



The Refusal to License Intellectual Property as an Antitrust Violation in China: How Should the Current Approach be Improved? (July 27 2023)

The Centre for Chinese and Comparative Law (CCCL) at the City University of Hong Kong School of Law held a legal research seminar on intellectual property rights on July 27, 2023. The seminar aimed to enhance the understanding of intellectual property law and antitrust law among the students and researchers of the School. **Dr. Wu Peicheng** from Zhejiang University was invited as the keynote speaker.

The seminar commenced with a welcoming speech by **Dr. Huang Tao**, who addressed all the participants.

Dr. Wu Peicheng is 'Zhejiang University 100 Young Professor' at Zhejiang University Guanghua Law School. He received his Bachelor of Laws degree from Southwest University of Political Science and Law. Later, he obtained his doctoral degree in Economic Law at the Shanghai Jiao Tong University. He further pursued another Ph.D. in Law at the University of New South Wales in Australia. **Dr. Wu Peicheng** has made significant research contributions in the field of competition law, intellectual property law and digital law, and his articles have been published in renowned journals both in China and abroad.

Dr. Wu Peicheng first elaborated on the historical background of Sino-US trade relations, stating that China's development of intellectual property and the application of competition law may lead to tension in the Sino-US trade relationship. Currently, China's approach to handling refusal to license intellectual property under antitrust law is not mature enough. Therefore, the central issue of this seminar was to explore the circumstances under which the refusal to license intellectual property in China constitutes a violation of antitrust law and how to improve the current practices.

Dr. Wu then discussed the existing antitrust practices and problems regarding refusal to license intellectual property in China. In China, Article 22 of the Antitrust Law lists several abusive practices that may lead to anti-competitive consequences, including refusing to trade without legitimate reasons. However, this provision does not clearly specify when the refusal to trade is illegal. Dr. Wu

Peicheng used the case of *Xu Shuqing v. Tencent*, tried by the Supreme People's Court, to illustrate this issue. He discussed how the State Administration for Market Regulation (SAMR), the competition authority in China, introduced the "essential facility doctrine" to determine whether the refusal to license intellectual property can be considered an illegal refusal to deal. However, SAMR has not applied this concept in any specific cases yet.

Dr. Wu also discussed the approach taken by the United States in such cases, which involves a limited application of an antitrust duty to deal. He cited the case of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, which demonstrates that it is rare to find refusal to deal as an antitrust violation in the United States. He also mentioned the *Verizon v Trinko* Case, indicating that it is unlikely for the United States to deem a refusal to deal illegal after that decision.

In contrast to the United States, the European Union (EU) adopts the "essential facilities" principle when dealing with refusal to license intellectual property cases. Dr. Wu discussed the examples of the Bronner test, the Magill case, and the IMS case as instances where the EU demonstrates a positive attitude toward the "essential facilities" principle. He also cited the *Microsoft v. European Commission* case as an example of the EU's application of competition law in the field of refusal to license intellectual property.

Dr. Wu believes that the EU's approach is more suitable for China's current situation, and he presented insightful perspectives on improving the current state of affairs. These suggestions aim to enhance the specificity and clarity in handling refusal to license cases, while reducing the authorities' discretion. In conclusion, China's current antitrust regulations regarding the refusal to license intellectual property are overly broad, leaving room for excessive interpretation. Dr. Wu suggests that China should primarily refer to the EU's competition law to improve the approach to handling refusal to license intellectual property cases.

Following Dr. Wu's thought-provoking speech, the seminar proceeded to a discussion session led by **Prof. Lai Sin Chit** and **Dr. Guan Taorui**. They offered their own profound insights based on Dr. Wu's presentation, and other participants actively expressed their viewpoints, often providing valuable and thought-provoking arguments. The seminar concluded with closing remarks from **Prof. Huang Tao**, who sincerely thanked all the speakers for their valuable contributions and all the attendees for their presence, which led to fruitful outcomes for this seminar.



Prof. Huang Tao



Dr. Wu Peicheng



Dr. Guan Taorui



Prof. Martin Lai