

China's IP Abuse Rule: Another approach to protecting the public domain

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Background: IPR vs. Public Domain

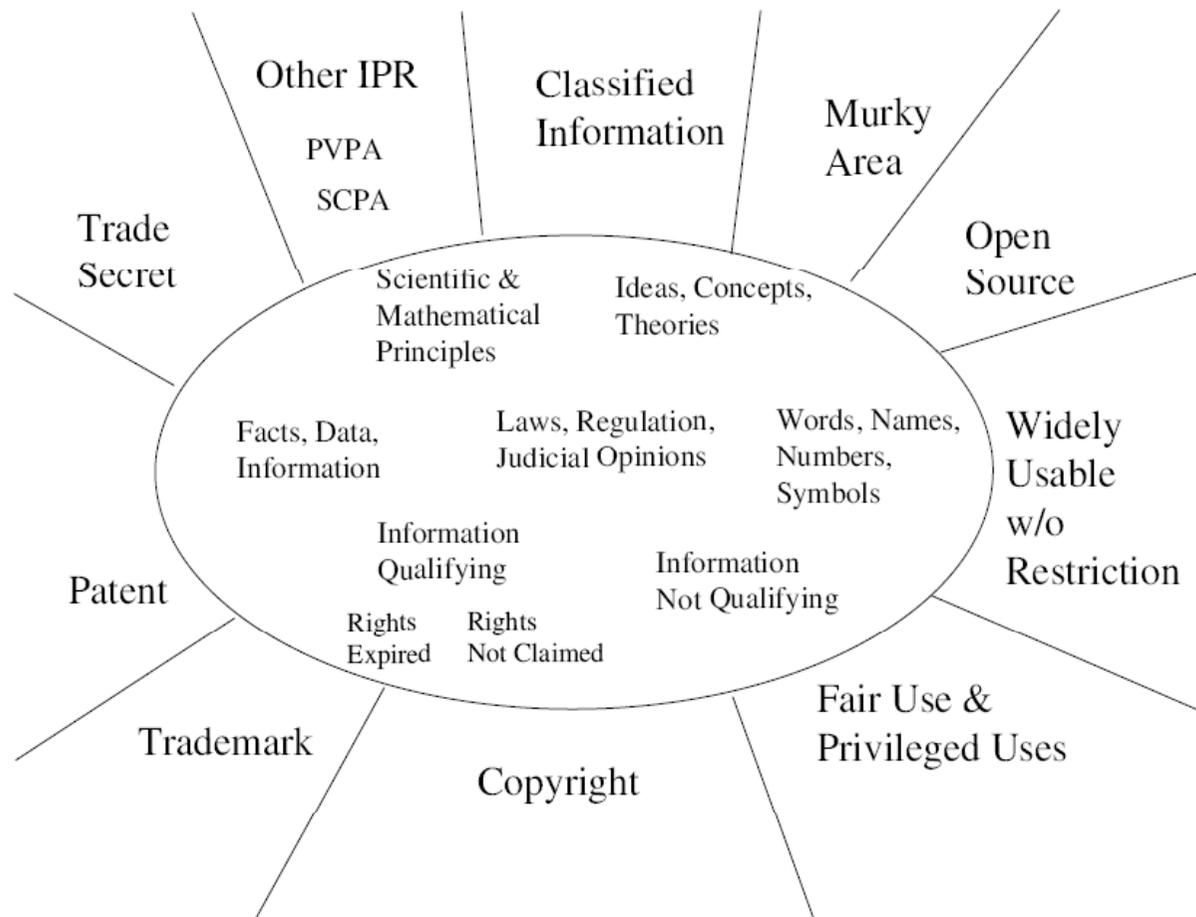
- The interrelation between **IPRs** and **Public Domain** has become one of important issues in the international IP debate for many years.
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- Professor Caenegem in his article ‘the Public Domain: Scientia Nullius’ made a sound and brief summary of roles of knowledge, IP and public domain, and stated:
 - ... the subject-matter of *intellectual property law* is *knowledge* in its various forms. It is suggested that the essence of *intellectual property law* is not to determine which *knowledge* is available for appropriation, but to identify which *knowledge* cannot be appropriated. From this perspective, the notion of the "*public domain*" in fact operates to deny claims to control certain forms of human knowledge...
- - Caenegem, William Van. ‘the Public Domain: Scientia Nullius’ in 3 *European Intellectual Property Review* 2002, 24(6), 324-330, 324.

IPR vs PD: Innovation, Competition & Consumer Protection



- Source: swiss-copyright.ch
- In the current IP expansion environment, a sound balance of IPR and public domain is particularly important to protect innovation, fair competition and consumer welfare.

