

INTELLECTUAL PROPERTY ANTITRUST LAWS IN CHINA: RETROSPECT AND PROSPECT (2008 – 2018)



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I. INTRODUCTION

2018 marked the 40th anniversary of the Reform and Opening-Up of the People's Republic of China (the "Reform"), as well as the 10th anniversary of the enactment of the *Antitrust Laws of the People's Republic of China* ("中华人民共和国反垄断法" the "Antitrust Laws"). Profound changes have taken place in China both economically and socially during this 40-year period. Some would say, "From the perspective of depth and width of the contributions the Reform has made to the human society and the long-lasting influence it brought to the human society, it is fair to say that it is a great reform in the history of human beings."² Against this background, intellectual property, antitrust, and other legislations intended to regulate economy related social behaviors were introduced to address the issues emerging from the development in the Chinese society during this process.

China joined the World Trade Organization in 2001, which further opened its domestic market to the world. Together with this move, China enacted its Antitrust Laws in 2008. The Antitrust Laws, from their enactment, included provisions to regulate the antitrust issues in the intellectual property domain. Therefore, the enactment of Antitrust Laws is also usually seen as the symbol for the birth of the intellectual property antitrust regime in China.

During the decade after its birth, the practice of intellectual property antitrust was limited, but meaningful. For the purpose of this article, the author divides the development of the intellectual property antitrust mechanism in China into three stages, namely (i) **the exploration stage** (2000 to 2012), which laid down the ground for legislation, enforcement, and the application of laws mainly from theoretical and legislative perspectives; (ii) **the active stage** (2012 to 2015), which begins from the trial of *Huawei v. Interdigital* case and ends with the penalty decision against Qualcomm; and (iii) **the post-*Qualcomm* investigation stage** (2015 to 2019), during which focus is on reflection of the previous practice and legislation of the intellectual property antitrust mechanism – cautiousness and reason was the theme at this stage. The author believes that the intellectual property antitrust regime will continue to develop and improve, with the re-organization of the enforcement authorities and the nation-wide awareness of the importance of protecting intellectual property.

II. THE EXPLORATION STAGE: THE ESTABLISHMENT OF THE INTELLECTUAL PROPERTY ANTITRUST REGIME

Antitrust legislation was formally included in the legislative plan of the National People's Congress in 1994, but the Antitrust Laws were only formally enacted in 2008. During this fourteen-year period, debate, which has never stopped, centered around whether any antitrust legislation was

² https://www.sohu.com/a/281928038_115423.

necessary at all, what type of antitrust legislation were suitable, and which governmental department should take lead in the drafting.

There were also different opinions on whether intellectual property should be subject to the antitrust legislation and whether relevant provisions around intellectual property should be included in the antitrust laws to be enacted. Some held the opinion that intellectual property, same as other types of rights of property, is a type of monopoly endorsed by laws per se, and therefore, it should either not be subject to any antitrust laws or the relevant legislations should expressly provide for the disapplication of antitrust laws to intellectual property related issues. Some held the opinion that the antitrust laws should specifically provide for the antitrust issues related to intellectual property. Some others held the opinion that the antitrust laws should be clear that the antitrust laws are applicable to the intellectual property related issues as well, but detailed provisions should be subject to further legislation at a later stage.

The Antitrust Laws adopted the third approach. It provides in Article 55 that “the exercise of intellectual property rights by operators in accordance with relevant intellectual property laws and regulations is not the subject of the Anti-Trust Laws, but the abuse of intellectual property rights to exclude and/or restrict any competition shall be regulated by the Anti-Trust Laws.”

