

Essential Facilities with Chinese Characteristics: A Different Perspective on the Compulsory Licensing of Intellectual Property

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ABSTRACT:

China has become the fastest-growing market for licensed goods in the world, and by some estimates has emerged as the world's largest patent filing nation.

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 June 2014 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.

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I. Essential Facilities/Compulsory Licensing of Intellectual Property – A Chinese Take

A. The Guidelines' Rationale

China's draft "Guidelines for Anti-Monopoly Enforcement in the Field of Intellectual Property Rights"³ endorse fairly robust limits on private intellectual property rights in the interest of competition law. The current June 2014 – which may become law soon with relatively little advance notice – represents work towards accommodating the interests of the State Administration of Industry and Commerce (SAIC), which handles the application of China's Anti-Monopoly Law "AML" to non-price conduct, and the various domestic and international stakeholders who have been consulted in the drafting process. While prior drafts represented non-binding Guidelines for applying the AML to intellectual property, the most recent drafts (those since June 2012) contemplate the adoption of specific administrative rules that will have the force of law within the SAIC's scope of enforcement. Notably, three sections of the American Bar Association (ABA), representing the legal industry of China's largest national trading partner, have argued against China's proposed extension of what the ABA lawyers call a version of the "essential facilities doctrine" to intellectual property rights.⁴ While these

³This [draft] article addresses the most recent version of the Guidelines, issued on June 11, 2014. A private law firm English translation is available at <http://www.ipkey.org/en/resources/legislation/item/74-state-administration-for-industry-and-commerce-released-draft-ip-abuses-rules-for-public-comments/74-state-administration-for-industry-and-commerce-released-draft-ip-abuses-rules-for-public-comments> (last visited Jul. 18, 2014) (hereinafter "Guidelines translation").

⁴See, e.g., Sarah Bruno et al., *Not So Fast, China – ABA Sections Submit Comments on Intellectual-Property-Related Provisions in China's Draft Anti-Monopoly Law*, Nov. 12,

objections reflect a consensus concern about over-application of essential facilities in the United States,⁵ the Chinese context helps explain the SAIC's more benign view.

The endorsement of compulsory licensing of IP on competition policy grounds by China's SAIC looks more reasonable given three key factors. First, China's academics and policymakers retain a degree of skepticism of private IP rights based on first principles. Second, from a doctrinal perspective, restriction of private IP rights fits fairly naturally into a civil law framework regarding the possible "abuse of rights." Finally, as a substantial net IP importer, China has economic realpolitik interests in a less inviolable view of IP rights than, for example, the United States, its IP rightsholders, and their lawyers.

From a first principles perspective, Chinese scholars and policymakers take a less deferential view of IP rights in general. To a significant degree, Chinese commentators take the view that since patents and other IP rights are awarded and often subsidized by state organs, and since their prosecution, enforcement, and licensing requires the expenditure of state resources, the public interest militates for a strong role for the State in contracts involving IP.⁶ For example, leading scholars Zhang Ping and Ma Xiaohe have observed that, from a development

2012, available at <http://www.lexology.com/library/detail.aspx?g=9941962f-a31c-46cd-8f35-aa6362124416>.

⁵See, e.g., Joint Comments of the American Bar Association Section of Antitrust Law, Section of Intellectual Property Law, and Section of International Law on the SAIC Draft Rules on the Prohibition of Abuses of Intellectual Property Rights for the Purposes of Eliminating or Restricting Competition, Jul. 9, 2014 available at http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_c omments_201407saic.authcheckdam.pdf (last visited, Jul. 22, 2014).

⁶See Harris, Wang, Zhang, Cohen and Evrard, *Anti-Monopoly Law and Practice in China*, p.227.

perspective, “the key question is how to use the public rights in new intellectual creations,” and that this is complicated by “the intellectual property system[’s] seeking to implement [the] confirmation of private right and individual property interests.”⁷ Chinese scholars have taken the nuanced view that private IP rights have both a positive and a negative effect on economic development, and that their enforcement raises difficult questions from the perspective of social welfare.⁸ Given this inherent doubt about the overall effects of private intellectual property rights, Chinese scholars and policy makers start from a position that leans more in favor of an essential facilities/compulsory licensing policy than their American counterparts.

