



**Japan Fair Trade Commission (JFTC)
Competition Policy Research Centre (CPRC)**

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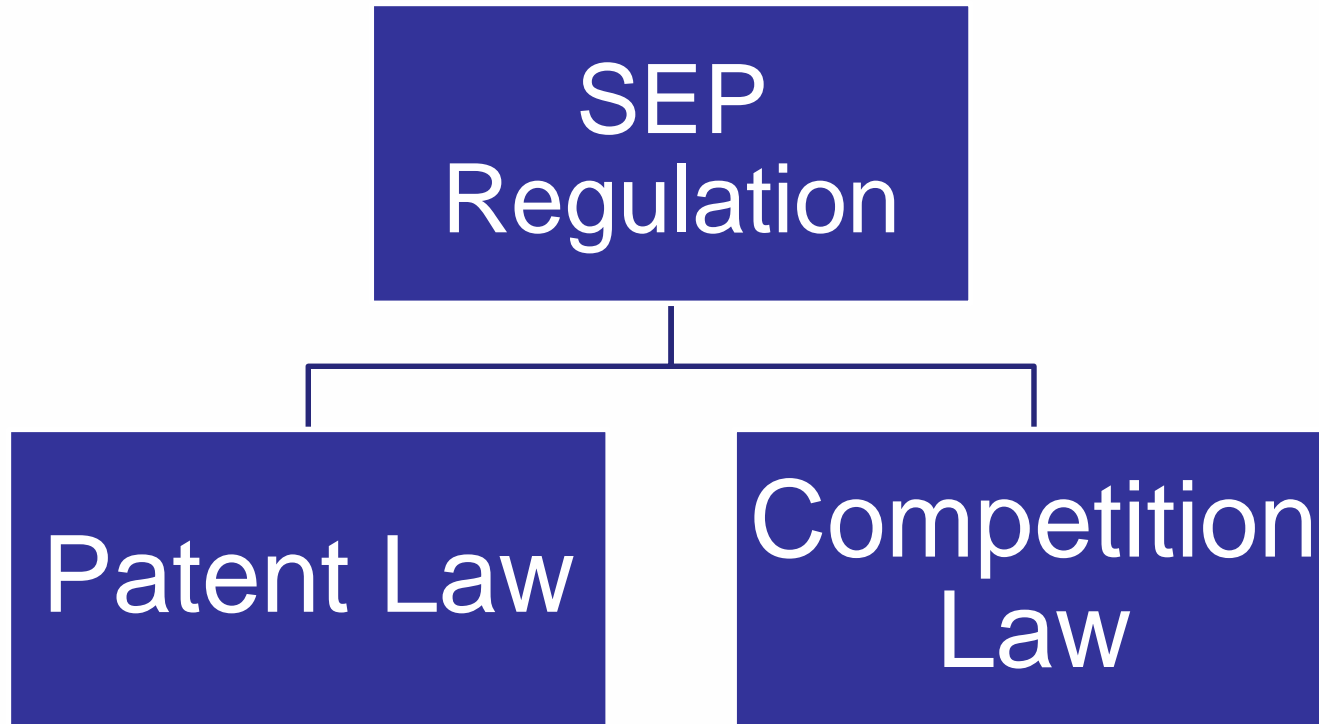
Digital Economy and Competition Law and Policies

**The SEP War:
*A Chinese Equilibrium***

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Bifurcated Approach



Rights under FRAND

- **Licensors**

- No right of granting exclusive licenses

- **Licensees**

- Not *de jure* right of license

- Case *Iwncomm vs. Sony*

- But *de facto* right of production

- Business custom

FRAND Injunctions

- No automatic entitlement of injunction
- Injunction is granted only when the negotiation is not in good-faith
 - No explicit willingness to engage in licensing negotiations (written offer or counter-offer without unreasonable delay)
 - Unreasonably obstructing or interrupting negotiation
 - Proposing apparently unreasonable conditions
 - Other cases of obvious fault during the licensing negotiation

FRAND Royalties

Cases	Royalties	Approaches
<i>Huawei vs. IDC</i>	0.0195% of net sales (100 times lower than proposed)	Apple
<i>Iwncomm vs Sony</i>	RMB 1 Yuan per device	4 Other competitors
Commitments after <i>Qualcomm</i> (NDRC case)	3.25% of net sales for 3G	65% of the original
	2.275% of net sales for 4G	

Top-down Approach

- “Antitrust Guidelines on Abusing IP (public consultation)” by the Chinese Anti-monopoly Commission defines some factors for evaluation
 1. Calculation methods, and contribution to the standard
 2. Commitments during standardization
 3. Historic or comparable royalties
 4. Whether to include unreasonable conditions
 5. Whether to include expired or invalidated patents
 6. Overall level of royalties associated with the standards concerned

