PATENT DISPUTE IDENTIFICATION IN CHINA: HARMONY BETWEEN THE PROTECTION AND RESTRAINT

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Abstract

How to keep a balance between restraining patent abuse and weakening local intervention has been a global issue, especially in such developing countries as China, while meeting a serious challenge of intellectual property protection. This article argues that patent right is definitely a kind of property, which must remain fully within the reach of antitrust law and it is against regulating special independent provisions in the drafted Chinese antitrust law to emphasize unduly on IP abuse. This requires an inquiry into intent that is consistent with antitrust essentials and preserves legitimate patent claims.

Key words: Patent protection, antitrust law, local interest, harmony in China

To carry out its promise to the WTO, China has no other choice but to strengthen its intellectual property protection (IP) systems. Since December 11, 2001, China has been experiencing a historical challenge on how to establish characteristic systems of IP protection. Up till now, there are a series of laws and regulations relevant to IP published in China, including the trade mark law, patent law, copyright law, computer Software Protection Bill and Regulations on Protection of Integrated Circuit Layout Design, etc.. In addition, China’s legislators also observe such common law rationales as

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2 25 Cardozo L. Rev. at 366-67 (listing even more statutory changes and international agreements passed by China since 1996).
presumption of fault and Imminent Infringement. Specifically, in April 1999, China became a member of the International Union for the Protection of New Varieties of Plants (UPOV).³ It is obvious that the Chinese Government has fulfilled basic obligations of IP protection. Furthermore, China has considered publishing a national IP Strategy, which being under its aim of establishing a harmonious community. As a result, strengthening technical patents would have a deeper social impact in China tomorrow.

Accordingly, this paper will address the following issues: first, a review of updated disputes on patent abuse in China; second, an examination of Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) interpretation of the aforementioned situations; third, a discussion of the conflicts between patent protection and antitrust in China.⁴ Finally, this paper concludes with the author's views on the matters and possible future guidelines.

I. INTRODUCTION

Along with the IP protection campaign, more and more foreign investors pour into the Chinese market, which result in a series of fights against IP infringement with local enterprises. After its entrance into the WTO, China has become the largest processing plant for patentees from developed nations. But nowadays, Chinese products are suffering serious claims due to the lack of independent patent rights. In practice, the tactics of patents from developed countries have been restricting a number of local native entities’ rapid development all around China.

According to one core principle of Non-discriminatory treatment under WTO, is the key aim of Non-discriminatory treatment to protect complete freedom of Trade? Does it ensure lasting economic development? Has the Chinese legislative strategy of merely emphasizing protection of patents deviated from Non-discriminatory treatment? Why

don’t developed countries’ defensive strategies breach WTO/TRIPs agreements? Furthermore, how should China establish independent IP development strategy?

A. Brief of Foreign Investor’s Patent Protection Tactics

After China’s entrance into the WTO, foreign enterprises have mounted a stealth campaign for IP protection. On one hand, foreign patents have controlled the domestic high technology market in some high technology areas. According to the Report from the State Intellectual Property office in PR.C, comparing with China’s numbers of technology and foreign patent applications in 2005, the United States, Japan and Europe occupy dominant positions. It seems clear that technology output protection depends on patent protections, which means technological achievements of research have not directly produced competitiveness, unless the technology is protected by patent. This is a core reason why developed countries have paid so much attention to patents, along with exporting technology and transferring producing workshop to China. ⁵

The total sum of China’s foreign trade in 2006 is 176 million US Dollar, the third behind the U.S. and Japan. But independent innovation products are less than 2%, 99% native enterprises do not own any patent. The applications for Patents in 2006 increased swiftly to 34.6% comparing to 2005, ⁶ and total numbers of applications for Patents and trademarks are the highest in the world. We should acknowledge that a total of 58,000 patents for new inventions were authorized, of which 25,000 were domestic ones, accounting for 43.4 %, and 56.6% applications come from abroad. But a patentee from a developed country usually does not make use of its own patent in the Chinese market immediately. That means multinationals generally adopt such tactics as IP antecedence before entering the Chinese market; in other words, applying for patent and trademark, then leaving them unused thereby occupying the market space of Chinese native enterprises, which propose to develop independent technology and to apply for a trademark for a similar product. Thus such blocking of the paths of independent research

by native enterprises creates a serious technology barrier.\(^7\)