Based on publicly available materials, the author summarizes the main reasons for adopting the third approach:

First, the legislative body believes that it is necessary to regulate the potential abuse of intellectual property by foreign companies when doing business in China. Professor Wang Xianlin, a member of the Expert Panel for Antitrust Laws Committee of the State Council, expressed such concern in his publication, stating that “some actions taken by cross-border enterprises in China may actually be abusing their intellectual property rights in nature, with the purpose of combatting its rising Chinese local competitors or even excluding these competitors from the market” and “considering the special role and function of anti-trust laws in regulating abuse of intellectual property and the relevant practice in this area world-wide, China should also treat the anti-trust laws as the main legislation to regulate the abuse of intellectual property rights.”³ Professor Wang participated in drafting the Antitrust Laws and his advice was also adopted by the enacted Antitrust Laws. Therefore, it is reasonable for the public to believe that tackling with abuse of intellectual property may be one of the intentions of the legislators.

Second, decisions in other jurisdictions, especially *United States v. Microsoft Corporation*, 253 F.3d 34 (D.C. Cir. 2001) in the United States, have justified the necessity of applying antitrust laws to the intellectual property domain. In *United States v. Microsoft Corporation*, one of the key defenses Microsoft Corporation raised was that Microsoft Corporation has the “absolute and unfettered”⁴ right to use its intellectual property rights it lawfully acquired and “[i]f intellectual property rights have been lawfully acquired, their subsequent exercise cannot give rise to antitrust liability,”⁵ but this defense was not admitted by the court. The court stated that “Intellectual property rights do not confer a privilege to violate the antitrust laws.”⁶ The aforementioned court decision was widely recognized in China and was repeatedly cited and reported. The Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”) of the United States issued Antitrust Guidelines for the Licensing of Intellectual Property and Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition. The European Communities issued 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. Both aforementioned practice of the United States and the European Communities have had their influence on the practice in China.

Third, as the legislators were not as familiar with the intellectual property antitrust mechanism back to 10 years ago, they avoided going into details but provided for the general principles in the Antitrust Laws. Given the limited practice in China, the concept of intellectual property antitrust was still foreign to legislators. The practice in other jurisdictions was also quite limited. The issues were complicated and there were no unified or standard practice either. Therefore, legislators only included “declarative” or principle provisions in the Antitrust Laws but did not set out detailed operative rules. The Antitrust Laws only provide for intellectual property issues in the Miscellaneous Chapter (Chapter 8). The contents related to the intellectual property rights were rather declarative and state the legislators’ encouragement and set out certain principles. It is a general belief that the provision is not enforceable and cannot serve as a base for law enforcers in their enforcement or be cited in court judgements.

³ Wang Xianlin, On the Anti-Trust Analysis of Abuse of Intellectual Property Rights by Cross-border Companies in China, Intellectual Property, the 6th Issue in 2005.

⁴ *United States v. Microsoft Corp.*, 253 F.3d 34, 48 (D.C. Cir. 2001)

⁵ *Id.*

⁶ *Id.*

Compared to the difficult birth of the Antitrust Laws, the intellectual property antitrust regime seems quite quiet and left the disputes and arguments to the actual practice.

III. ACTIVE STAGE: FROM *HUAWEI v. INTERDIGITAL* TO THE *QUALCOMM* INVESTIGATION (2012 TO 2015)

The first four or five years after the Antitrust Laws' enactment saw a very limited number of actual enforcements against monopoly agreements and abuses of dominant market position. Low enforcement also occurred in relation to intellectual property antitrust. This was quite contrary to the general public's expectation. As a commentary from National Business Daily pointed out, "the Anti-Trust Laws were enacted 5 years ago. People had very high expectation for the Anti-Trust Laws and were hopeful that the various monopoly behaviors could be combatted by the Anti-Trust Laws. However, the actual outcome was quite disappointing to the general public. The Anti-trust Laws were like a sword which never left its scabbard and never played its full function."⁷

Nonetheless, the case of *Huawei Technology Ltd. ("Huawei") v. InterDigital ("IDC")* and the following investigation by the National Development and Reform Commission ("NDRC") against Qualcomm (the "*Qualcomm* Investigation") attracted world-wide attention to the development of intellectual property antitrust in China.