A Map of the Public Domain – Complexity



- Samuelson, Pamela. MAPPING THE DIGITAL PUBLIC DOMAIN: THREATS AND OPPORTUNITIES, *66 Law & Contemp. Probs.* 147 (Winter/Spring 2003)

Background: IPR vs. Public Domain

- It is common to think of information resources fall into **two binary opposite categories** - either **IP-protected** or **public domain**, and either accessible to the public or not.
- But the reality is **much more complex** than this.
- As Professor William Van Caenegem pointed out,
 - ‘determining the ideal size of a "healthy" public domain, and by inference, the scope of IPRs, is a **conceptually, analytically and empirically challenging task**’, and
 - ‘there is **no simple linear relationship** between the scope of IPRs and the size of the public domain’.
- In 2006, Professor Pamela Samuelson examined **thirteen conceptions** of the **public** domain in various law reviews, and came to a **same conclusion**
 - ‘the public domain literature views ‘the concepts of IPR and public domain **not as binary opposites, but rather as points along a continuum**’.

Background: IPR vs. Public Domain

- **Instead of focusing on** how to draw a clear line between the public domain and IPR
- this paper will **focus on**
 - how to use existing **legal instruments** (particularly **non-IP law instruments**) to restrict the **activities** of IPR holders in **abusing IPR** to jeopardize **public domain** and **consumer rights**,
 - such as **monopolistic activities** and **misuse** of **technology transfer licensing arrangements**.
 - Will focus on **recent development** of **IP abuse laws** in China
 - Particularly, the IP provision in the Chinese Antimonopoly law

Structure of Today's Presentation

- Key Issues in Today's Presentation
 - 1. Requirement of TRIPS on IP abuse
 - 2. Recent Development of IP Abuse and Technology Transfer Laws in China
 - 2.1. Non-AML Law
 - 2.2. AML and Its IP Provision
 - 3. Potential Problems IP Abuse laws in China – Art 55 of AML
 - 4. Risk vs Opportunity: Strategies for Different Stakeholders (public consumers, SMEs, foreign competitors, IP giants)
 - 5. Conclusion

1. Requirement under TRIPS & Major Forms of IP Abuse

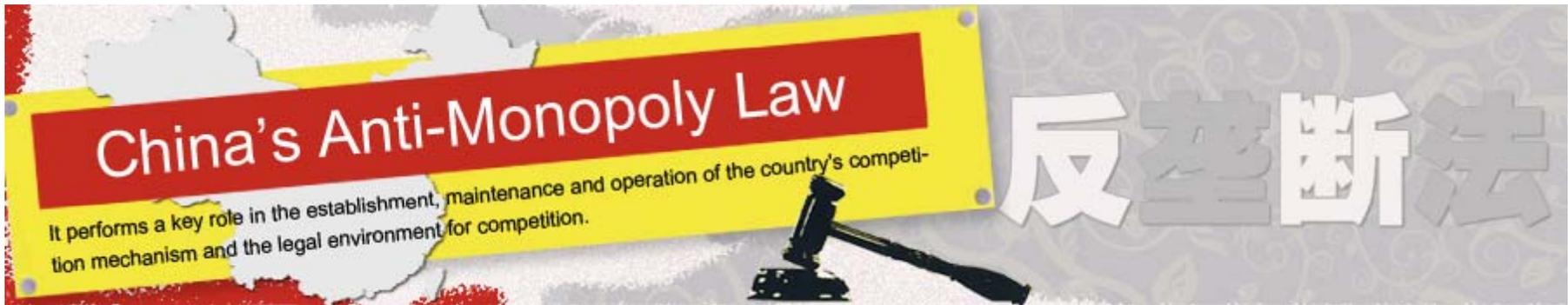
- The ‘abuse of Intellectual Property’ is **not a new terminology**.
- Article 8 of the *TRIPS Agreement 1994* explicitly provides:
 - **Appropriate measures**, provided that they are consistent with the provisions of this Agreement, **may be needed to prevent the *abuse of intellectual property rights* by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international *transfer of technology*.**
- It is clear that this article allows member states to **adopt**
 - **any measures they think appropriate to prohibit IPR abuse and**
 - **any other conduct that may unreasonably restrain trade or international technology transfer.**
- As a United Nations study has pointed out, Art 8 to a large extent reflects the **view of many developing countries**, such as India, during the **Uruguay Round negotiations**, that a ‘**main objective of TRIPS should be to provide mechanisms to *restrain competitive abuses* brought about by reliance on *IPR protection*’.**

2. IP Abuse Rules in China

- 2.1. Prior to AML
 - Contract Law
 - Foreign Trade Law
 - Anti-unfair competition Law
 - Patent law
- 2.2. AML – one of core components of the Chinese IP Abuse Rules
 - 2.2.1. Structure of AML
 - 2.2.2. Purpose of AML
 - 2.2.3. Enforcement Agency
 - 2.2.4. General Prohibition
 - 2.2.5. IP Provision – Art 55

