

Compulsory Licensing of Intellectual Property in China

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China's State Administration of Industry and Commerce (SAIC) has indicated that it is close to finalizing rules on compulsory licensing for intellectual property; if prior practice is followed, these finalized rules may be promulgated without much advance notice. The current (and sixth) draft takes an interesting approach. In particular, the draft IP Enforcement Rules contain provisions intended to curtail patent ambushes arising out of standards setting. In general, the draft rules presume it to be an abuse of a dominant position when a patentee deliberately fails to disclose the existence of a patent knowing it would likely be included in a standard, in violation of the standard-setting organization's rules. Coupled with the Huawei case against InterDigital and the broad view the Intermediate Court took of standard setting as a market from a competition law perspective, the IP Enforcement Rules may promote a kind of "essential facilities with Chinese characteristics" - a result at great odds with the approach that courts in China's largest single-nation trading partner, the United States, have taken in the past decade. This Article describes the emerging Chinese approach and explores the tensions this will create with recent U.S. cases such as Rambus and Trinko.

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