IDC is a non-practicing entity based in the United States and holds various standard essential patents ("SEP"). During the negotiations with Huawei in relation to licensing of several patents, not only the royalty it proposed to charge was much higher than the actual value of its patents in issue, but it also initiated several suits in the United States International Trade Commission and the State of Delaware to seek injunctions against Huawei. As a result, Huawei also initiated antitrust litigation against IDC in China. The presiding court in China found that every SEP held by IDC constitutes an independent relevant market and IDC had market dominant position in each of such relevant market, and therefore, IDC's proposed royalty together with the injunction as a threat constitutes unfairly high royalty. The presiding court also found that IDC through bundling pricing of different generations of mobiles, achieved to expand and extend its market dominant positions, which was a violation of the relevant provisions of the Antitrust Laws. This case was the first case in the world that the patent holder of an SEP was found abusing its market dominant position. This case was followed by the investigation of Motorola and Samsung by the European Union and ECJ's judgment in the case of *Huawei v. ZTE*, the ruling or judgement of both cases held the same opinions with the presiding court of *Huawei v. IDC* regarding similar subject matter.

The wide recognition of the judgement for *Huawei v. IDC* in China enhanced the law enforcers' confidence in intellectual property antitrust cases. The Antitrust Bureau of NDRC, in responses to the complaints by several entities both domestic and foreign, launched its investigation against Qualcomm in 2012 and issued its administrative decision in the February 2015 against Qualcomm. NDRC in its decision held that Qualcomm had market dominant position in the relevant markets of both SEP and baseband chip. Qualcomm's charge of royalty for expired patents, request of reverse licensing, and bundling of SEP and non-SEP constituted abuse of its market dominant positions in the relevant market of SEPs, and its "no challenge of patent" provision in sales agreements for chip constituted abuse of market dominant position in the relevant market of baseband chip. NDRC imposed fines of 6.088 Billion RMB (around 960 Million USD) for the aforementioned behavior.

The fine imposed by NDRC was the highest amount of fine ever by an antitrust law enforcement authority in China. However, this administrative decision did not fundamentally affect Qualcomm's business model or pricing model.

First, it did not rule whether the price charged by Qualcomm was unfairly high. The ruling applied the relevant provision of the Antitrust Laws which forbids the operators to charge unfairly high price,⁸ but it was silent on whether the price charged by Qualcomm was unfairly high or what would be a fair price; instead it found that there were unfair elements in the composition of the price charged by Qualcomm. Such unfair elements include charging royalty for expired patents and the request of reverse licensing.

⁷ See Deng Yuwen, The Anti-Trust Laws Should Catch the Tigers and Do It Accurately, January 18, 2013, China Business Daily, 8th Edition.

⁸ Article 17 of the Anti-Trust Laws, "Operators who have market dominant positions are forbidden to sell products with unfairly high price or purchase products with unfairly low price."

Second, the NDRC decision did not penalize Qualcomm for its “No License No Chip” policy or “No license to competitors” policy. According to news reports, NDRC had already collected relevant evidence of Qualcomm’s implementation of aforementioned policies. Having such policies in place would usually be considered as abuse of market dominant positions according to classic antitrust law theories and were the precise reason why the Korea Fair Trade Commission (“KFTC”) penalized Qualcomm and the FTC initiated antitrust litigation against Qualcomm.

Third, Qualcomm claimed that its adjusted prices were already consented to by NDRC. It announced on its website that “NDRC has reviewed and approved the Company’s rectification plan”⁹ and Qualcomm would use “a royalty base of 65% of the net selling price of the device”¹⁰ for use in China, while NDRC never announced any statement confirming or denying Qualcomm’s such announcement. In reality, many mobile producers were still not satisfactory to the adjusted prices and Qualcomm sued these unsatisfied mobile producers and sought injunctions against those producers. NDRC remained silent despite the movements of the market and did not resume its investigation.

Although the law enforcement departments penalized Qualcomm in the meantime they were careful in protecting the core interests of the holders of the intellectual property rights, with the purpose of keeping the impact of antitrust enforcement on the ordinary business of market participants at a minimum level.