2. IP Abuse Rules in China

(1)	<i>Contract Law 1999</i>	Articles 329 and 343	three general prohibitions for IP abuse in technological contracts
	<i>Interpretation of the Supreme People's Court concerning Some Issues on Application of Law for the Trial of Cases on Disputes over Technology Contracts 2005,</i>	Article 10	Interpretation of Art 329 of <i>the Contract Law 1999</i> (on the determination of technology monopoly and impairing scientific progress)
(2)	<i>Foreign Trade Law 2004</i>	Articles 30 and 32	three types/forms of IP abuse activities by IPR holders
	<i>The Regulations on Administration of Import and Export of Technologies 2002</i>	Article 29	Listing the clauses limiting the rights of technology accepters which should not be included in the technology contract.
(3)	<i>Anti-unfair Competition Law 1993</i>	Article 12	Prohibition on tying and bundling
(4)	<i>Patent Law 2000 Amendment 2009</i>	Articles 48 and 49	Provisions on compulsory licensing
(5)	<i>Antimonopoly law 2008 (AML)</i>	Chap II & III, Art 55	Prohibitions on monopolistic agreements, dominant position, and IP Abuse.



2.2. Background of AML

- After 13 years of discussion and three revisions, China's *Anti-Monopoly Law (AML)* was promulgated on 30 August 2007 and has come into effect on 1 August last year.
- It is the *first anti-monopoly law* in China. It is also the first law that includes a special provision on 'IP abuse'.
- **However**, the *wording* of some provisions of the AML, including the sections dealing with IP protection, is quite *vague*.
- Juridical interpretations and more specific implementing regulations on the AML have *not appeared yet*.
- This has arguably led to a lot of *uncertainty* for the operations of foreign enterprises, particularly IP related enterprises in China.

2.2.1. Structure of AML

- The AML includes 8 chapters and 57 articles
- Chapter I - General Provisions
- Chapter II - Monopoly Agreements
- Chapter III - Abuse of Dominant Market Position
- Chapter IV - Concentration
- Chapter V - Prohibition of Abuse of Administrative Powers to Restrict Competition
- Chapter VI - Investigation of Suspicious Monopoly Behaviours
- Chapter VII - Legal Liability
- Chapter VIII - Supplementary Provisions

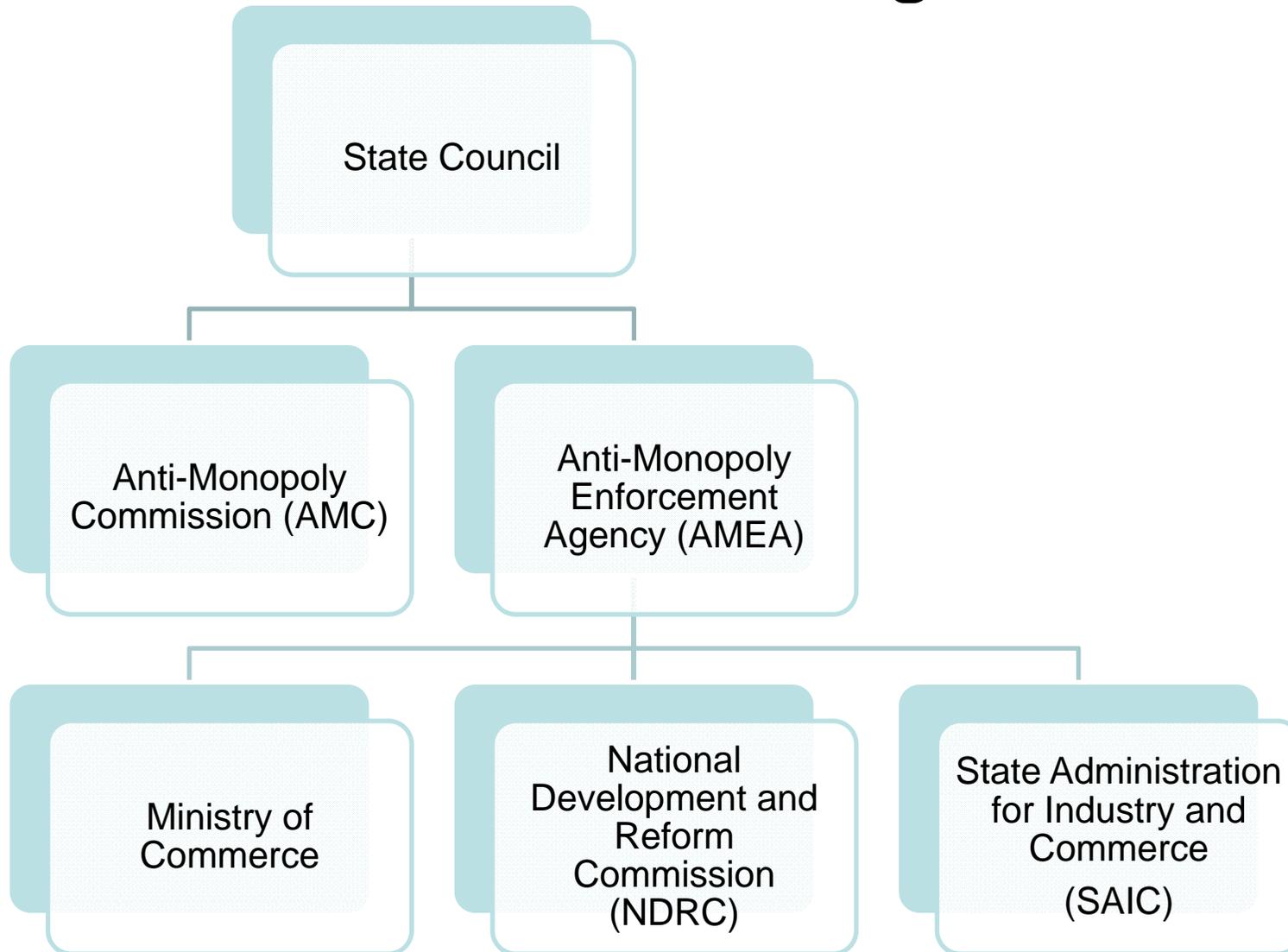
2.2.2. Purposes of AML (Chap I)