Comment

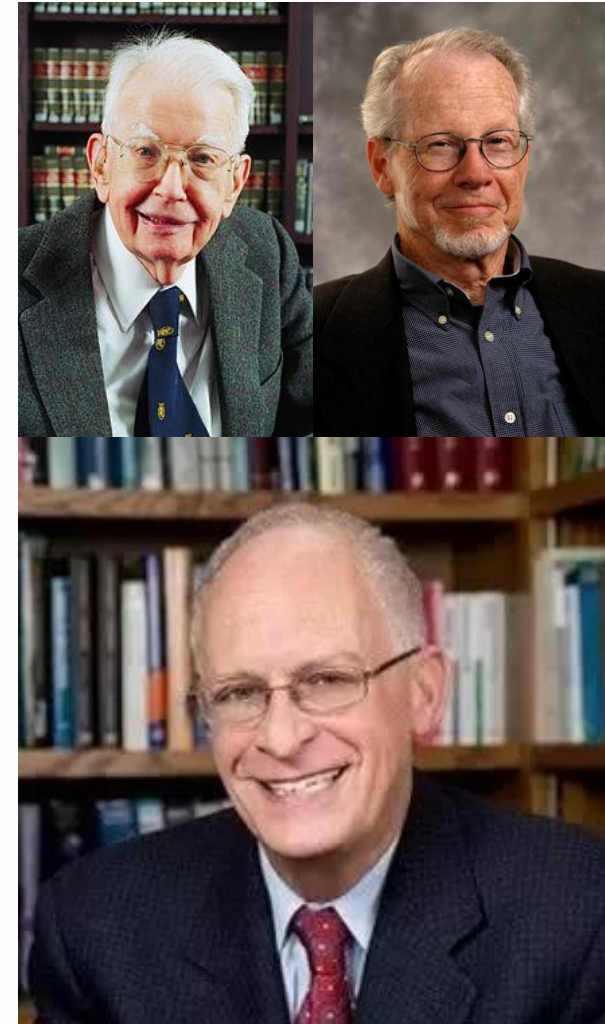
- Top-down is already a solid principle when calculating SEP royalties in China.
- However, difficult, if not impossible, to go any further for the purpose of setting a uniform royalty cap
 - Unwired Planet: 3-8% for 3G
 - Apple Japan v. Samsung: 5% for 3G
 - Huawei vs. Samsung: 3.2% of average profit level for Chinese smartphone producers

A Zero-sum Game worthy of less or no intervention

- **A fight for more profit in a contractual negotiation**
 - Difficulties for antitrust law to deal with high prices
 - Contrary in principle to freedom of contract
- **Consumer welfare would not be increased in any case**
 - Consumers receive little benefit when royalties are decreased
 - Consumers might be harmed if royalties are increased
- **Investment might be not affected in any case**
 - Growing demand for smart device

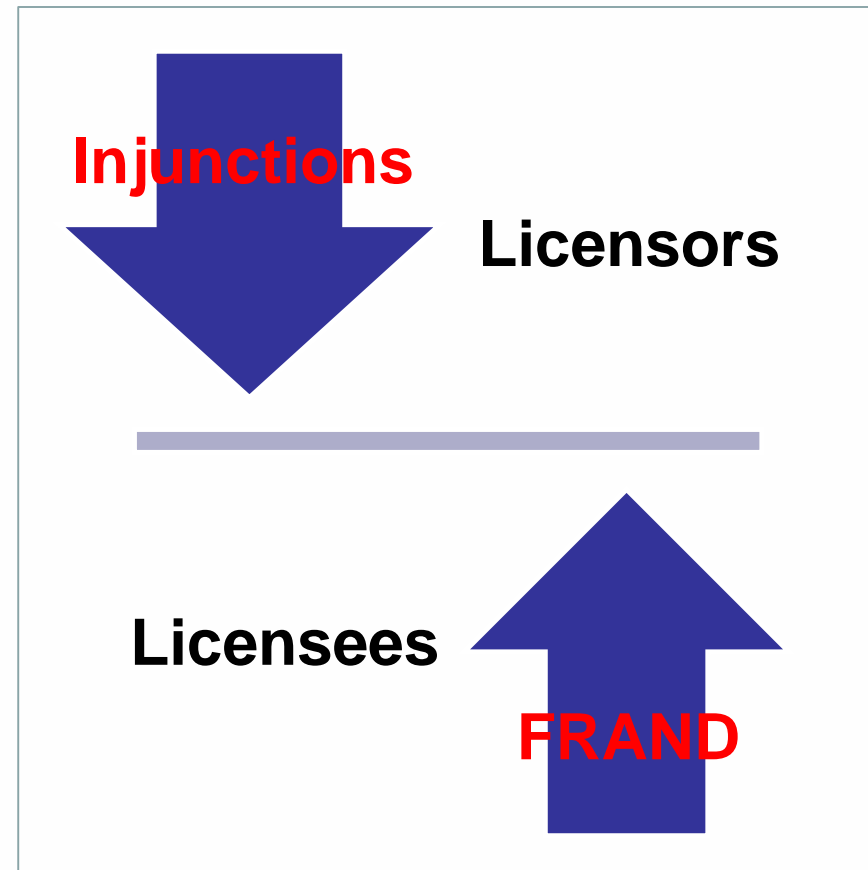
Incomplete Contracts

- Contractual terms can be incomplete;
- Transaction-specific investment results into a lock-in effect;
- Decision-makers are not investors, and may hold up the latter;
- Social institutions better re-allocate rights back to investors.



Chinese Equilibrium

- Licensors (party to hold up) are balanced by injunctions when they are negotiated not in good faith;
- Licensees (party to hold out) are counter-balanced by FRAND (*de facto* right to produce) when they are offered unreasonably.



Subsequent Interplay

- In most cases reputation alone can solve the problem;
- If not, negotiation should be the key since both parties receive relatively equal degree of control over their investment;
- Regulators' only role is to ensure an uninterrupted process.
 - Antitrust Law: non-discrimination
 - Patent Law: damages

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谢谢
THANKS!

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