Thus currently, patent claims from multinationals for compensation occurred frequently. The case of Microsoft suing Yadu, was followed by the DVD case of Union 6C/9C suing Chinese enterprises, Lighter Cases of Wenzhou, Cisco suing Huawei and Auto Case of GE suing Qirui. On one hand, claims for compensation are rising more and more; on the other hand, independent patent rights are under the threat of devaluation or even disappearance.\(^8\)

During the process of a reform for China’s state-owned enterprises, foreign investors’ merges grew. In addition, the Chinese government has canceled most restrictions on foreign investors’ mergers on A type stock market. This has posed a kind of risk and obstacle regarding native brands’ survival and development.

B. Review of the Case of the Nanfu Merge

The output in 1999 of Nanfu Alkaline Batteries has already been listed as the fifth in the world, and its rate of expansion was the top in its field. Part of Nanfu’s shareholders established a joint venture, China Battery Co., Ltd., by cooperating with Morgan Stanley Netherlands National Investment Bank and the Singapore government investment company. Chinese shareholders hold 51%, and foreign parties hold 49% of Nanfu. But Morgan Stanley increased its shares to 72% by purchasing two other foreigners’ shares. As a result, Morgan owned controlling rights in the end. In 2003, Morgan Stanley changed China Battery Co., Ltd.’s original overseas stock market plan. Instead, Morgan Stanley transferred all its shares at the price of 100 million USD to Guillermo American Companies, which is Nanfu’s largest competitor. Before that, Guillermo had tried to increase its stake in the Chinese market for ten years, but it was too hard for it to enlarge its sales scope, with its market share of only 10% compared with Nanfu. However after

\(^7\)There are similar reports from other developing countries, I.E. A McKinsey study on the pharmaceutical industry in India notes that multinational corporations limited their involvement in the Indian drug market after the adoption of the weak patent system in 1970. Some stopped selling drugs that were priced too low, while many multinationals limited the portfolio of products they sold in India to only patent expired products. See Rajesh Garg et al., Four Opportunities

\(^8\)See the Report by State of Intelect Property Office in PR.C. on http://www.sipo.gov.cn/sipo/xwdt/yazz/200512/020051209_74557.htm
Nanfu was controlled by Guillermo, to avoid challenging Guillermo, Nafu was forced to retreat from the large foreign market, which caused more than 50% percent of its machines to be left unused. To summarize, the updated characteristics for Patent abuse in China are as follows:

First, colluding antitrust action. Some agreements of patent admission include such limitations item as fixing prices, carving up markets, across admission and united dealing etc. It would violate law by dealing for the purpose of carving up markets, limiting outputs or collectively fixing prices.

Second, refusing admission. A transnational patent owner refuses to award its Chinese rivals reasonable admission, thereby eliminating competition, which strengthens its controlling status in China.

Third, carry-on sale. The customers must sell to everyone. Carry-on sale can sometimes ensure an original brand and its quality. But it would have a negative effect if it excludes equal quality foreign products. Because it restricts freedom of choice of imports, on the other hand, it unfairly elbows out competitors in the national import market.

As an indispensable segment of constructing a “harmonious society”, the most frequently-echoed developmental theme since late 2002, universal IP protection has existed as one of the most obvious spotlights in China. Nevertheless, as a main high technology importer, China does lack balanced systems for restricting against patent abuse under WTO/Trips, rather than merely paying attention to patent protection. Furthermore, some predict that China today is in the crisis of losing its own independent IP, and such bottleneck has practically impacted China’s lasting development in the Twenty-first Century. Under above sophisticated background, provisions on mergers and acquisitions of domestic enterprises to foreign investors were regulated by Ministry of Commerce of the PR.C in 2006. 9 However, does it violate one basic principle of Non-discriminatory treatment under WTO? We might express particular review in other Article.

II. ANALYZING WTO/TRIPS: THE AVAILABILITY OF COMPULSORY LICENSING UNDER TRIPS ARTICLES 30 AND 31 IN THE DEVELOPING COUNTRY OF

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9 See http://www.mofcom.gov.cn/aarticle/b/c/200608/20060802839585.html
From December 11 of 2001, TRIPS starts to significantly affect China’s legal reform such as antitrust law. How to utilize the elastic policies of Article 30-31 in TRIPS regarding patent is given more attention. Although TRIPS is intended to reverse worldwide thinking regarding trade from an anti-protectionist philosophy to one of global competition, it does not come without controversy.  