Second, the SAIC guidelines accord with a civil law tradition that views rights as deserving limitation in cases where they are abused. Moreover, Chinese scholars point to the special economic, cultural and administrative reasons – most notably, the nation’s socialist ideology and heritage – for the view that all private rights be restricted to some degree. Indeed, it is worth noting that existing Chinese statutes on the subject confirm regulatory power to limit the licensing of IP rights based on social welfare grounds. Specifically, Article 55 of the AML sets out broadly that “This Law is not applicable to undertakings’ conduct in the exercise of intellectual property rights . . . but this Law is applicable to undertakings’ conduct that

⁷Zhang Ping and Ma Xiaohe, *Biaozhunhua yu Zhishichangquan Zhanlue* (Standardization and Intellectual Property Strategy) (Intellectual Property Press, 2d. ed., 2005) at 30-31.

⁸See Zhang Ping, *The Impact of the IP System on China’s National Economic Growth*, p.29 (observing that China’s “national guideline for IP strategy . . . recognizes that IPR is an instrument for advancement of social welfare, which has a negative effect as well as [a] positive effect), *available at* http://www.ip.mpg.de/shared/data/pdf/003_zhang_impact_of_ip_system_on_china_national_economic_growth_paper.pdf (last visited July 19, 2014).

eliminates or restricts competition by abusing their intellectual property rights.”

Additionally, Article 13 of the AML, which prohibits “agreements among . . . competing business operators” that “restrict[] the purchase of new technology or new facilities or the development of new technology or new products,”⁹ has been interpreted to broadly reach standard-essential patents. Similarly, the PRC Contract Law (1999) states that “[a] technology contract that illegally monopolizes technology, impedes technological progress or infringes the technological achievements of others is void.”

However, it would be a mistake to see the SAIC guidelines merely as a restraint on private IP rights. Additionally, the SAIC guidelines echo contemporary global trends towards limiting regulation and making it more consistent in its application.¹⁰ That is, China’s intent with the SAIC Guidelines is both to regulate and to restrict the regulation of intellectual property rights based on competition law principles. On the one hand, the AML’s grant of authority to regulate intellectual property rights are quite broad and abstract, and the Guidelines’ adoption of a form of essential facilities/compulsory licensing for IP reflects that. On the other hand, the Guidelines are designed to make the exercise of that authority more specific and definite, in the hopes of leaving private actors less open to being abused by the original broad, abstract statutory powers vested in the SAIC. The Guidelines also create a set of principles to influence the design of the enforcement procedures and

⁹See Anti-Monopoly Law, Article 13, *available at* <http://english.mofcom.gov.cn/aarticle/policyrelease/announcement/200712/20071205277972.html> (last visited July 15, 2014).

¹⁰Meng Yanbei, *Regulating and Limiting the Regulation: Research on IP Licensing from China’s Antimonopoly Law*, p. 8 [Yanbei, where was this draft published?]

system so that their actions seem more reasonable and predictable. In that vein, it is expected that some form of “safe harbor” or “block exemption”-like system will also be adopted.¹¹ Notably, unlike prior drafts, the sixth (2013) draft took the form of regulations that would bind the SAIC if formally adopted – the prior versions were issued as nonbinding guidelines.

Third, and finally, it is worth appreciating the Chinese interests at stake with respect to the licensing of IP. Per the International Licensing Industry Merchandisers’ Association, China is the fastest growing market for licensed goods in the world, more than tripling from 2005 (\$1.1B) to 2010 (\$3.9B). Much attention has been paid to the rising number of patents filed by Chinese firms. Nonetheless, China remains a heavy net importer of intellectual property, with a 2012 record deficit in royalties and license fees of \$17 billion per Thomson Reuters. As a result, the possibility that private IP rights may inhibit economic growth and development has been recognized to be a key policy issue. As a result, the SAIC guidelines are emerging against a very different background than against which debates over essential facilities or compulsory licensing take place in the United States.

B. An Overview of the Guidelines

As noted above, the guidelines represent an attempt to formulate rules to make the application of the AML’s Article 55 addressing IP more consistent and reasonable. As a result, they set forth a number of provisions defining what types of

¹¹*Id* at pp. 9-10. *See also* Guidelines, *infra* nn.__ and surrounding text (discussing proposed 20% market share safe harbor for horizontal IP licensing agreements, and 30% market share safe harbor for vertical IP licensing agreements).

IP licenses will draw scrutiny, as well as defining safe harbors for IP licensing conduct. Specifically, the Guidelines prohibit horizontal agreements under which competitors might enhance their power in IP markets, they proscribe certain types of exclusive licensing and vertical arrangements involving IP, and they specify thresholds for safe harbors from punishment under the Anti-Monopoly Law.

