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BEFORE THE  
**SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL  
AND ANTITRUST LAW**  
**COMMITTEE ON THE JUDICIARY**  
**U.S. House of Representatives**

**“International Antitrust Enforcement: China and Beyond”**

**JUNE 7, 2016**

## **Introduction**

Chairman Marino, Ranking Member Johnson, and Members of the Committee:

Thank you for this opportunity to discuss China’s Anti-Monopoly law from the perspective of the U.S. Patent and Trademark Office (USPTO).

My comments are focused on the intellectual property (IP) aspects of China’s antitrust regime, in particular on the role of the USPTO in IP and China’s anti-monopoly law (AML).<sup>1</sup>

## **The Role of the USPTO in Anti-Monopoly Matters in China**

The USPTO is engaged with China on all IP issues, including those that involve antitrust and licensing. The USPTO has a statutory mandate to advise the President and all federal agencies, through the Secretary of Commerce, on national and international IP policy issues, including IP protection in other countries. In addition, the USPTO is authorized by statute to provide guidance, to conduct programs and studies, and to interact with IP offices worldwide and with international intergovernmental organizations on matters involving IP.

Under Secretary of Commerce for Intellectual Property Michelle Lee and other USPTO officials routinely engage in discussion with high-ranking Chinese officials related to IP law

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<sup>1</sup> China has a number of laws other than the AML that have competition aspects, including the Anti-unfair Competition Law, Pricing Law, Contract Law, and the Technology Import/Export Regulations, which can regulate how intellectual property is transferred or monetized for stated purposes of regulating competition or preventing unfair behavior.

developments and proposed improvements to Chinese IP laws. For example, last year, Under Secretary Lee met with Chinese Vice Premier Wang Yang. And just last week, Deputy Under Secretary Russell Slifer was in Beijing to advance talks on critical IP issues. Along with the United States Trade Representative (USTR), Under Secretary Lee also co-chairs the IPR Working Group of the Joint Commission on Commerce and Trade (JCCT) to engage bilaterally on improvements to China's IP laws.

This past December, the JCCT included several outcomes on the Anti-Monopoly Law, standards, licensing, IP, legitimate sales of IP-intensive goods and services, abusive IP litigation, and judicial cooperation – all of which directly impact IP in China. USPTO experts coordinate with our trade and antitrust colleagues from other agencies in these bilateral discussions.

The USPTO leads negotiations on behalf of the United States at the World Intellectual Property Organization (WIPO); advises USTR on the negotiation and implementation of the IP provisions of international trade agreements; supports USTR at the World Trade Organization (WTO); advises the Secretary of Commerce and the Administration on a full range of IP policy matters, including in the areas of patents, copyrights, trademarks, and trade secrets; conducts empirical research on IP; and provides educational programs on the protection, use, and enforcement of IP.

The USPTO's "China team," which I lead, consists of 21 lawyers and support personnel located in the Washington area and three cities in China: Beijing, Guangzhou, and Shanghai. We have negotiated agreements and Memoranda of Understanding to support cooperative activities on IP with several Chinese agencies, which also contain bureaus with authority over Anti-Monopoly Law-related issues, including the State Administration for Industry and Commerce (SAIC) (which handles non-price related abuse of dominance), the Ministry of Commerce (which handles merger review), and the State Intellectual Property Office (SIPO) (which is involved in the intersection of IP protection and antitrust). We have also actively engaged in recent years with China's IP courts and tribunals, which are limited jurisdiction courts and tribunals that hear IP and non-IP related antitrust-related disputes. We have also actively supported numerous Congressional and Congressional staff delegation visits to China on IP-related matters.

Through the USPTO's Office of the Chief Economist, and work my team undertakes, we actively support more data-driven approaches to IP in China. Our new China Resource Center collects data on all IP-related matters. The focus of this center is on the protection and enforcement of IP rights, and commercialization and industrial policies affecting these rights. As this effort grows, we hope that the USPTO's China Resource Center will prove to be an invaluable resource to our stakeholders in the U.S. Government, perhaps including our colleagues in the antitrust enforcement agencies, and the business and academic communities.

The IP Attaché Program is an important asset that supports the USPTO's efforts. We currently have 13 attaché positions in 10 cities, including three based in China. IP attachés are IP experts who serve as U.S. diplomats in Embassies and Consulates abroad. IP attachés promote U.S. IP policies to achieve high-quality and balanced IP systems, including effective protection and enforcement, in their host countries and regions. The IP attachés work closely with the USPTO and the Office of Intellectual Property Rights (OIPR) in advancing the commercial interests of U.S. companies in foreign markets where they are experiencing barriers to market access.