- Chapter I - General Provisions
- **Article 1** of the AML sets out the purposes of the law.
- They may be summarized as:
 - (1) preventing and prohibiting **monopolistic conducts**,
 - (2) protecting **fair market competition**,
 - (3) improving **efficiency** of economic operation,
 - (4) safeguarding **consumer** and **public interests**, and
 - (5) promoting the healthy development of the **socialist market economy**.
- AML's **legislative purposes are similar with competition law around the world**.
- Asides from the choice of nomenclature in the last provision **none of these** would be **out of place** of in a competition statute **outside of China**.

2.2.3. Enforcement Agencies - AMC

- Regarding enforcement, the AML specifies that the State Council shall create two new entities to develop and enforce the law; namely
 - (1) Anti-Monopoly Commission (Art 9)
 - (2) Anti-Monopoly Enforcement Agency (Art 10).
- The [Anti-Monopoly Commission \(AMC\)](#) does not have substantive enforcement powers. Its responsibilities mainly include: [formulating competition policies and guidelines](#), evaluating competition condition, and coordinating enforcement activities.
- The State Council of China has already established an AMC at the end of July 2008 - one week before the AML took into effect.

2.2.3. Enforcement Agencies



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2.2.3. Enforcement Agencies - AMEA

- The AMEA has **broad powers to inspect and investigate** business and non-business premises in order to obtain relevant evidence. It can seize files and records, including documents, accounting records and electronic data. **It may even access bank account records without a court order.**
- However, the structure of the **Anti-monopoly Enforcement Authority (AMEA)** is **not yet clear** in the AML, nor is the relationship between them and industry specific regulators.
- According to the source close to the law-making process, **several** government agencies, rather than a **single** body, will be responsible for enforcing the law.
- **Three** government bodies
 - the Ministry of Commerce,
 - the central planning agency National Development and Reform Commission (NDRC) and
 - State Administration for Industry and Commerce (SAIC)
- will enforce the law.

2.2.3. Enforcement of AML: Trinity Model of AMEA

- They focus on different issues respectively. Under the new structure:
 - the MOFCOM is responsible for merger review.
 - The NDRC is responsible for monopoly agreements, particularly price-fixing issue.
 - The SAIC is responsible for abuses of dominant position.
- It would be interesting to see how this trinity model work.
- Overlaps ??
- Some commentators have expressed their concerns on the potential problems of the new *trinity structures*, and believe that the trinity enforcement model '*creates a complicated institutional framework where conflicts are probable*'.

2.2.3. Enforcement of AML: IP Court

- Jurisdiction of IP Courts
 - On 31 July 2008, China announced that its specialist IP courts would have jurisdiction of anti-monopoly law cases.
 - These courts are likely to be better equipped in dealing with complex economic concepts under competition law than China's general judiciary.

2.2.4. Comparison with EU Law: General Prohibitions & Exemptions

- Like the counterparts of *the EC Treaty of Rome (EC Treaty)*, the **AML** contains **three general prohibitions**:
 - a prohibition on “**monopolistic**” (anti-competition) agreement, including agreements, decisions and other concerted actions that exclude or restrict competition, subject to a number of exceptions relating to the purposes of the agreement (**Chapter II**);
 - a prohibition on the **abuse of a dominant market position**, subject to the existence of “valid reasons” in certain circumstances (**Chapter III**).
 - **Chapter IV** focuses on ‘**concentration activities**’.
- Moreover, the AML provides a number of **exceptions** relating to the purposes of the **agreements**.
- The structure is quite similar with the Counterparts of *EC Treaty*

2.2.5. IP Provision: Art 55

- Unlike the EC Treaty, in addition to the above general prohibitions, the AML also contains a specific provision (article 55) relating to IP.
- Article 55 provides:
 - ‘This Law is **not applicable to** the undertakings which use intellectual property rights according to the laws and administrative regulations relevant to intellectual property, **but is applicable to** the undertakings which *abuse intellectual property* and *eliminate or restrict market competition*’.
- It has **two-fold** meaning:
 - On the one hand, it recognized legitimate use of IPR. Article 55 implies that the laws governing IPRs are considered to be ‘equivalent in status’ to the AML.
 - On the other hand, the AML does prohibit the abuses of IPRs.
- However, the language of Article 55 is overly general. Neither has it provided a clear definition of the ‘IP abuse’, nor has it detailed potential liability or penalty for IP abuses.