The guidelines clarify that certain types of horizontal agreements involving IP will draw the attention of the SAIC. For example, Article 4 of the guidelines states that, subject to certain specific exemptions under the AML, “[b]usiness operators shall not reach monopoly agreements in the course of exercising IP” rights.¹² More specifically, Article 12 declares that “[b]usiness operators shall be prohibited from eliminating or restricting competition through patent pooling arrangements,” and Article 14 sets forth a similar prohibition for “[c]opyright collective management organizations.”¹³ Additionally, Article 13 addresses standard-setting and standard essential patents, stating that “business operators are prohibited from using standard setting and implementation of the standards to eliminate or restrict competition,”¹⁴ and further explaining that “business operators that have dominant market positions are prohibited from . . . refusing to allow other business operators from practicing [standard essential] patents under reasonable conditions . . . in violation of the fair, reasonable, and nondiscriminatory principle.” Accordingly, the Guidelines appear to contain an endorsement of the view that the decision to make agreements with competitors or other IP rightsholders concerning IP carries an

¹²See Guidelines translation, *supra* n.[].

¹³*Id.*

¹⁴*Id.* (parenthetical omitted).

obligation, notwithstanding the possession of private IP rights, to license or otherwise deal in that IP on terms that do not injure competition.

The Guidelines also spell out limitations on the exercise of private IP rights by single firms that have a dominant position. Several provisions restrict firms that have a dominant position from licensing their IP rights even vertically, that is, to a downstream firm, not a competitor, in ways that might create disadvantage in the marketplace. Specifically, firms with a dominant position may not license their IP in such a way that: restricts counterparties to exclusively deal with the firm or prevents them from dealing with a firm's competitors (Article 8); bundles or ties IP in a way that extends its market position or limits competition (Article 9); without justification, requires counterparties to agree not to assert their own IP rights or to agree to grant-back improvements they make using the licensed IP (Article 10); or discriminates among similarly situated counterparties (Article 11). While they may sound concerning to holders of IP, these provisions on vertical IP agreements are not fundamentally at odds with existing U.S. approaches to IP and competition law.

However, the guidelines restrictions on a dominant single firm's conduct with respect to IP licensing are not limited to dealings with firms in a vertical licensing arrangements or other noncompetitors. Perhaps most notably – and alarmingly from an American perspective, given the orthodox view that antitrust law protects “competition, not competitors,” Article 6 states that, in general, “[a] business operator that has dominant market position shall not abuse [that] dominant market position in the course of exercising IP rights to exclude and

restrain the competition.”¹⁵ That provision goes on to clarify that “[t]he ownership of IP [rights] by a business operator may be a factor for the determination of a dominant market position,” though it will not be automatically presumed from such ownership.¹⁶

Finally, and most notably, Article 7 explicitly endorses the essential facilities doctrine for dominant firms dealing in IP. That provision states that:

Without justifiable reasons, business operators that have dominant market positions shall be prohibited from refusing to license other business operators to use[their] IP under reasonable conditions where [that] IP has become[] [an] essential facilit[y] in the manufacture or business operation[s]

The following factors shall be considered in determining whether [the] IP is [an] essential facility in manufactur[ing] and operation activities: there is no reasonable substitutable IPR in the relevant market, and the IP is essential for other business operators to participate in the competition in the relevant market; the refusal to license will impose [an] adverse impact on competition and innovation in the relevant market, and the licensing of the IP will not cause unreasonable damage to the business operator[.]¹⁷

As evidenced by the ABA comments to the most recent draft, Article 6 and 7 significantly concern American lawyers and businesspeople.¹⁸ By speaking directly to the interests of competitors, as well as seemingly creating an affirmative duty to deal with its competitors concerning its IP, these provisions come the closest to direct conflict with the U.S. approach to dominant firms with IP to license, though they do bear similarities to the EU approach taken in cases such as *IMS Health*,¹⁹ as

¹⁵*Id.*, Article 6.

¹⁶*Id.*

¹⁷*Id.*, Article 7.

¹⁸See ABA Comments, *supra* n.[].

¹⁹See *IMS Health* [fill in cite]

well as the EU's post *Microsoft* guidelines on competition law, IP and compulsory access.

