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Competition Law in China: Technical Standards and Intellectual Property

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IPR/Standard and Comp. Policy in China

- IP as a concept started in early 1980s
- IP started to be linked with competition in early 1990s, mainly from a fairness point of view (1993 Anti-Unfair Competition Law)
- Increasing concerns over the alleged abuse of IP since early 2000s (esp. the DVD patent royalty incident in 2002);
- Recognition of technical standard as a source of competitiveness and a source of market power only in recent years
- Calls for competition law as a remedy

Policy Responses

- China's proposal to the WTO regarding standard/IPR and trade barriers (2005 MOFCOM)
- Third revision of China's 1984 Patent Law
 - Main reasons include (SIPO, March 2005)
 - To regulate abuse of IPR
 - To better balance public interest and the interest of IP owner in the case of standard.
- Introduction of Anti-monopoly Law

Objectives of 2007 Anti-Monopoly Law

- To prevent and prohibit monopolization
- To safeguard fair competition
- To raise economic efficiency
- To protect consumers welfare and public interest

-- Article 1 of AML

China's Anti-Monopoly Law

- Exemption under 2007 China's AML (Article 15)
 - Horizontal agreements among competitors for the purpose of "... setting standards" are exempted from provisions governing price-fixing.
 - This provision was absent in previous drafts of AML.
 - The scope of exemption is not clear.

- The Anti-Monopoly Law prohibits abuse of IPR that restricts competition (Article 55).

- China is yet to set up specific competition guidelines regarding IPR and standard setting.

Competition Effects of Standard Setting

- Standards setting leads to “network effect”.
- Pro-competitive effects:
 - Allows products supplied by different firms to interoperate, making them more valuable to consumers.
 - Technology interoperability produces efficiencies, leading to cost reduction, increased innovation and output, and the provision of new services..
 - Increase price competition (because standard technologies and products can be more readily compared and contrasted).

Competition Effects of Standard Setting

- Potential anti-competitive effects:
 - As a device for price-fixing:

A standard setting effort could be used as a mechanism for competitors to fix prices (or boycott a competing firm or technology)

 - The “hold –up” problem:

The potential for an IP owner to “hold up” other members of a SS organization after the standard has been set.

The Hold-Up Problem in Standard Setting

- Ex ante technologies compete to be the standard, and no patent holder can demand more than a competitive royalty rate.
- After lock in (or ex post), the owner of the chosen technology may have the power to charge users supra-competitive royalty rates, which may ultimately be passed on to consumers.
- The ability of a patent holder to charge a high royalty rate may result from reduction in competition after lock in.

The Hold-Up Problem in Standard Setting

- SSOs have employed a variety of tools to prevent their members from being held up.
 - Patent disclosure before a standard is set
 - IP licensing agreements under RAND terms.
 - Agreements on RAND rates can be vague and thus may not fully protect industry participants from the risk of hold up.
 - Consequently, some suggested stating the intended royalty rates before the standard is set. If so, price would become part of the competition to become the standard .

The Hold-Up Problem in Standard Setting

- Some even proposed *joint* ex ante royalty discussion whereby SSO members collectively discuss before lock in- a royalty rate (or at least a maximum rate) for incorporated technology.

(See, e.g., Robert A. Skitol, 2005).

- However, such ex ante joint discussions may raise antitrust concerns (for price-fixing).

The Hold-Up Problem in Standard Setting

- Some SSOs expressly forbid discussions of the license terms beyond the vague requirement that they be “reasonable”.

(Robert A. Skitol, 2005, and Mark A. Lemley, 2002).

- Also, joint ex ante discussion may result in lower royalty rate, because of the “buyer bargaining powers”.

(Deborah Platt Majoras, 2005).

Treatment of Royalty Negotiations under Competition Law

- A Trade-off
 - Too high royalty rates may limit competition and may translate into high prices to consumers;
 - Too low royalty rates may hinder innovation incentives.
 - The “rule of reason” approach has been recommended towards ex ante joint negotiations in the US (Anti-trust Modernization Committee, 2007)

Patent Pools

- Pro-competitive effects
 - Eliminating the problem of multiple blocking positions
 - Reducing transaction costs
 - Facilitating integration of complementary technologies
- Anti-competitive effects
 - As a device for collusion (price cartel)
 - Can reduce competition if pools include patents that otherwise would compete for licensees.
 - Entrenchment of a dominant technology by discouraging new R&D.

Patent Pools

- Insight from economic analysis
 - A “rule of reason” analysis (as opposed to per se illegal) should be adopted.
 - Pools of complementary patents tend to lower prices and hence should be allowed.
 - Pools of substituting patents tend to raise prices and hence should be banned.
 - Safeguard against downstream coordination
 - Limiting the scope of “grant backs”.

Difference between competition policy and industrial policy

- Standard setting and/or patent pools can promote competition and innovation.
- Competition policy protects competition, not competitors.
- Industrial policy focuses more on supporting certain (selected) competitors and making them more competitive vis-à-vis other firms.

Trade-Offs for China in Policy Design

- The balance between IP holders and the public interest
- The balance between maintaining post-innovation competition and ex ante incentive for R&D (dynamic efficiency consideration)
- The balance between international technology transfer and promotion of domestic R&D.
- The balance between efficiency and fairness

-Thank you-

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