A. TRIPS Article 30

Article 30 is seen as a means to allow the developing countries such as China, to have the ability to compellingly manufacturing some high technology products without violating TRIPS. However, Article 30 gives a broad interpretation that provides exceptions to exclusive patent rights under three conditions: first, the exception must be limited; second, it must not unreasonably conflict with the normal use of the patent; and third, the legitimate interests of the patent-holder must be protected, while also taking into account the legitimate interests of third parties.

B. TRIPS Article 31

Article 31 provides a detailed means for a WTO Member state to grant the use of the subject matter of a patent without the consent of the patent-holder.

Under Article 2(1) of TRIPS, WTO Members must comply with specific articles of the Paris Convention, including Article 5, which permits the use of compulsory licensing. Thus Article 31 does not expressly refer to the term "compulsory license," but can imply from Article 2(1) of TRIPS and Article 5(A)(2) of the Paris Convention, so allowance of

compulsory licensing is clear.  

Furthermore, Section (b) of Article 31 provides exceptions for countries to compromise a patent-holder's rights under certain circumstances, including a “national emergency” exception. That means Article 31 would help developing countries to have the ability to produce particular products in the case of a "national emergency”.

C. Analysis in Articles 30-31

One trait in Articles 30-31 under TRIPS is its flexibility. We argue that with mutually tailored contracts, nation-states could give private domestic corporations a greater role in intellectual property rights protection. That means it would allow those companies to bargain around the TRIPS agreement so that the TRIPS regime becomes the basis of a contract. Although this would be advantageous to the exporter, because any unfavorable factual scenario can be considered in advance, however, the consumer could also internalize the contract, thereby creating a better chance of self-enforcement. Obviously, all terms that one party might deem inappropriate to an individual market can be eliminated via rounds of negotiations. Thus we further argue that, to settle ongoing heavy burden of patent abuse disputes, China should fully utilize the flexibility of Articles 30-31 under principles of non-discrimination, rather than merely criticizing it as an efficient unfair makeshift. We notice that although Articles 30-31 do offer safeguards from patent abuse and the negative effects of patent protection, it is unclear in above Articles how countries are to implement these safeguards for their benefits.

Articles 30-31 allow all countries to grant compulsory licenses to third parties to manufacture the necessary products that would be able to address public interest issues, such as HIV/AIDS. Compulsory licensing permits the manufacture and use of generic technology without the agreement of the patent holder. Developed countries generally

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11 Mr. F. Abbott: (UNCTAD/EDM/Misc.232/Add.18 Copyright © United Nations, 2003)
“Course on Dispute Settlement in International Trade, Investment and Intellectual Property consists of forty modules”. This Module has been prepared by at the request of the United Nations Conference on Trade and Development (UNCTAD).
dislike compulsory licenses, since the government of another country can strip a patentee of his rights while reducing the amount spent on research and development. The patentee is entitled to receive a reasonable compensation for the compulsory license, determined by the country granting the license.  

Above all, TRIPS is flexible, because it allows nation-states to create their own laws with regards to domestic problems. In addition, it is consistent, because the same procedure of dispute resolution exists regardless of the nation-state in question, and its transparent process makes the TRIPS system a fair international law, which can be internalized by various nation-states with different priorities. Thus through application of TRIPS, China could make effort to keep a balance in each IP abuse case via encouraging a kind of detailed contract between entities instead of the government’s unilateral interruption. However, it is true that the argument for connection between TRIPS and Chinese domestic law is till a contentious notion in China, due to current situations mentioned above in Chinese domestic market.

III. A COMPARISON ON LEGISLATION BETWEEN CHINA AND THE UNITED STATES

A. The Datable Core in drafted antitrust law in China

Theoretically, Chinese law has to fill a gap in order to be in compliance with the intellectual property protection standards provided for by the TRIPS Agreement. Up till now, a set of large scale crackdowns on pirated and counterfeit products has been launched by China government. However, in practice, the problems of Chinese enforcement mechanisms for its laws, and the balance between the independence of the antitrust policy and protection of intellectual property are still sensitive and puzzling bottlenecks in China today.

