Competition, Intellectual Property, and Economic Prosperity

Remarks of AAG Makan Delrahim
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Good afternoon. It is a great honor to be back in Beijing and a true pleasure to have this opportunity to meet some of the leading professors and practitioners here in China. I look forward to getting to know the members of the next generation of China's great thinkers and leaders. I am very grateful to the Peking University IP Alumni Association, the China IP Law Society, and my colleagues here at the U.S. Embassy in Beijing for hosting this event.

This afternoon, I thought I would talk about an issue that is near and dear to me, and a topic of much study here in China—the role of competition in innovation, creative arts and economic prosperity. This is a topic I have cared about for a long time. As a registered patent lawyer, my faith in the dynamic power of innovation shapes the way I look at competition enforcement and economic development. The proper role of innovation incentives is very much on my mind as I consider what I want to accomplish as Assistant Attorney General for Antitrust at the U.S. Department of Justice.

As some of you may know, this is not my first time working at the Antitrust Division. I served as Deputy Assistant Attorney General for International, Appellate and Policy from 2003 to 2005. In that role, I was heavily engaged with our competition enforcement colleagues around the world, and I was fortunate to have a front-row seat as we watched competition law enforcement develop and begin to mature around the world. In fact, it was during my last

tenure at the Division that China's Anti-Monopoly Law was being drafted and classified as fundamental economic legislation, well on its way to becoming law. It is exciting to be back at the Division again, to have the opportunity to pick up where I left off, and to see how far so many countries have come in the last 15 years. In addition to issues of IP policy, international engagement is at the top of my list of priorities as Assistant Attorney General. I am here today because engagement with an international audience on issues of IP policy is at the core of our agenda.

Let me begin by explaining why I think policies that provide maximum innovation incentives are so important. To put it simply, experience and economic research have taught us that intellectual property rights are the key to unlocking the innovation that drives our economy. Intellectual property laws provide incentives for investment in research and development, and these are the processes through which new products and services are ultimately offered to consumers, improving their lives, and stimulating the economy along the way. It is because of these important benefits that the U.S. Constitution confers upon our government the power "to promote the progress of science and useful arts, by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries."[1] One of our country's founding fathers, James Madison, explained at the time that our Constitution was being drafted that with respect to patent rights, "the public good fully coincides . . . with the claims of individuals."[2] This is because all of society stands to benefit

[1] U.S. CONST. art. 1, § 8.
[2] Madison, James. "The Powers Conferred by the Constitution Further Considered (Continued)." Independent Journal. January 23, 1788.

when individuals are incentivized to create, and to commercialize. A key component of promoting innovation and spurring advances in science and technology is enforcing intellectual property rules. Protecting the inventions that result from research and development is essential to any pro-growth and competitive economic agenda.

Of course, I hardly need to tout the benefits of innovation here in China where paper was invented more than 1700 years before my country's forefathers sat down to draft the U.S. Constitution.

I understand that another innovation we can credit to China is the first law against price-fixing. According to historians, the T'ang Dynasty (618 to 907 AD) punished the pernicious conduct of price-fixing by 80 flogs with a heavy stick.[3] Other misconduct justifying serious punishment included monopolizing common areas such as mountains and lakes, eating melons from private orchards, speaking recklessly about wild beasts in the marketplace, and the general crime of "doing what ought not to be done."[4] So China can certainly claim having some of the oldest known antitrust laws.

China has had a long history of invention as well, and as it continues to shift toward a market-based economy, one of the most important decisions it will make is to protect and reward innovation. Looking to the future, China's efforts to promote its movie industry, advanced manufacturing, industrial capability, and increased innovation will be much more

[3] The T'ang Code Vol. II, Article 421 (Wallace Johnson trans., Princeton University Press 1997).
[4] *Id.* at Articles 405, 441, 423 and 450.

successful if they include a recognition and culture of protection and enforcement of intellectual property rights.

Having said why I think IP rights are so critical, let me address the role of some other areas of the legal system that bear on those rights in today's world. I'll start with the role of competition law enforcement. It has long been the view of the Antitrust Division that the intellectual property laws and the competition laws share the common purpose of promoting innovation and enhancing consumer welfare.[5] While intellectual property laws provide incentives for innovation and commercialization by establishing enforceable rights for the creators of new and useful products, competition laws promote innovation and consumer welfare by prohibiting certain actions that harm competition with respect to either existing or new ways of serving consumers.[6] When applied thoughtfully, and when informed by economic experience, these complementary bodies of law yield exciting results: a strong and dynamic economy with rich and varied choices for consumers.