## **The Anti-Monopoly Law/IP Relationship in China**

China's experience in IP-related issues has deeply informed its perspective on antitrust issues generally. Certain of China's highest profile cases in recent years have involved IP. There are also jurisdictional, agency, and legislative overlaps between IP and antitrust.

To name a few examples: China's specialized IP tribunals and courts handle antitrust litigation. China's State Administration for Industry and Commerce, which houses a bureau that handles non-price-related abuse-of-dominance cases, in addition to trade secrets and trade dress matters and also has bureaus that administer trademarks, trademark enforcement, trademark agency appeals and company name registrations among other areas. The former Minister of Commerce Director General, who handled mergers, was in charge of IP matters when he was the Director General of Law and Treaties at the Ministry of Commerce. Many of China's antitrust related laws also build upon pre-existing laws, regulations, and rules, some of which have significant IP components. These laws include the Anti-Unfair Competition Law, which contains measures to protect trade secrets and trade dress, and the Contract Law, which also addresses the "monopolization of technology."

The paradox China presents, from a USPTO perspective, is the combination of weak and non-deterrent IP protection with strong antitrust enforcement with potentially high penalties that has recently focused on IP, including on IP held by U.S. companies. As USTR noted in its 2015 report on China's WTO compliance, "inadequacies in China's IPR protection and enforcement regime continue to present serious barriers to U.S. exports and investment." In a recent survey, U.S.-China Business Council respondents listed IP concerns in a number four priority slot in a list of the top 10 challenges for members with respect to business performance in China.<sup>2</sup> IP issues have averaged as a number 4.5 priority over the past ten years. According to AmCham Shanghai's 2016 China Business Report, 49% of respondents believed that lack of IPR protection and enforcement constrains their investment in innovation and R&D in China.<sup>3</sup> Concerns about IP are based on the U.S. perception that these are our competitive advantages in China. When AmCham China respondents in all sectors addressed what they considered their competitive advantage versus Chinese domestic entities, three of their top four perceived advantages were IP-related: Brands (74%), Technology & IP (63%), and Development and Innovation (59%).<sup>4</sup>

### **IP Challenges in China's Antitrust Environment**

Broadly speaking, the current environment for IP and antitrust in China shows three clear trends: strong antitrust enforcement balanced against weak IP rights for deterring infringement; pursuit of foreigners in antitrust, with little foreign affirmative use of the IP system; and, a legal and

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<sup>2</sup> <https://www.uschina.org/reports/uscbc-2015-member-company-survey>

<sup>3</sup> <http://www.amcham-shanghai.org/ftpuploadfiles/Website/CBR/2016/China-Business-Report.pdf>

<sup>4</sup> <http://www.amchamchina.org/policy-advocacy/business-climate-survey/>

industrial policy environment where it is very difficult to legitimately license patents to third parties. I will discuss each of these, below:

### 1. Strong Antitrust Enforcement/Weak IP Enforcement

Chinese patent damages are too low. IP holders who run afoul of Chinese AML authorities, and may potentially pay significant fines, do not have comfort that their legitimate IP rights have been or will be protected. For example, one antitrust/IP related administrative penalty for a completed investigation to date is the antitrust fine imposed against Qualcomm for \$975 million USD by China's National Reform and Development Commission (China's former State Planning Commission) (March 2, 2015). By comparison, according to one database, Ciela.cn, the average damages in a Chinese patent case is as low as CNY 118,266<sup>5</sup>, or about \$18,000 USD. A recent report by a newer database service, IPHouse, determined that the average compensation in a patent infringement matter in Beijing for 2015 was 460,418 RMB or about \$74,260.<sup>6</sup> By comparison, the Qualcomm fine was over **50,000** times the average patent damage award as calculated by CIELA, or about 13,000 times the IPHouse report. It is also about 20 times higher than the highest patent damage award, \$45,000,000 USD in a first instance trial against Schneider Electric, which many view as an outlier, in terms of the high damages that were awarded.

Of course, antitrust and IP infringement cases seek to remedy different harms, and penalties in these matters are calculated differently. That said, in the area of IP, there is an international obligation, under the TRIPS Agreement, for courts to award damages sufficient to deter further infringements (Art. 41.1).