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Antitrust law in China started to draft in 1995, and it should go into force in 2007. Under Article 52 in the drafted antitrust law (2006), an operator whose behavior excludes and/or limits competition beyond the scope of intellectual property law should be subject to the antitrust law. However, above statement has separated IP from other types of property in antitrust. IP is definitely a kind of property, so the draft of Article 52 puzzles us whether IP protection is independent from antitrust.

Taking into account these considerations, we have explored a timely and contentious topic, that is, the standard of identifying IP abuse should solely be subject to general items under antitrust law. It means that IP and antitrust should not be viewed as a conflict. IP is just one kind of property, which is a united body regulated by antitrust law. In addition, we took careful note of the peculiar characteristics of patent property rights, including the fact that they are more "probabilistic" in nature than other property rights, so any specific item regarding IP listed in antitrust law would require an unnecessary burden of proof on both theory and practice.

B. Mutual relationships between IP protection and antitrust law in China

Therefore, on the issue of the tangible relationship between IP protection and antitrust in China today, we argue the following three positive propositions:

(1) Interdisciplinary coordination
Interdisciplinary coordination should focus on such patent dispute social issues. On the views of Economics, technological innovations remain the work product of their originator so that there is an incentive to research and develop new products. However, society must have many sellers in a market and ensure that no one company monopolizes

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14 See, e.g., Burling et al., supra note 16, at 535 ("[T]hus the patent laws create a monopoly in the 'discovery' for the inventor who spent the time and resources necessary to create the invention. The monopoly owner is thereby insulated from the competitive exploitation of his patented art.").

15 See, "... the possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly." United States v. Line Material Co., 333 U.S. 287, 308 (1948).
the market for any one highly-demanded product. Consequently, a balance must be struck between those two goals of giving the creator the exclusive right to his/her creation, and the free market enough producers and suppliers to prohibit monopolies.

On legal views, when two legal regimes exist, their common aims are to promote innovation and to protect social welfare. Patent law protects the property rights and interests of inventors, and antitrust law combats restrictions on the competitive process that may harm consumers and slow innovation. Furthermore, patent law, like antitrust law, is a powerful tool for promoting welfare. It would be wrong to exalt patent law over other forms of property in the drafted antitrust law, and their common aim is to prevent anticompetitive restrictions from harming social welfare.

Generally speaking, TRIPS requires coordination among patent and antitrust law in at least two areas. On the one hand, the protection of patent may affect competition. Poorly functioning patent law distorts competition and may chill innovation. On the other hand, poorly functioning antitrust law and policy at the interface with patent can distort patent-based innovation. Although the China’s legislators have tended to decide on a balance of antitrust policies and patent protection, it does not mean antitrust should been considered as a core measure of settling patent abuse issue. We suggest that interdisciplinary cooperation should focus on protection issues of patent as a precondition.

(2) Essential aims of IP and antitrust law

One of the fundamental bases of patent law as a whole is that a patent is a bargain between the inventor and the public, in which the inventor is allowed to exploit an invention for a certain amount of time, in exchange for disclosing his invention to the public. Most of patents that address the public emergencies around the world are not yet in the public domain. 16 When these patents expire, there will likely be more effective

16 See, e.g., Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940); Dunlop Co., Ltd. v. Kelsey-Hayes Co., 484 F.2d 407, 417-18 (6th Cir. 1973); Brownell v. Ketcham Wire & Mfg. Co., 211 F.2d 121, 128 (9th Cir. 1954) (“It is a fundamental rule of patent law that the owner of a patent may license another and prescribe territorial limitations.”).
products on the market for the same use. But the ones that are on the market right now will still be effective.

This will allow China to have the capacity to manufacture products for itself. This ability will not only allow China to address patent products within its own borders, but will also provide the mechanism to spur business development from China into the markets of developed countries. The recent drafted patent law’s amendment in China is on a more positive process of reviewing more rules on the United States systems.17

(3) Long-term beneficiary

From the view of China’s internationalization, more and more Chinese investors have become stakeholders in the global systems especially on the area of software industry which has experienced tremendous growth. It means the treatment of IP protection tactics would benefit Chinese investors as well. In addition, the R&D cost in China will be easier to recoup, because a U.S. versus Brazil type dispute would be unlikely to result, since China would be in a better position, through TRIPS and its own IP law, to purchase the high technology products. This will lead to greater economic harmony, foster further R&D, and address grave worldwide public interest concerns.