While the Guidelines possess robust restrictions on IP licensing, they also contain fairly clear safe harbor provisions. They provide for safe harbor immunity from prosecution for firms below certain market share thresholds and in cases in which the SAIC cannot show that an agreement actually adversely impacts competition. The safe harbor thresholds differ according to the nature of the relationship between the IP rights holder and the licensee. For horizontal agreements (i.e., with competitors), the safe harbor applies where the combined market share of the firms involved is less than 20%, or where there are at least four additional firms with IP that is a close substitute (Article 5).²⁰ For vertical agreements (such as with a supplier or customer), the applicable safe harbor threshold is 30% market share per firm, or the existence of at least two alternative firms with IP rights that are close substitutes.²¹ Though not completely identical these safe harbors bear a strong resemblance to existing exemptions in EU competition law.²²

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²⁰*Id.* (Article 5).

²¹*Id.*

²²See COMMISSION REGULATION (EU) No 330/2010 of 20 April 2010, on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, p.102 (listing 30% threshold for safe harbor), available at http://ec.europa.eu/competition/antitrust/legislation/handbook_vol_2_en.pdf (last visited Jul. 20, 2014). Compare *East Jefferson Hospital*, __ U.S. __, __ (1984) (concluding 30% and below is not sufficient share to apply quasi per se rule against vertical restraint of tying under U.S. antitrust law).

Even before the Guidelines are adopted as formal regulations, let alone applied, American observers are concerned about the tension that they create with existing U.S. antitrust law, as well as intellectual property policies that militate for more *lenient* treatment of IP and technologically heavy industries.²³ Such concern is not unjustified, and what little case law exists suggests that Chinese courts might be receptive to essential facilities arguments.

C. The *Huawei* Case

In the recent private case *Huawei v. InterDigital*, recent rulings of the Shenzhen Intermediate People's Court and the Guangdong Higher People's Court have dealt with important issue at the intersection of IP and competition law. Additionally, the nature of the case – which focused on the enforcement of standard essential patents – directly implicates the question of how Chinese competition law will deal with essential facilities arguments. As the Guidelines suggest, Chinese competition law in this area represents an attempt to harmonize concerns about abuse of IP rights by dominant firms with a desire not to thwart IP licensing where adverse effects on competition are not a concern. In this regard, the Guidelines seek to accommodate concerns familiar to U.S. and EU policymakers and lawyers. However, some observers of this case suggest that China's interest in preventing its

²³See, e.g., *United States v. Microsoft*, __ F.3d __, __ (en banc) (adopting a more lenient approach towards technologically changing industries in applying antitrust law prohibition against vertical restraint of tying).

economic development from being stifled by IP-related barriers represents a “China-specific” interest in this area.²⁴

The *Huawei* case involved two separate complaints filed by plaintiff Huawei against defendant InterDigital on December 5, 2011 before the Shenzhen Intermediate People’s Court for: (1) abuse of dominant position violating the AML, and (2) failure to negotiate and license SEPs for 2G, 3G, and 4G telecommunications technologies on FRAND terms. On February 4, 2013, the court issued its judgment in the FRAND case; given an overall consideration of the patents’ essentiality, relevant licenses in the same industry, and the market share of the patents in China, the court required InterDigital to license at an appropriate royalty that it determined.²⁵ In doing so, the court concluded that this form of compulsory licensing was required by Article 4 of China’s General Principles of the Civil Law and Articles 5 and 6 of China’s Contract Law.²⁶ That same month, the court issued its ruling in the abuse of dominance claim, concluding that InterDigital had abused its dominant market position and thus violated the AML by tying its SEPs with non-SEPs during licensing negotiations and by also trying to get an injunction against

²⁴See Michael Han and Kexin Li, *Huawei v. InterDigital: China at the Crossroads of Antitrust and Intellectual Property, Competition and Innovation*, __ Competition Pol’y Int’l __ (2013) (describing “the encouragement of indigenous innovation and the government’s efforts to help Chinese companies to get around the perceived technology barriers (often in the form of industry standards) set by foreign companies” as a “China-specific consideration”), available at <https://www.competitionpolicyinternational.com/assets/Uploads/AsiaNovember3.pdf> (last visited Jul. 23, 2014).

²⁵See Yanbei Meng, *The Shenzhen Intermediate Court decides that a telecom company abused its patents rights by requiring to pay excessive royalties for essential patents for mobile telephone technology* (*Huawei v. America IDC*), e-Competitions, No. 53999, www.concurrences.com.