This past November, I gave a speech at the University of Southern California, where I talked about certain risks to incentives to innovate—some of them arising from over-enforcement of the competition laws. For example, I explained my view that over the past several years, in the context of technology standards, some enforcers have strayed too far in the direction of accommodating the concerns of technology implementers, to the potential detriment of IP creators, who must be appropriately rewarded for break-through technologies

[5] DOJ-FTC Antitrust Guidelines for the Licensing of Intellectual Property (January 2017), available at https://www.justice.gov/atr/IPguidelines/download.
[6] *Id.*

if technological innovation is to continue. I cautioned that the misapplication of antitrust laws can disrupt free-market bargaining, which is the best method for resolving disputes between innovators and implementers. More generally, I noted that patents are a form of property, and I identified the fundamental right of intellectual property, namely, the right to exclude, as one of the most important bargaining rights a property owner possesses. Rules that deprive a patent owner from exercising this right—or processes that dilute the meaning of this right—can undermine the underlying incentives to innovate. It is a perverse result indeed when the misapplication of the competition laws results in less innovation, less competition, and ultimately, fewer consumer choices. This is why, as I said in November, competition law enforcers should exercise humility and enforce the competition laws in a manner that best promotes dynamic competition for the benefit of consumers.

With an eye to promoting dynamic competition, I humbly submit that competition law enforcers around the world must give careful consideration to the interests that drive innovation, including by allowing innovators to reap the full rewards of their investment in research and development. This means that the focus of our analysis must be less on short-term pricing, and more on the innovation and growth that delivers value to consumers over the longer term.

We must also approach remedies for violations of antitrust law with caution. I am generally skeptical of behavioral remedies, and even more so when it comes to mandating licensing requirements that could skew incentives away from technological advancement. Similarly, we must recognize that innovation can be unsettling and disruptive—yielding clear

winners and losers—and trust that while this push and pull in the market may not help a particular competitor at any one time, it ultimately will result in the maximum consumer benefit. In all of these ways, we must be careful that in our attempts to promote competition, we do not inadvertently stifle it.

I should note—as I did when I spoke on this topic in November—that my emphasis on humility when it comes to competition law enforcement in the IP context should not be taken to imply that there are no circumstances in which the exercise of patent rights should attract antitrust scrutiny. While I support thoughtful and deliberate application of the competition laws to the exercise of IP rights, I do not believe in wholesale exemptions from those laws. In the United States, patent holders are not immune from the antitrust laws, nor are state-owned enterprises that are engaged in commercial activity. Where competitors come together to engage in collusive or anticompetitive behavior, we will bring all of our enforcement tools to bear.

Having described my views about the appropriate role of competition law enforcement, let me move on to an equally important and related topic, and that is the role of the courts in supporting the patent system. U.S. courts offer a very effective forum for the resolution of commercial disputes between private parties, including those arising out of the exercise of IP rights. As such, they play a critical role in the free-market bargaining I mentioned earlier. One can certainly imagine that in countries where the court system is not well-equipped to handle IP disputes, or where courts do not operate according to fundamental principles, there is a risk that IP rights will be undermined, and that incentives to innovate will atrophy. If a patent

owner whose patents are infringed has no effective recourse in the courts, that patent owner is bound eventually to question whether future investment in innovation will be worthwhile.

When he was last in China, my international deputy, Professor Roger Alford, described four key components for an effective legal system. The first was accountability for all people under the law. The second was fair, published and stable laws. The third was a robust and accessible legal process, pursuant to which rights and responsibilities based in law are evenly enforced. Finally, he discussed the importance of competent and independent lawyers and judges. Deputy AAG Alford posited that together, these components create a stable framework for individual and collective planning and coordination. I wholeheartedly agree with that view, and I submit to you that well-functioning IP courts perfectly exemplify these principles. In an environment where companies and individuals understand and believe in their patent rights, expect fair enforcement, and make genuine and informed choices about their conduct, they are likely to invest in ways that foster innovation, and engender competition.