C. Analogy on patent abuse status quo in the United States

Although Chinese are taking steps to apply the goals found in the TRIPS regime, it is still not as vigorous about supporting intellectual property rights as the United States. In the U.S., the antitrust statutes are: the Sherman Act (1890), the Clayton Act (1914) and Robinson Patman Act (1936), in which there is not any section specifically dealing with IP abuse. As an application of the above laws, the Federal Trade Commission and Department of Justice published “Antitrust Guide for the Licensing of Intellectual


The Guide’s subtitle is "Litigating and Advising in an Era of Uncertainty", so its main aim is to ensure social harmony by imposing detailed policy underlying IP rights. These basic perspectives can be taken into account by using ordinary antitrust principles. IP is a kind of property, which is easier to misappropriate, with high fixed costs, near-zero marginal costs and often requiring many complementary inputs to produce a product. IP licensing is generally pro-competitive, because it allows firms to combine complements. That means a patent owner has the legal right to refuse to license his or her patent on any terms. The existence of a predicate condition to a license agreement cannot state an antitrust violation.

Furthermore, to keep a harmonious nexus of antitrust and IP law policy, the Guide promulgate that there should be a general antitrust duty on any participant in the standards-setting process, to identify and disclose relevant intellectual property rights to the standards-setting organization.

In Dell Computer, 121 F.T.C. 616 (1996), the standard-setting participants came up with a new product that quickly became widely used and commercially successful. After the standard was adopted and new products based on the standard entered the market, Dell began to assert that these products infringed on its patent, despite having twice certified during the standards-development process that it had no intellectual property rights. If Dell had provided information on its patent claim up front, the participants could have made an informed choice of whether to avoid the Dell technology and opt instead for a

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19 See Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 816 (1945) ("a patent is an exception to the general rule against monopolies and to the right to access to a free and open market"). A sharp example of loose language expressing judicial distaste for broad patent rights may be found in Graham v. John Deere Co., 383 U.S. 1, 7 (1966): "It was a monopoly on tea that sparked the Revolution and Jefferson [the first Commissioner of Patents] certainly did not favor an equivalent form of monopoly under the new government."
technology without any IP conflicts. The FTC alleged that Dell's belated assertion of IP rights was an unfair method of competition, in violation of Section 5. Dell then agreed to a consent order, under which it would not assert its patent rights against the standard. Thus it was a famous challenge in terms of various characters from a charitarian to a miser for public interests, Guard encourages the former on a certain of degree.

However, the meaning of public interest should be a kind of broad conception, rather customers’ benefits and social development than limitation within the scope of local enterprises’. Both Dell and Microsoft’s general sites are registered in the United States, so they are not foreign investors in the U.S.. We hereby have an analogy of above mentioned Chinese current cases. After researching the backgrounds in the cases of Yadu, Qirui, Wenzhou, we found the cases are still within the scope of patent law instead of antitrust law. On one hand, appellees’ common points are domestic civil enterprises which have controlled a certain market share. That means plaintiffs could not have consisted of controlling market actions under antitrust law, even if this law would have been put into effect. On the other hand, the exemptions in Articles 30-31 under WTO/ TRIPS are just for emergency situations for public interest instead of for local enterprises’ or individuals’, which mentioned above. Thus the issues in these cases should not be regulated by WTO/TRIPS as well. Furthermore, how to encourage more investment rich in high technology to enter the Chinese market is a lasting subject, in light of the situations of the Chinese developing market.