²⁶*Id.*, p. 2.

Huawei in U.S. Court while at the same time negotiating with Huawei to accept unreasonable licensing terms.²⁷

The *Huawei* case, subsequently affirmed on appeal,²⁸ illustrates several interesting features of Chinese law regarding these issues. First, while an adverse effect on competition may make application of the AML likely, it is not necessarily inevitable; other legal provisions regarding the abuse of rights and need to protect overall social benefits may be called upon, as was done in the *Huawei* case.²⁹ Second, even though there was no authoritative definition of a standard essential patent under Chinese law, the court was able to come to a conclusion by drawing on its assessment of the SEP's replaceability, as well as the power of the rights holder to control prices, outputs or transaction terms.³⁰ Finally, because it was a notable case issued while the Guidelines were considered and drafted, thoughts and discussion about the *Huawei* case provided an anchoring example and highly relevant suggestions for improving those Guidelines.³¹

²⁷See Han and Li, *supra* n.[] (describing case, which does not have published opinion, based on subsequent description of ruling in journal article written by three of the court's judges).

²⁸See You Yunting, *The Antimonopoly Judgment's Digest of Huawei v. InterDigital*, Apr. 30, 2014 (describing substantial affirmance of the judgment), available at <http://www.chinaplalwyer.com/anti-monopoly-judgments-digest-huawei-vs-interdigital-china-courts/> (last visited Jul. 24, 2014). The appeals courts' rulings, in Chinese, are available <http://www.gdcourts.gov.cn/gdcourt/front!content.action?lmdm=LM43&gjid=20140417030902158689> (antimonopoly law ruling) and <http://www.gdcourts.gov.cn/gdcourt/front!content.action?lmdm=LM43&gjid=20140417024309113155> (FRAND ruling).

²⁹Meng, *supra* n.[] at p. 5.

³⁰*Id.*, p. 6.

³¹*Id.*, p. 7.

II. The View from the United States: Doubting Essential Facilities

The SAIC Guidelines take an approach that is, to put it mildly, in some tension with current U.S. views about the wisdom essential facilities doctrine in general. Additionally, recent U.S. cases cast a critical eye at use of the essential facilities doctrine to leverage competition concerns to advocate for compulsory licensing of intellectual property. Indeed, the Guidelines resemble mid-20th century antitrust policies towards IP from which the U.S. antitrust community now mostly distances itself. Even in the context of standard-setting and standard-essential patents, which seem the most appropriate for the application of essential facilities to IP, antitrust-based action in the U.S. has faced significant roadblocks.

The essential facilities doctrine in the United States has been substantially undercut over the past decade through Supreme Court and appeals court rulings. This is due in part to the ascendance of a series of doubts put forth most notably a quarter-century ago by the late Phillip Areeda.³² That article focused the origin of the doctrine in cases such as *Terminal Railroad* and *Associated Press*, in which groups of cooperating competitors in possession of an effective industry bottleneck were compelled to deal with excluded competing firms.³³ Tracing the doctrine to more recent cases, including those dealing with single-firm conduct, Areeda concluded by setting forth six limiting principles, including two that are particularly relevant to IP and standard-setting, specifically that “[n]o one should be forced to deal unless doing so is likely substantially to improve competition in the

³²Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles* (1989)

³³*United States v. Terminal R.R. Ass’n*, 224 U.S. 383 (1912); *Assoc. Press v. United States*, 326 U.S. 1 (1945).

marketplace by reducing price or by increasing output or innovation” and that “[n]o court should impose a duty to deal that it cannot explain or adequately and reasonably supervise.”³⁴

Notably, Areeda’s focus was on the role of essential facilities doctrine in imposing on dominant firms a “duty to deal” with their competitors. While Areeda was not focused on using essential facilities doctrine to compel licenses of IP with downstream firms – not direct competitors – later competition law and intellectual rights scholars have extended his criticisms; such criticisms have gone beyond a call for limiting principles to a call for abolition.³⁵ Moreover, the Supreme Court has embraced Areeda’s doubts, most clearly in its *Trinko* and *linkLine* opinions. In those cases, the Court has, respectively, questioned in dicta whether the doctrine is valid and clarified that where there is no duty to deal, there is also no duty to offer reasonable terms or prices.³⁶

To American lawyers, the Chinese guidelines resemble past American approaches to IP,³⁷ such as the famous “Nine No-Nos” of the pre-Chicago school

³⁴Areeda, *supra* n.32 at 852.