### 2. IP-related Antitrust Activities Against Foreigners for Asserting IP Rights and Weak Foreign Utilization of the IP System

Chinese antitrust authorities have taken pains to indicate that they are enforcing their antitrust laws even-handedly.<sup>7</sup> Nonetheless, many U.S. tech companies have been the subject of antitrust enforcement for their IP-related practices including licensing, such as Qualcomm, InterDigital, Microsoft, Dolby and HDMI. IP issues have also appeared in Chinese merger decisions, including Google-Motorola, Microsoft-Nokia, and Coca Cola-Huiyuan. Press reports<sup>8</sup> and survey data suggest that many foreign companies feel targeted. U.S.-China Business Council survey data<sup>9</sup> presents a severe picture for foreigners in antitrust matters: 86 percent of companies

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<sup>5</sup> Viewed on May 17, 2016; this finding is consistent with a research study by Brian Love et al. which found average damages of between 80,00 and 150,000 RMB in patent litigation in China. (<http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1920&context=facpubs>)

<sup>6</sup> <http://en.iphouse.cn/#page2>

<sup>7</sup> Xinhua, China's anti-monopoly law fair and strict: official (Sept. 4, 2014) [http://english.gov.cn/policies/policy\\_watch/2014/09/24/content\\_281474989118272.htm](http://english.gov.cn/policies/policy_watch/2014/09/24/content_281474989118272.htm)

<sup>8</sup> See also China Targeting Foreign Companies, American Chamber Says (Sept. 2, 2014), <http://www.bloomberg.com/news/articles/2014-09-02/u-s-companies-say-china-subjectively-enforcing-laws>.

<sup>9</sup> <https://www.uschina.org/reports/competition-policy-and-enforcement-china>

surveyed said they were concerned about China's competition enforcement activities, and nearly 30 percent said they were concerned that they would be targeted by future investigations.

Recently released data from China's Supreme People's Court reporting on IP litigation for 2015 reveals that the total number of civil IP cases in China involving foreigners, as calculated by the Court, was only **1.3%** of China's IP docket, or 1,327 cases in 2015. Foreign IP cases dropped 23% in absolute numbers from last year, despite an overall increase of 7.2% of total decided IP cases.

Concerns over targeting may also stem in part from the perceived bias within the Chinese system. In the Huawei vs InterDigital case, QIU Yongqing, the chief judge who ruled against U.S. based InterDigital, stated that Huawei's strategy of using anti-monopoly laws as a countermeasure is worth learning by other Chinese enterprises: and that "Chinese enterprises should bravely employ anti-monopoly lawsuits to break technology barriers and win space for development."<sup>10</sup> James M. Zimmerman, the current Chairman of AmCham China described the environment from a U.S. perspective: "There's the insinuation that foreign company executives will be personally persecuted or prevented from leaving the country... The lack of due process in these investigations is disturbing."<sup>11</sup> Many foreigners also have concerns over retaliation of various kinds if they bring IP lawsuits. For example, several years before the AML was enacted, the State Administration for Industry and Commerce conducted a study which appeared to point to foreign companies, including Cisco, as abusing its dominant position by refusing to license its technology<sup>12</sup>. Cisco had sued one of those companies (Huawei) for illegally copying its IP before the SAIC survey was completed. There have been several other cases which suggest that there may have been retaliation for bringing Section 337 or other patent litigation matters, or even for seeking settlements of disputes in the U.S. or elsewhere.

Nonetheless, we lack equivalent data sets on both the IP system and antitrust system at this time to draw comprehensive comparisons. In recent years, Chinese IP adjudication has however benefited from initiatives involving publication of all civil and administrative cases, statistical reporting of decisions, annual white papers on developments in agencies and the courts, experiments in developing case law and precedent, experiments in publicly filed amicus briefs, regulations requiring transparent coordination amongst enforcement authorities, and even a WTO request to provide copies of IP cases<sup>13</sup> which are providing an increasingly robust basis for assessing China's IP system, including, in many cases, its impact on foreigners. This experience in IP, in appropriate circumstances, may create useful pathways for China's antitrust development.

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<sup>10</sup> [http://rmfyt.chinacourt.org/paper/html/2013-10/29/content\\_72138.htm?div=-](http://rmfyt.chinacourt.org/paper/html/2013-10/29/content_72138.htm?div=-)

<sup>11</sup> "Mr. Confession' and his boss drive China's antitrust crusade" (Sept. 15, 2014) <http://www.reuters.com/article/us-china-antitrust-ndrc-insight-idUSKBN0HA27X20140915>

<sup>12</sup> "Multinationals' Anti-Competition Behavior in China and Counter-Measures Therefore," Industry and Commerce Administration, Section (1)D, Issued by the Anti-Monopoly Division, Fair Trade Bureau, State Administration for Industry and Commerce (March 1, 2004). See also [https://www.uschamber.com/sites/default/files/legacy/reports/100728chinareport\\_0.pdf](https://www.uschamber.com/sites/default/files/legacy/reports/100728chinareport_0.pdf)

<sup>13</sup> See <http://www.ip-watch.org/2006/01/25/ustr-clarifies-demand-for-details-on-chinas-ipr-enforcement-cases/>.