In August 2016, Bill Baer, my predecessor as Assistant Attorney General of the Antitrust Division, co-led a U.S. delegation to China for a judicial dialogue, where some of the most prestigious judges from both of our countries had an opportunity to discuss the functioning of our judicial systems and the rule of law. As part of that engagement, experienced Antitrust Division officials had the opportunity to visit an IP court here in Beijing, where they were able to see one of China's professional and respected IP judges presiding over a courtroom outfitted with advanced technology, and populated with sophisticated legal practitioners. China's dedicated IP courts—which I understand continue to be established around the country, most

recently in Nanjing, Suzhou, Chengdu and Wuhan—are a very positive step towards ensuring that patent holders and implementers have access to factfinders with the requisite experience and expertise to deal with the complexities of patent cases, and more generally, to engendering faith in the patent system as a whole. In fact, I understand that at the judicial dialogue, Grand Justice Tao Kaiyuan, Vice President of the Supreme People's Court, held up China's specialized IP courts as an example of many of the principles I discussed just a minute ago: accountability, accessibility, and competency. And I understand that since the judicial dialogue in 2016, additional measures have been proposed to ensure that China's courts are empowered to protect IP rights, including increasing access to evidence, and increasing statutory damages for patent infringement. This will be a great move towards further investment in and development of high technology innovations in China.

It is probably not a coincidence that these reforms have occurred at the same time that Chinese companies have transformed from net implementers of IP rights to important innovators and holders of IP rights. Almost daily, I see news reports evidencing the furious pace of innovation that is underway here. According to one recent article, Huawei Technologies filed more patent applications in 2016 than any other company in the world.[7] The same article reported that China is now among the world's top three markets for venture capital in digital technologies like virtual reality, autonomous vehicles, 3D printing, drones and artificial intelligence.[8] And, according to another source, from 2000 to 2015, Chinese research and

[7] "Innovation Takes Off in China." Fortune Magazine (December 1, 2017).
[8] *Id.*

development spending grew an average of 18 percent annually.[9] This transformation is exciting and commendable. I recall, from my service at the office of the United States Trade Representative almost 25 years ago, when China was considered a developing nation. Times have certainly changed!

This exciting new environment means that now, more than ever, the promotion and protection of patent rights is critical. For China and its consumers to enjoy the fruits of this staggering innovation long into the future, those who are investing and innovating—whether Chinese companies or foreign companies investing and doing business in China—must believe that their intellectual property rights will be respected, and that their legal rights and responsibilities will be evenly enforced in an adequate and effective manner.

I was fortunate to have the opportunity to serve as a commissioner on the Antitrust Modernization Commission, which was charged by the President and Congress with reviewing our country's antitrust laws and practice, and with making recommendations about how to proceed into the future. In my final statement on the work of the Commission, I noted that patent-protected goods, such as pharmaceuticals and electronic products, had become our country's number one export, and I said that their creation and protection would be critical to maintaining our own vibrant economy.[10] I said, at that time, that we should take care to ensure that competition law and policy would not constrain the legitimate exercise of intellectual property rights, or stifle innovation by undermining incentives for investment.[11] I respectfully

[9] "The New Scientific Superpower." Washington Post (January 22, 2018).
[10] ANTITRUST MODERNIZATION COMMISSION: REPORT AND RECOMMENDATIONS 404-05 (2007) (Statement of Makan Delrahim).
[11] *Id.*

submit to you that China is in much the same position today as the United States was at the time that I wrote my statement, approximately ten years ago. As China continues its transformation to an innovation economy, I believe its progress can be amplified—and its prosperity increased—through policies that promote and protect IP rights, including thoughtful competition law enforcement, and effective adjudication of IP-related disputes.

As I mentioned at the outset of my remarks, international engagement is one of my top priorities as Assistant Attorney General. I hope very much that during my tenure, our two countries will continue our productive discussions on competition law enforcement, and on our respective judicial systems. We all have much to gain from cooperation in these areas, not least of all the promotion of innovation and competition in our respective economies and across our borders. Consumers and entrepreneurs in both of our countries will be the great beneficiaries of such mutual cooperation.

Thank you very much for the opportunity to speak today.