As for the Case of Nanfu, Nanfu’s disappearance from International Market is basically due to capital recombination, which is generally under the regulation of corporation law. In addition, the articles in the drafted antitrust law have listed registering conditions of merger action. Obviously, such cases relative to merger action as Nanfu case are just stipulated by antitrust law instead of other more special regulations.20

20 See, e.g., Mallinckrodt, Inc. v. Medipart, Inc., 976 F.2d 700, 708 (Fed. Cir. 1992) (unless a practice is per se unlawful under the antitrust laws, patent misuse requires a showing of anticompetitive effect in a relevant market); Windsurfing Int'l, Inc. v. AMF, Inc., 782 F.2d 995, 1001-02 (Fed. Cir.) (patent misuse requires a showing "that the patentee has impermissibly broadened the physical or temporal scope of the patent grant with anticompetitive effect"), cert. denied, 477 U.S. 905 (1986); USM Corp. v. SPS Technologies, 694 F.2d 505, 513 (7th Cir. 1982) (patent misuse requires a showing of "actual or probable anticompetitive effect in a relevant market under general Antitrust Law").
IV. TOWARDS A PRAGMATIC GUIDE ON PATENT ABUSE: CONSIDERATION, ARGUMENTS AND SUGGESTIONS

A. Consideration of a Guide for Patent in China

We argue the cancellation of Article 52 in the drafted antitrust law on the basis of above reasons. But more importantly, we do support paying more attention to how to settle current disputes about IP abuse in a reasonable way as well.

In China today, there are no guidelines addressing standard-setting, as well as no antitrust law, and there is little guidance available at recent vintage. Although IP laws in China today are developing, they do not approach the issues from an antitrust or competition perspective. And the drafted antitrust law itself provides a cacophony of IP protection mainstream. It might at best set up a basic principia within antitrust scope. But it could not provide a detailed solution, focusing on how to establish a long-term standard-setting of IP abuse identification in China, and on how to keep a balance between IP protection and antitrust, and so forth.

Since China is challenged by an increasing number of disputes about IP abuse, and the paucity of relevant laws and regulations, we argue that China should issue a set of guidelines for a standard of IP abuse identification to assist the upcoming enforcement of antitrust law. But as a precondition, the following three general issues needed making clear before formally discussing guidelines.

First, in the initial stages, we should choose patent abuse rather than all of IP as the focus of the guidelines. China is the largest developing country, and also the largest nation importing high technology. Therefore, most IP abuse cases are in the patent abuse area. The key to settling current situations is to spur the tangible control of Patent abuse at first. Afterwards we might promote a series of Guidelines for copyright, trademark and

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21 China's Vice Premier Wu Yi introduced on April 24, 2007, "Right now China's burden is heavy and the road is long, with relatively little of its own intellectual property, weak competitiveness, continuous piracy disputes, and a prominence of fake products," “Government's plans to enact and revise at least fourteen laws on intellectual property rights and initiate campaigns to educate the public on piracy issues”. See website http://english.gov.cn/2007-04/24/content_594700.htm
commercial secret infringement gradually.

Second, the guideline’s mission is to create a set of harmonious regulations underlying IP protection, to protect innovation, and to fulfill the national strategy of constructing an IP power. The 16th Central Committee of the Communist Party of China (CPC) issued a communique highlighting the issue of social harmony on October 11, 2006, IP protection has been a lasting historical aim in China. In addition, antitrust law relative to IP items should be promulgated matching a globally recognized principle of non-discrimination under WTO/TRIPS. Generally, China’s officials and scholars should emphasize IP right protection, rather than serious restraint.

Third, in comparison with agencies of Guide in the United States, which are the Federal Trade Commission and Department of Justice, the strongest relative agency in China should be State Department, thus we argue that the Chinese State Department should consider working as an agency of this guideline of Patent Abuse identification, which could establish a particular office to be in charge of executive managements. And the office should be independent from Commercial Department and Industry and Commercial Bureau. Because standards in guidelines play a critical role in fostering competition, innovation, and economic growth, we suggest an antitrust enforcement agency should definitely meet that need.22

B. Suggestions

Reviewing the century-long history of Antitrust development in the United States, IP abuse is listed by only the independent guide, which abides with all general principles of the Sherman Act, the Clayton Act and Robinson Patman Act, instead of regulated by the Acts themselves. The core reason is due to IP’s sensitive natures, including IP license being generally pro-competitive, being as a kind of special Property, etc.

We hereby suggest China’s legislators to add one Article such as “fair actions subjected to Copyright Law, Trademark Law and Patent Law should not apply to this Act”, instead of Article 52 in the draft antitrust law. The basic difference between them is a various focus. In contrast with above suggestion, Article 52 is obviously on the foot of how to restrict IP protection.