### 3. Licensing Practices

In its 2015 annual member survey<sup>14</sup>, the U.S.-China Business Council reported that 59% of respondents expressed concern about transferring technology to China. Concerns about technology transfer included protection of IP (75%), enforcing license agreements (51%) and the government dictating or influencing licensing negotiations (32%). The U.S.-China Business Council noted that the companies impacted by this issue felt it “very acutely.” A more recent, unpublished 2016 survey by the US-China Business Council rated China the most challenging legal and regulatory market, ahead of the United States, Europe, developed markets in Asia and other emerging markets.<sup>15</sup>

These consequences can be especially acute for the United States, which is the world’s largest technology exporter. In 2014, the United States exported \$130.362 billion dollars of technology. The Chinese market was \$6.826 billion, or about 5.2% of that total. Ireland, Switzerland, the United Kingdom, Canada and Japan all exceeded China as an export market. Importantly, most of the technology exports to China from the U.S. (about 58%) are between related parties, e.g., between a parent and subsidiary. In other words, only about 42% of the technology exports to China are between unrelated parties. By comparison, Taiwan which is a slightly smaller technology market, was dominated by unrelated party transactions with the U.S. (about 93%).<sup>16</sup>

The above data raise concerns whether China is overly focused on IP abuse, and not sufficiently directed to improving IP use. I believe that much of the problem with commercialization of technology today is due to an over-interventionist Chinese economy. From a legal perspective, one should not lose sight of the fact that the AML, like many Chinese laws and China’s constitution itself, is intended to promote “the healthy development of the socialist market economy” (Art. 1)<sup>17</sup> which includes China’s state planning apparatus. Notwithstanding the international consensus that IP is a “private right” (TRIPS Agreement, preamble), China’s legacy state planning has created a wealth of incentives and intervention in IP creation and licensing, from which it is reasonable to assume antitrust policy is not excluded. These policies have the potential to make it difficult for foreigners to license their technology in China.

Amongst two of the notable socialist market economy goals of China, are the 15 year Science and Technology Plan (2006) which has a goal of reducing “dependence on imported technology reduced to 30% or below” and the “Action Plan for Implementing the National Intellectual

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<sup>14</sup> <https://www.uschina.org/reports/uscbc-2015-member-company-survey>

<sup>15</sup> Unpublished survey conducted in 2016 with the support of USPTO, China Resource Center. Details are available from USCBC or USPTO.

<sup>16</sup> International service trade data from Department of Commerce, Bureau of Economic Analysis and Census Bureau.( <http://www.bea.gov/international/index.htm#services>)

<sup>17</sup> See also, PRC Constitution, Art. 15, Antiunfair Competition Law (Art. 1).

Property Strategy (2014—2020)” promulgated by the State Council”<sup>18</sup> which has a goal of increasing technology exports from the \$1.3 billion USD in 2013 to \$8 billion USD by 2020.

Regarding policy support for different sectors, NDRC, the antitrust regulator which brought the Qualcomm case and was the former State Planning Commission, drafted a plan in 2014 of “building an innovative platform to promote the development of strategic emerging industries” which includes the IT sector. SIPO, through its leadership of the National IP Strategy in 2013, similarly called to “prepare a work plan for intellectual property in China’s Strategic and Emerging Industries.”<sup>19/20</sup> The current five year national IP strategy also calls for China to “Strive to Build a Strong IPR Country” and calls for “strengthening patent pilot projects, joint utilization of patents and collective management of patents... to strengthen the competitive advantages of industries.”

Chinese government interventions include a goal of increasing state support for patents through state funded loans secured by patents to about \$30 billion USD by 2020.<sup>21</sup> The Chinese government, through its High and New Technology Enterprise tax incentives, also provides tax benefits for companies that locally own IP or conduct R&D. Chinese government interventions in IP creation include national and local quotas for patent creation per 10,000 people, subsidies for patent applications or maintenance, national and local incentives to participate in standards setting bodies, tax preferences for companies which own their own locally-created IP, industry specific plans to obtain additional patents in technologies of concern to China, and talent programs for developing IP talent or talent in industrial sectors.