During this period, there were also several other judicial and administrative cases in addition to the *Huawei v. IDC* case and the *Qualcomm* Investigation. The antitrust law enforcement in the intellectual property area was quite active. Looking back to those cases, the following features can be observed:

First, the protection of intellectual property should not be subject to a violation of Antitrust Laws. There is no special treatment for intellectual property compared to other types of properties, and in some cases, especially when SEPs are involved, the holders of intellectual property rights may be more easily found to have market dominant positions than owners of other types of properties.

Second, the antitrust law enforcement departments look closely at the pricing issue. While in the western world the law enforcers would pay more attention to the depriving abuse, the Chinese law enforcers would be more sensitive to unfairly high pricing. It is a common awareness in the Chinese market that although reasonable rewards are necessary for holders of intellectual property rights, unfair licensing pricing attached with unfair conditions would damage the industry. It is necessary for law enforcers to intervene to protect the newly born manufacturing industry.

Third, the law enforcers in China were innovative and making breakthroughs. In both the *Huawei v. IDC* and *Qualcomm* Investigation cases, there were unprecedented issues in China or other jurisdictions. These trials and breakthroughs achieved by the Chinese law enforcers in fact became precedents for other jurisdictions. As mentioned, both the KFTC and the TFTC referred to the precedent in China when investigating Qualcomm in its own jurisdiction.

The practice by the Chinese law enforcers attracted eyes world-wide, but also brought tremendous pressure to the Chinese law enforcers. After the *Qualcomm* Investigation, the trend changed again.

IV. STAGE III: POST-QUALCOMM INVESTIGATION STAGE – CAUTIOUSNESS AND MATURITY

After the *Qualcomm* Investigation, the number of cases where penalties were issued by the law enforcers in relation to intellectual property antitrust disputes significantly decreased. Although there was news on certain companies under investigation, and some of these companies actually participated in certain enquiries by NDRC, the antitrust law enforcers, i.e. formerly NDRC and the State Administration for Industry & Commerce (“SAIC”) and currently the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau (the “Antitrust Bureau”), did not announce any penalty ruling in any intellectual property antitrust law related cases. Meanwhile, the courts are also very cautious in trying any dispute in relation to intellectual property antitrust issues.

⁹ <https://www.qualcomm.cn/news/releases-2015-02-09>.

¹⁰ *Id.*

At this stage, the law enforcers are more enthusiastic in making rules related to intellectual property antitrust issues compared to making decisions in specific cases. NDRC announced its *Antitrust Guidance on Abuse of Intellectual Property (Draft for Public Comment)* (关于滥用知识产权的反垄断指南(征求意见稿)) on December 31, 2015 and SAIC announced its *Antitrust Enforcement Guidance on Abuse of Intellectual Property (SAIC Seventh Draft)* (关于滥用知识产权的反垄断执法指南(国家工商总局第七稿)). These two drafts both covered issues arising from law enforcement in the intellectual property antitrust area, and to some extent reflect the enforcement power division and overlaps between NDRC and SAIC. In light of this situation, the Antitrust Law Committee of the State Council, i.e. the superior authority of NDRC and SAIC in terms of antitrust law enforcement, announced the *Antitrust Guidance on Abuse of Intellectual Property (Draft for Public Comment)* (关于滥用知识产权的反垄断指南(征求意见稿)) on March 23, 2017 and this guidance took both previous draft guidance issued by NDRC and SAIC into consideration. In 2018, after the internal re-organization of relevant departments of the State Council, the Antitrust Bureau took over the antitrust law enforcement power of both NDRC and SAIC. The National Intellectual Property Administration ("CNIPA"), same as the Antitrust Bureau, became a sub-department of the State Administration for Market Regulation ("SAMR"). Although after the re-organization, the jurisdiction of intellectual property antitrust issues will not be subject to any dispute, the Antitrust Bureau has not announced any penalty decision, which reflects its cautiousness in making decision for these types of issues.

