCOM	Ministry of Commerce
NDRC	National Development and Reform Commission
NPC	National People's Congress
PRC	People's Republic of China
R&D	Research & Development
SAIC	State Administration of Industry and Commerce
SASAC	State-owned Assets Supervision and Administration Commission
SEP	Standard essential patent
SETC	State Economic & Trade Commission
SIPO	State Intellectual Property Office
SOE	State-owned enterprise
SPC	Supreme People's Court
SSO	Standard setting organisation
TFEU	Treaty on the Functioning of the European Union
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TTBER	Technology Transfer Block Exemption Regulation
WTO	World Trade Organisation