3. Potential Problems of IP Abuse Law – Art 55 of AML

- Art 55 has already been the subject of much debate.
- (1) Scope of Prohibitions vs Test of ‘Dominate Position’
- **Does** art 55 **merely clarify** the application of the Law (including both general prohibitions) to the exercise of IP, or **does** it create a **further, wider prohibition**?
- Some commentators believe that Article 55 may have widened the scope of general prohibitions under the AML, and **extended** the scope of the prohibition on abusing a **dominant market position to** activities that **non-dominant companies** carried out in an IP context.
- Covers both **dominant** and **non-dominant** IP companies

3. Potential Problems of IP Abuse Law – Art 55 of AML

- (1) Scope of Prohibitions vs Test of ‘Dominate Position’
- Using Microsoft’s business operation in China as **an example**, Microsoft often argues that it **does not have the preconditions of monopolistic activities** because ‘*genuine Microsoft products have a very low market share in China*’ due to widespread piracies.
- **However**, once Article 55 is interpreted widely to include non-dominant IP companies, *the ‘test of dominant position’* may become *irrelevant* in determining monopolistic conducts.
- Consequently, the ‘**piracy defence**’ **alone** will **not** be **sufficient** to provide Microsoft with the immunity.

3. Potential Problems of IP Abuse Law

- (2) Potential Impacts on IPR Infringement Proceedings
- A further concern is that domestic IP companies may use Article 55 to restrain foreign IP holders from enforcing their IPRs against their competitors in China.
- IP infringers may be able to avoid or delay infringement actions brought against them in China by using Art 55 as a defence, and
- claim that the bringing of the infringement action against them constitutes an abuse of the relevant IP right or a restriction to market competition.

3. Potential Problems of IP Abuse Law

- (2) Potential Impacts on IPR Infringement Proceedings
- **Art 55 as a Defence for IP Infringement**
- For example, art 55 means that a company that has been accused of patent infringement in China could claim that the patent is preventing competition.
- It could then request the Anti-Monopoly Enforcement Agency (AMEA) to conduct an anti-monopoly investigation – likely a very time-consuming procedure.
- As such, some commentators believe that the enactment of the AML has paved the way for domestic software firms to bring anti-trust lawsuits against foreign software companies for their business practices in China.

3. Potential Problems of IP Abuse Law

- (3) Increases of Potential IP Abuse Lawsuits
- (4) Uncertainty of Trinity Enforcement Model
- (5) Lack of Unified Legal Guideline on IP and Antitrust law

4. Risks vs Opportunities: Strategies for Different Stakeholders

- **4.1. Potential Defence for IP Abuse Claims – IP Giants**
- A. Development Defence
- It is noteworthy that the AML introduced a few exemptions/defences –development defences - for certain agreements which have monopolistic effects.
- One notable caveat in Chapter 2 of the AML is **Article 15**, **authorizing** a competent anti-monopoly **authority** to **approve exemptions** from **Articles 13 and 14** (provisions on prohibition on “monopoly agreement) if certain **monopoly agreements** among the operators **are beneficial to:**

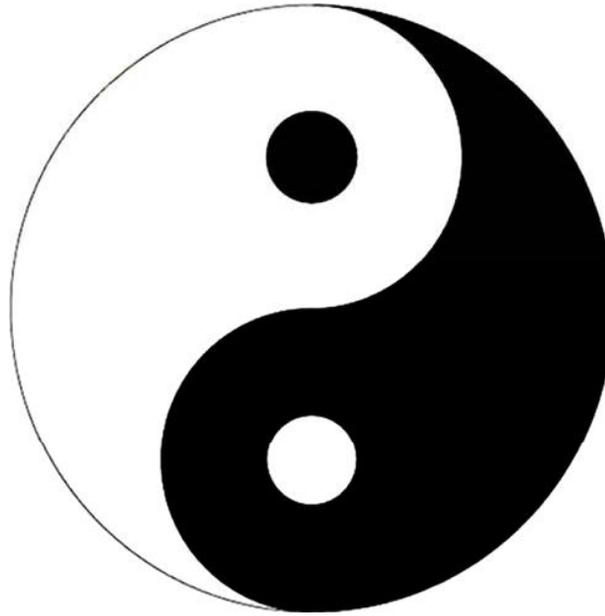
Defence for IP Abuse Claims

- A. Development Defence
 1. to improve **technology** or **research and develop** new products;
 2. to upgrade product quality, reduce costs, improve efficiency, **unify product specifications and standards**, or realize division of work based on specialization;
 3. to **improve operational efficiency** and enhance competitiveness of small and mediumsized undertakings;
 4. to serve **public welfares** such as conserving energies, protecting environment, and providing disaster relieves.
 5. to mitigate serious decrease in sales volume or obviously excessive production during economic recessions;
 6. to safeguard the justifiable interests in the foreign trade or foreign economic cooperation; or
 7. other circumstances as stipulated by laws and the State Council.[\[1\]](#)