Furthermore, we present the following three practical recommendations as to the issues that should be addressed by the guidelines:

1. Duty to Disclose. It includes two aspects: First, firms that participate in standard-setting groups should be required to disclose patents or patent applications, which the individuals attending the meetings (or their associates monitoring the standard-setting activity) know or reasonably should know might be needed to utilize a proposed standard. This disclosure duty should apply even if the standard-setting group does not have rules expressly requiring such disclosures. Second, re the duty to early disclosure, disclosure of patents or patent applications should be made when the participant learns that the technology in question is being considered for inclusion in a proposed standard or might be needed to utilize a proposed standard.

It should be further noticed that in the standard-setting context the patent holder may be obligated to license patented technologies incorporated in a standard on a reasonable and non-discriminatory basis. The IP policies of some standard-setting organizations may further impose an obligation on the patentee to disclose any existing patents or pending patent applications that would cover the standard being adopted. Failure of the patentee to disclose this information to the standard-setting organization may raise significant antitrust issues.23

2. Patent Pooling. When a standard-setting group considers the adoption of a standard requiring use of several patents held by more than one participant in the group, the group should be permitted to discuss and negotiate the terms under which all the patents will be

made available to all interested parties for licenses, provided that any patents in the pool are blocking. Moreover, the participants should be required to reevaluate and revise pooling arrangements as circumstances dictate (e.g., a substantial royalty could become anticompetitive over time), and to consider the interests of other industry participants and newcomers.

3. Methods of settling relative disputes. To protect the mutually confidential technology, we suggest Parties to settle such kinds of disputes in closed court instead of by open litigation. This means standard-setting groups should be encouraged to require mediation and/or arbitration procedures for resolving disputes about licensing terms. For example, arbitration would be useful to determine whether licensing terms offered to one firm are reasonable, non-discriminatory, or otherwise in compliance with assurances given by the patent holder or the standard-setting group's policies.

In fact, whether an intellectual property right owner has market power in the relevant market must be assessed on a case-by-case basis, by examining whether there are "sufficient actual or potential close substitutes" for the specific product, process or work that is the subject of intellectual property protection. Thus, under the guidelines, there is no presumption that a patent necessarily confers market power upon its owner. Furthermore, the market share requirement will be evaluated only with respect to the relevant goods market, unless such an analysis fails adequately to address effects in technology and/or innovation markets. In those cases, the guidelines will replace the market share criteria with a determination of whether more substitutable, independently controlled technologies or research and development entities are in existence.

**CONCLUSION**

China is becoming an international market player, and will continue to advocate stricter enforcement of IP protection, because the reciprocity agreement which underlies the international framework makes China internalize the international agreement of
WTO-TRIPs. So the principle of non-discrimination internalizes international norms, especially those which protect the rights of foreign investors, because they have a vested interest in following the norms, and sharing the common long-term purpose of "encouraging innovation, industry and competition." Under such a precondition, to meet the challenge of more and more disputes on IP, we urge to identify a set of standard of patent abuse in China, rather than simply restrict IP protection by the upcoming antitrust law.

It should be stressed that although the policy goal of IP protection can be pursued through an array of approaches in China, including enforcement of patent law and admitting to WTO/TRIPs, the long-term solution rests with how to build up a balance between the efficiency with increased market competition and the equity for public interest. To this end, I argue that the establishment of fair guidelines for operators, featuring competitive-neutral standards as a practical mechanism, shall be a requirement for China to make the grade in a harmonious, knowledge-based economy.

24 The Supreme People’s Court and the Supreme People’s Procuratorate jointly promulgated the “Interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate on Several Issues Concerning Specific Application of Laws in Handling Criminal Cases Concerning Infringement of Intellectual Property Right (II)” on April 5, 2007 so as to further stipulate the application of law on the cases of intellectual property right infringement. It came into effect from the same date. See http://www.court.gov.cn/lawdata/explain/penal/200704090035.htm

25 In line with “Action Plan on IPR Protection for 2007 in China” published on April 6, 2007, to advance IPR protection at the business level, 9 measures such as building a business priority watch-directory in the public security system. China Gov. emphasize more to strengthen macro management over IP in the 21 century. See http://english.gov.cn/2007-04/06/content_574197.htm