The judicial body, in the meantime, was also very cautious. Following the judgement of *Huawei v. IDC*, ZTE, another telecommunication equipment manufacturer also initiated litigation against IDC. Although the cause of action and facts were similar to Huawei's in *Huawei v. IDC*, and the trying court was the same with *Huawei v. IDC*, after several court hearings, the first instance court has not rendered its judgement so far. In *Zhejiang Magnetism Material Association ("Zhejiang Magnetism") v. Hitachi Metals ("Hitachi")*, Zhejiang Magnetism sued Hitachi for abuse of market dominant position by adopting the product hopping method. As per Zhejiang Magnetism, Hitachi, by replacing certain material in its old products, created certain new products before the patents in its old products expired, and forced the market to accept its new products by threatening to litigate, sending cease and desist letters, and signing licensing agreements etc., but there was no significant new technology improvement in the new products. The litigation by Zhejiang Magnetism was initiated in 2015, but the first instance court has not yet rendered any judgement. In addition, several courts issued their own judicial guidance during this period, and some of the guidance to some extent rectified the opinions in the *Huawei v. IDC* case. For example, the Guangdong High Court issued the Trial Working Guidance for Trying Standard Essential Patents Related Cases (关于审理标准必要专利纠纷案件的工作指引(试行)), and this guidance, for the first time in China, expressed that "Breach of FRAND covenants by holders of standard essential patents, does not necessarily constitute a violation of the Anti-trust Laws."

The author believes the aforementioned trend at this stage is a result of the following reasons:

First, parties to SEPs tend to resolve relevant issues through negotiation of royalties and this makes it less necessary to resolve relevant disputes through antitrust law. The core issue for SEP is the holder obtained an unfair market position through methods such as injunctions, and the holders may take advantage of such market position to win certain points in negotiations without making real contribution to the progress of technology. The recent judicial practice tends to fix a royalty directly for parties and adjust over charged royalty in the relevant judgements. Such judgements mitigated risks that the holders might by way of litigations obtain over charged royalty and make the chance of SEP holders abuse market dominant positions lower. As a result, the room for Antitrust Law to play a role became rather limited.

Second, the business models of Chinese market players have switched from pure licensees who rely on foreign technologies to contributors to technological progress. Over application of Antitrust Laws in intellectual property area may do damage to the domestic industry. According to a report by National Applied Research Laboratories of Taiwan, the number of SEP of holders from the Mainland China in 4G area is right next to such number of SEPs of holders from the United States and represents more than 25 percent of all SEPs in 4G area globally.¹¹ Aggressive enforcement in intellectual property antitrust area may do more harm than help to innovation and the development of this industry.

Third, China is in the process of strengthening the protection of intellectual property rights. Therefore, the mainstream voice is to call for protection of intellectual property rights rather than combatting holders of intellectual property rights. Antitrust law enforcement against intellectual property right holders may still have its grounds, but may deviate from the mainstream track at the moment.

¹¹ <http://tech.hexun.com/2014-07-23/166894444.html> (Last visit at 2019.2.7).

Stable as it is in terms of intellectual property antitrust law, there will still be issues around monopoly in exercising intellectual property rights by the holders. Patents, as a type a monopoly *per se*, can be easily structured by the patent holders as obstacles to the new market players. In the special report of November 2018, The Economist magazine bluntly stated a series of problems brought about by the decline in competition in Western economies. Among them, patents have become one of the reasons for restricting competition. The magazine even suggested that the anti-monopoly law should consider giving market entities data and patent licenses to break the monopoly.¹²

Both the intellectual property regime and the antitrust law regime share the same goal of promoting innovation, but each has its own complexity and uncertainty. The latter is especially true for the antitrust law regime. Although intellectual property antitrust may have its own features, it is still part of the overall antitrust regime. Although the antitrust laws in China has its own features, it still follows the logic and theory of antitrust law mechanism world-wide. The further development of the intellectual property antitrust regime in China relies on the innovation, adjustment, and perfection of the entire antitrust law mechanism . Revolution is clearly ongoing in the entire antitrust law mechanism. The author believes this revolution will influence the construction of intellectual property antitrust law mechanism in China.

Let's see...

¹² <https://www.economist.com/special-report/2018/11/15/western-governments-need-a-plan-for-reinstating-effective-competition> (Last visit at 2019.2.7).

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