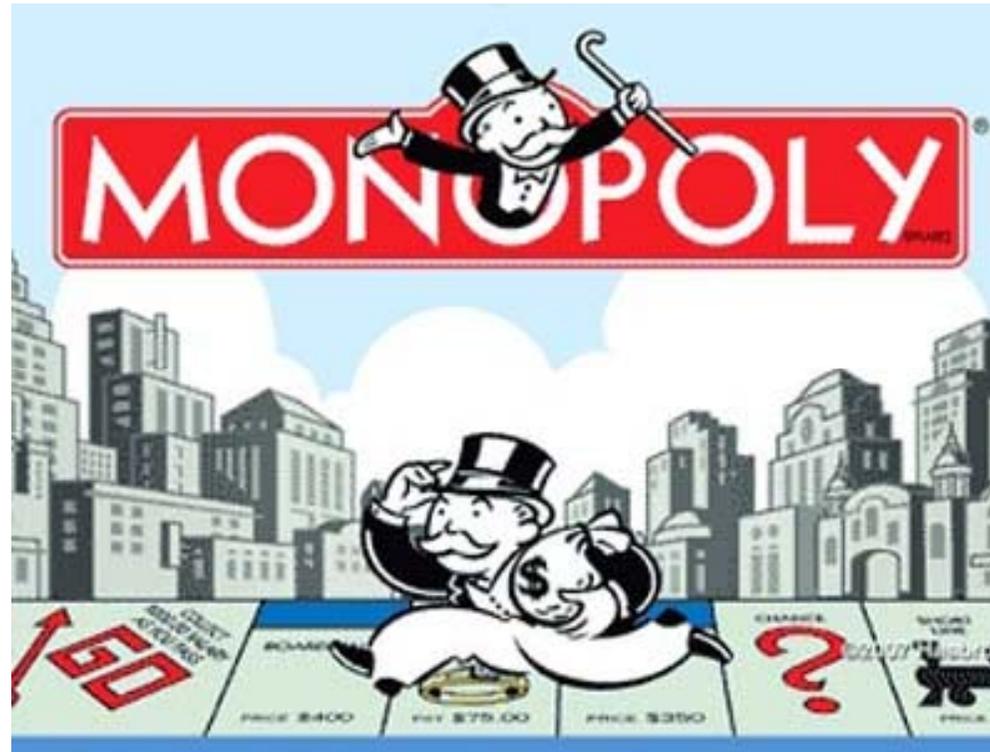
A. Development Defence

- The reality today is that **technology-driven companies**, such as **Microsoft**, **Intel** and **Dell**, are making **huge investments** in China at the moment.
- Therefore, those companies may use Article 15 as potential defence for IP abuse claims against them.
- For example, Microsoft has set up the **China Research & Development Group** in China.
- In November 2008, Microsoft announced that it will invest more than **\$1 billion** on its research and development center in China over the next three years.
- Thus, Microsoft may arguably use **Article 15 (i) as a defence** for any potential IP abuse lawsuits in China, and **claim that** their business operations in China are beneficial to 'improve **technology or research and develop** new products' (Article 15 (i)).