³⁵See, e.g., Bruce Kobayashi and Joshua Wright, *Intellectual Property and Standard Setting*; Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* (West 2011) at 336 (concluding that “[t]he antitrust world would almost certainly be a better place if it were jettisoned, with a little fine tuning of the general doctrine of refusal to deal to fill any gaps”) [insert rest of laundry list here]

³⁶*Trinko* at 410-11 (stating that “where access exists, the doctrine serves no purpose”); *Pac. Bell v. linkLine*, 555 U.S. 438, 449 (2009). See also Herbert Hovenkamp, *The Antitrust Enterprise*, 248 (2005) (stating that “*Trinko* may effectively have brought the era of antitrust essential facility claims [under U.S. law] to an end”).

³⁷See, e.g., Alden Abbott, *Need for Chinese Antitrust Reform (and IP and Price-Related Concerns) Spotlighted at ABA Beijing Conference*, May 28, 2014 (describing former FTC official as stating that “[S]AIC Director General Ren Airong (responsible for AML non-merger enforcement not directly involving price) [presented] on a panel

era.³⁸ While they are now considered an example of regulatory overreach, these principles were then conventional wisdom for antitrust regulators dealing with IP licensing. Among the prohibitions were included “requiring a licensee to buy unpatented materials from the licensor,” “requiring the licensee to assign to the patentee any patent that may be issued to the licensee,” and “requiring the licensee to pay royalties . . . in an amount not reasonably related to the licensee’s sale of products covered by the patent.”³⁹ Such blanket prohibitions have been called into question by scholarship and related cases that adopt a more benign view of the use of patents to tie other products (e.g., *Illinois Tool*), by a broader understanding of the role of grants of reciprocal licenses in standard-setting, and by deep concerns about judicial oversight of pricing and royalties.⁴⁰

discussing abuse of dominance and the antitrust-IP interface . . . [and] revealed that key patents (and, in particular, patents that “read on” and are necessary to practice a standard, or “standard essential patents”) may well be deemed “necessary” or “essential” facilities under the final version of the proposed [SAIC Guidelines]”; former FTC official decrying “implementation of this requirement [as] mean[ing] that foreign patent holders would have to grant licenses to third parties under unfavorable government-set terms – a recipe for disincentivizing future R&D investments and technological improvements and “point[ing] out that the “essential facilities” doctrine has been largely discredited by leading American antitrust scholars”), available at <http://truthonthemarket.com/category/antitrust/essential-facilities/> (blog post), *last visited* Jul. 23, 2014.

³⁸Bruce Wilson, Remarks Before Michigan State Bar Antitrust Law Section and Patent, Trademark and Copyright Law Section (Sept. 21, 1972), *reprinted in* Trade Reg. Rep. (CCH) ¶ 50, 146 (remarks by head of DOJ antitrust division).

³⁹*Id.* Others echoed concerns about these practices. *See, e.g.,* William F. Baxter, *Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis*, 76 Yale L. J. 267 (1966) (suggesting “prohibition of royalty structures . . . that increase as licensee sales increase”).

⁴⁰*See, e.g., linkLine* at 749 (warning that “[c]ourts are ill suited ‘to act as central planners, identifying the proper price, quantity, and other terms of dealing’”) (quoting *Trinko*).

Moreover, the single area in which application of the essential facilities doctrine might seem most warranted, that of standards-setting and standard-essential patents, has recently been a rocky path for antitrust enforcers. The Federal Trade Commission's defeat in *Rambus* led to concern that antitrust enforcers would no longer be able to play a strong role in addressing competition concerns in this area.⁴¹ That debate is too recent to be completely resolved; those involved will likely view China's embrace of regulation in this area with keen interest.