The Administration has pushed back on these policies as well as procedural aspects of China’s AML regime, including some of the excessive practices and due process concerns, in our various bilateral dialogues.

### **USPTO’s Role Engaging on These Issues**

The USPTO engages on both sides of the balance between IP enforcement and increased antitrust enforcement in China. The Agency has a leading role in issues involving patent protection and enforcement and we have long engaged the Chinese government, its courts and the Chinese patent office, on the need for more deterrent and predictable remedies and better civil enforcement of IP rights.<sup>22</sup> We advocate on behalf of the U.S. Government through comments on draft laws, in JCCT discussions, and in the context of our direct relationships with China’s patent office and other agencies. We also conduct numerous training programs for U.S. industry to better understand China’s IP environment.

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<sup>18</sup> Guo Ban Fa [2014] No. 64

<sup>19</sup> The SEI’s include: 1. Energy efficient and environmental technologies; 2. Next generation information technology (IT); 3. Biotechnology; 4. High-end equipment manufacturing; 5. New energy; 6. New materials; and 7. New-energy vehicles (NEVs). See also <https://www.uschina.org/sites/default/files/sei-report.pdf>

<sup>20</sup> Notice of Its Opinion on Key Tasks on Deepening Economic Reform in 2014 (dated April 30, 2014, released May 20, 2014) ([http://www.gov.cn/zhengce/content/2014-05/20/content\\_8818.htm](http://www.gov.cn/zhengce/content/2014-05/20/content_8818.htm)).

<sup>21</sup> Guo Ban Fa [2014] No. 64

<sup>22</sup> See letter of SIPO Commissioner Tian Lipu to USPTO Director Kappos of September 27, 2012 at [http://www.uspto.gov/sites/default/files/ip/ip\\_overseas/china\\_team/Commissioner\\_Tians\\_letter\\_to\\_Mr\\_Kappos.pdf](http://www.uspto.gov/sites/default/files/ip/ip_overseas/china_team/Commissioner_Tians_letter_to_Mr_Kappos.pdf).

On antitrust matters, we support the efforts of the Department of Commerce and other agencies (including the U.S. antitrust enforcers, USDOJ, FTC, and as well as USTR) in their engagement when such matters implicate IP issues. There have been several commitments by China in recent years to improve procedural fairness on antitrust matters which USPTO supports.

We have also taken a lead on highlighting challenges involved in licensing IP to China, including testimony before the U.S. China Economic and Security Commission<sup>23</sup>, negotiating with our Chinese counterparts, conducting two separate programs with China's patent office and Ministry of Commerce on licensing regulation, and educating U.S. companies on risks of IP protection and licensing in China's current environment. One such program on China IP issues was held last year in cooperation with the University of California at San Diego.<sup>24</sup> Our next program on the Economic Contribution of Technology Licensing, in conjunction with George Mason University, is scheduled for tomorrow, June 8 at USPTO.<sup>25</sup>

## **Conclusion**

China's AML was enacted only eight years ago in 2008. But, Chinese regulators benefit from hundreds of years of experience of other governments, and have been engaging in technical dialogues and exchanges with a wide range of agencies, companies and universities. Comparisons with intellectual property suggest that arguments regarding China's developing world status should have a very short life span.

Although intellectual property appeared a very new concept to China in 1983, by 2011 China had become the most litigious society for intellectual property in the world, with the largest trademark office and one of the two largest patent offices. Moreover, this "foreign concept" has taken deep root in China: over 98% of the IPR litigation in China involves Chinese suing Chinese, and many of the key rights (85-98%) granted by China's IP agencies (trademarks, utility model patents, design patents), are granted to Chinese nationals. As with IP, China has now emerged as a major antitrust venue, which has also elicited considerable concern from the business community, and should be engaged accordingly.

The Administration strongly supports China's efforts to develop an antitrust regime consistent with the practices of other market-economy countries. However, we are concerned that there are many aspects of China's economy that may not be fully market driven, in the context of both IP and IP-related antitrust.

Thank You.

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<sup>23</sup>[http://www.uscc.gov/sites/default/files/Mark%20Cohen\\_testimony.pdf](http://www.uscc.gov/sites/default/files/Mark%20Cohen_testimony.pdf)

<sup>24</sup><https://china.ucsd.edu/files/np-2015/Agenda-New-Perspectives.pdf>

<sup>25</sup><https://events.r20.constantcontact.com/register/eventReg?oeidk=a07ecm8dmfg411c97a3&oseq=&c=&ch=>