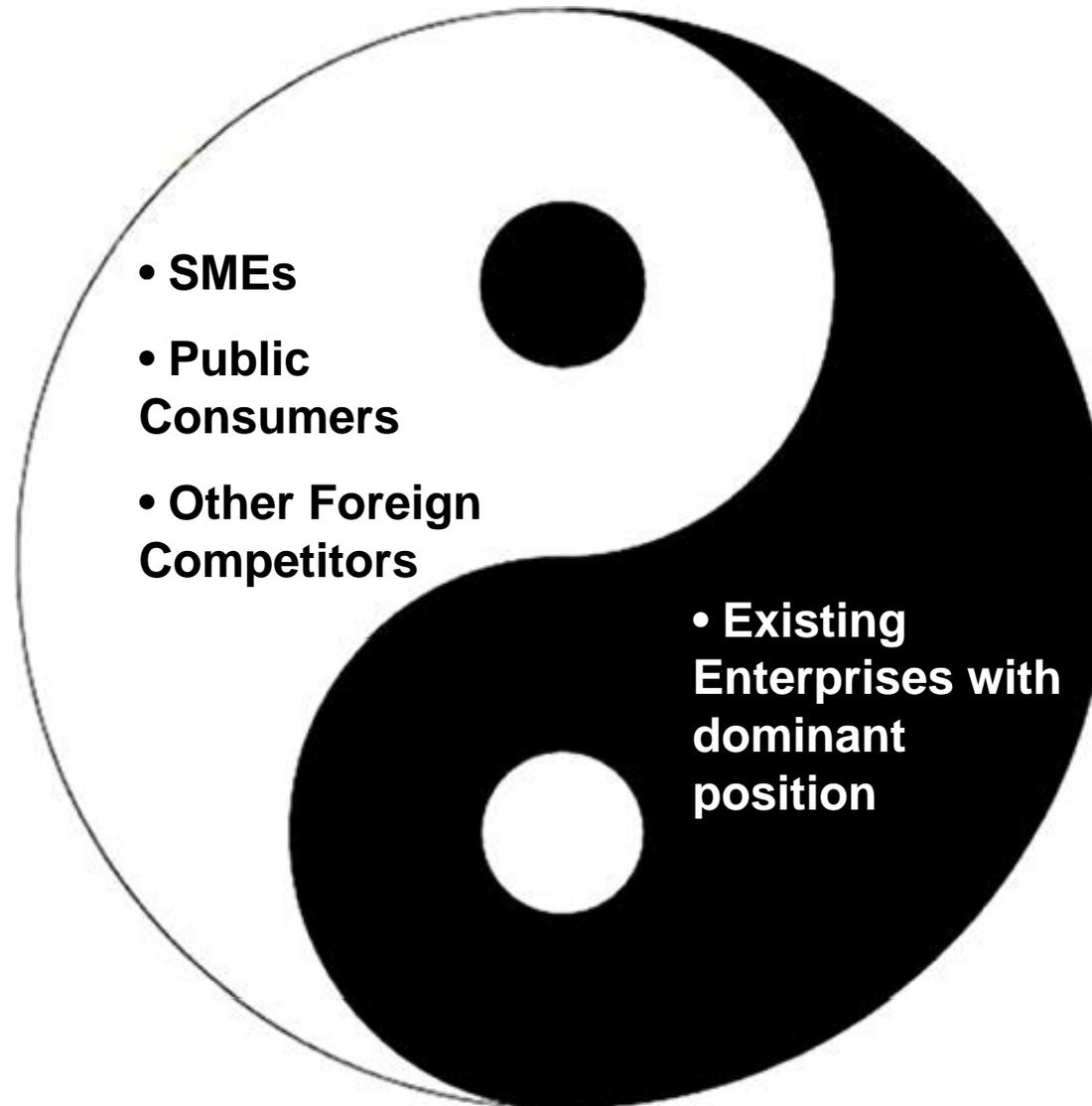
4.2. Risks vs Opportunities: Another Perspectives



4.2. Risks vs Opportunities



4.2. Risks vs Opportunities



4.2. Risks vs Opportunities – Different Stakeholders

- Another approach to evaluate the achievement of the AML
- IP Abuse Law may help to strike a sound balance of benefits between different stakeholders, such as
 - A. Small and Medium Enterprises (SMEs) and late comers of the market
 - B. public consumers,
 - C. existing IP giants.

4.2.1 Risks vs Opportunities – Competitors

- In some way, law is balance of benefits of different stakeholders – A,B,C.
- 4.2.1. Other foreign competitors - SMEs
- General speaking, the AML arguably provides an opportunity for foreign software companies, particularly late comers of China's IP market, to fairly compete with software giants that have achieved a dominant position in Chinese market.
- Again, we may use Microsoft as an example. In addition to China's domestic companies or consumers, Microsoft has to pay attention to potential legal actions of other foreign companies operating in China.

4.2.1. Risks vs Opportunities - SMEs

- As we know, Microsoft has tangled with antitrust disputes around the world for more than a decade, such as in US, EU, Japan and South Korea,
- As such, there is **no surprise** if any **foreign technological companies** owned by these countries (including **SMEs of US**), initiate antitrust lawsuits **against** the business operations of Microsoft in China.
- In doing so, help themselves to **maintain or expand their market shares** in China.

4.2.2. Risks vs Opportunities - Consumers

- Recent Antitrust Investigation against Microsoft in China
- The AML **not only** allows medium and small enterprises to be more fairly compete with big enterprises (which have dominant market positions), **but also** provide an opportunity for **public consumers** to respond to any monopolistic conducts of big undertakings, such as monopoly pricing.
- In fact, on 31 July 2008, one day before the AML took into effect, Dong Zhengwei, a partner with Beijing-based Zhongyin law firm, submitted a document - '*Application and Proposal for Protecting Citizen Property Rights*' [1]- to the anti-monopoly enforcement agency, and requires for initiating an **anti-monopoly investigation** against the global software giant Microsoft.[2]
- He alleged that Microsoft was using its dominant market position to manipulate software prices in China, and called for a US\$1 billion fine by virtue of AML.