III. A Rocky Path Ahead?

The potential Chinese adoption of the essential facilities doctrine for IP licensing creates several possibilities between the approach the SAIC is likely to take, and the way in which U.S. courts and enforcement agencies deal with similar single-firm conduct under the Sherman Act. First, while U.S. courts have worried about the ongoing supervisory duties that an embrace of the essential facilities doctrine might impose upon them, the *Huawei* case involved a Chinese court engaging in such rate-setting. Second, the stepwise approach that U.S. institutions take towards monopolization involving an IP essential facility seems more forgiving

⁴¹See Norman Hardee, *Single Firm Opportunism and the FTC's Rambus Defeat*, 18 Tex. Intell. Prop. L. J. 97, 98 (2009) (DOJ attorney writing that the D.C. Circuit's decision "throws into doubt the circumstances in which antitrust provides a remedy for opportunistic single-firm conduct in the standard-setting process"). But see Richard Dagen, *Rambus, Innovation Efficiency and Section 5 of the FTC Act*, 90 B.U. L. Rev. 1479, 1541 (2010) (defending the FTC's future ability to "craft a clear standard" for and avoid "chilling procompetitive conduct" in standard setting).

to IP rights holders than that the SAIC appears poised to take. Finally, and perhaps most fundamentally, the SAIC guidelines represent a special concern with abuse of IP rights as a competitive problem; this contrasts with a U.S. view that has often seen IP rights as uniquely deserving more accommodating treatment from antitrust law because of the incentivizing role IP rights play in promoting consumer welfare.

First, in contrast to American courts, the *Huawei* case suggests that Chinese courts take a different view of being involved in price regulation or ongoing supervision. Perhaps the most prominent institutional criticism of essential facilities doctrine in the United States, most famously voiced by Justice Scalia in *Trinko*, is that no court should impose a duty to deal that it cannot “adequately and reasonably supervise”⁴² In particular, American critics have pointed to courts’ need to regulate – and poor suitability for regulating – the price of a compelled license as reason to reject essential facilities doctrine completely.⁴³ But by contrast, the Chinese courts in *Huawei* did not hesitate to set a price for the compulsory license at issue; they set that price and then ordered it obeyed and kept sealed as a trade secret.⁴⁴

Second, the SAIC’s standards for inferring a competitive problem tends to invert that of its U.S. counterparts. For example, the U.S. approach asks first whether there is monopoly power, then asks whether there is unjustified exclusionary conduct, and if so, whether it is on balance anticompetitive. The

⁴²*Trinko* at __.

⁴³See George Hay, *Trinko: Going All the Way*, 50 Antitrust Bull. 527, 539 (2005); *DOJ Section 2 Report*, Chapter 7 (worrying that “courts would have to engage in price regulation”) (since withdrawn by DOJ).

⁴⁴See *Huawei*, *supra* n.[].

existence of an essential facility is a consideration in this inquiry, but does not drive the inquiry directly. By contrast, the approach the SAIC seems to be leaning towards uses the existence of an essential facility – e.g., a dominant standard or a standard-essential patent – from which to infer a dominant market position. At that point, the question turns to whether that essential facility has been “abused,” in the sense of a refusal to deal or the use of discriminatory terms, and if so, whether those practices are reasonable. All things being equal, the SAIC approach seems more likely to yield compulsory licensing as a result.

Finally, in contrast to U.S. courts and policymakers, the SAIC Guidelines represent a *less* favorable competition law view of IP in general. In particular, a dominant substantive critique of essential facilities doctrine in the United States is that, allegedly, “[p]articularly in capital intensive or high technology fields, the uncertainty caused by intrusive liability rules will retard desirable investment.”⁴⁵ This view suggests that, more than industries such as the former government sponsored and regulated monopolies (such as the U.S. phone system in *Trinko*), IP is a particularly poor fit for the application of the essential facilities doctrine. In contrast, with the SAIC guidelines, China’s competition enforcers have singled out IP, standard-setting and standard essential patents for particular attention. Particularly given the greater likelihood that Chinese firms will be the licensees of American licensors, this may tend to create significant tension between the trading partners, their governments, and their lawyers.

⁴⁵R. Hewitt Pate,
http://www.justice.gov/atr/public/hearings/single_firm/docs/218649.htm
(testimony by former head of DOJ antitrust division).

IV. Conclusion

Despite U.S. unease, the latest iteration of the draft SAIC Guidelines on the treatment of IP rights under the AML did not contain major surprises. After years of drafting and consideration, they have taken on a more final form. Together with the *Huawei* case, they suggest that China may take a somewhat different approach to IP rights and competition law than the U.S. has, and that that difference may be particularly pronounced in dealing with essential facilities.

However, it would be premature to decry this as fundamentally mistaken. China's embrace of the essential facilities doctrine stems from real concerns about the impact of IP rights abuse on social welfare, particularly on the potential impact to further economic development. To the extent that this view is correct, not only China, but also her trading partners, stand to benefit from continued robust growth and development.