4.2.2. Risks vs Opportunities - Consumers

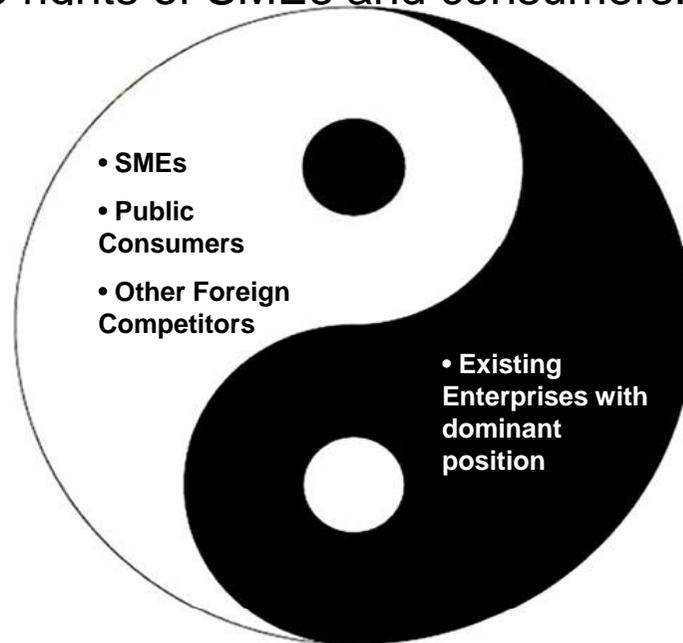
- Fair Competition & Consumer Rights
- On the other hand, sound competition environment itself will make **public consumers** benefit eventually.
- Fair competition would arguably provide consumers with **more affordable price** and **more purchase options** (i. e. choosing alternative software products from various foreign software companies).

4.2.3. Risks vs Opportunities – IP Giants

- IP Giants: Exemptions, Piracy & Innovation
- On the one hand, exemption provisions in AML are good for protecting the benefits of IPR holders and increasing the certainty of IP Licensing Arrangements, and good for protecting the incentive of innovation
- On the other hand, sound competition environment will arguably **contribute to prevention of piracy** in an indirect way.
- Once consumers can find cheap and high quality IP products, they will not choose unauthorized IP products.

Conclusion

- As we have seen, in the current IP expansion environment, **IP abuse laws**
 - may arguably serve as **powerful instruments**
 - for **balancing the right** of **different stakeholders**, particularly for defending the rights of SMEs and consumers.



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Conclusion

- As we have seen, in the current IP expansion environment, **IP abuse laws**
 - may arguably serve as **powerful instruments**
 - for **balancing the right** of **different stakeholders**, particularly for defending the rights of SMEs and consumers.
- As such, **IP abuse laws**, including antitrust laws, may serve as a **supplement** to **current public rights measures** (such as fair use and fair dealing doctrine and the open source movement), to enhance the public domain, consumer interests and fair competition.

- **Thank You!!**



5. Recommendations for future regulators

- 5.1. TRIPS Requirements
- 5.2. EU and US Laws
- 5.3. Law transplants

5.1. TRIPS Requirement

- ‘IP Abuse’ is Not a new terminology – Originally from Art 8 of TRIPS
- Although it is the idea of developing countries’ to include provisions for prohibiting IPR abuse and promoting technology transfer as part of the objectives and principles of *TRIPS*,
- regulators in most developing countries have not developed sophisticated laws and policies to enforce antitrust law in IP areas.
- In fact, some countries, such as China, have only set up their antitrust laws recently.

- By contrast, in developed countries, particularly in the US and the EU, sophisticated laws and policies on coordinating the relationship between IP and antitrust laws and enhancing technology transfer have developed over the past two decades.

5.2. EC and US Law: IP Abuse Rules in IP Exporting Countries

- For example, in Europe, the Europe Commission (EC) issued
 - *Technology Transfer Block Exemption Regulation – Commission Regulation 240/1996 ('TTBER 1996')*
 - *New Technology Transfer Block Exemption Regulation ('TTBER 2004') – Commission Regulation 123/2004 – in April 2004*
- In the US, the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued
 - a "watch list" for prohibiting anticompetitive restraints in patent licensing agreements in the 1970s.
 - *Antitrust Guidelines for the Licensing of Intellectual Property* (the Guidelines 1995), which provides some general approaches (such as Rule of Reason Approach) and principles for determining IP-related monopolistic activities.
 - *Antitrust Enforcement & IPRs: Promoting Innovation and Competition* (hereinafter '*the Report 2007*') in order to facilitate the understanding and application of the 1995 Guidelines

5.3. Law Transplant

- Advices for US International Trade Commission
- Laws in developed countries IP exporting countries are not necessarily suits developing countries/IP importing countries.
- ‘The implication of our analysis is that the interests of developing countries are best served by tailoring their intellectual property regimes to their particular economic and social circumstances.’
- U.K. IPR Commission, *Report of the Commission on Intellectual Property Rights: Integrating Intellectual Property Rights and Development Policy* (2002) <<http://www.iprcommission.org/>>