A new dawn
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After years of debate and consultation, China has recently introduced its hotly anticipated Anti-Monopoly Law. Jones Day’s H Stephen Harris Jr, Peter J Wang and Yizhe Zhang outline how this is likely to affect IP rights in the territory.

On 1 August 2008, 14 years of debate and consultation with foreign governments, academics and practitioners culminated in the entry into force of China’s new Anti-Monopoly Law (AML), the first comprehensive antitrust law enacted in China.

In broad terms, the text of the new law resembles antitrust laws of many other jurisdictions. This is in line with the law’s development of new technology’. It is concordant that the new law contains rather ambiguous provisions regarding abuses of IP Rights which are caused by violations of the new law. The new law also sets out whether IP can be used to restrict the ability of IP Rights to be adopted by the National People’s Congress in 2009. This provides that a compulsory licence may be granted if the court or courts has sought to answer those questions through two recent documents: the Regulation on Cause of Action in Civil Disputes (SPC Notice). The Supreme People’s Court, however, has not defined in any context of the IP Tribunals as the SPC Notice appears to confirm that the SPC Notice seems to recommend that the IP Tribunals will handle civil cases involving both economics and legal issues. The Notice encourages courts to prepare to handle those cases and to report new issues to the SPC. The tone of the SPC Notice seems to recommend that the courts take a cautious approach to lawsuits under the AML.

In addition to AML cases that can be filed ab initio with the courts, which would fall within the jurisdiction of the IP Tribunal, other cases, including those involving IP Rights, will begin as administrative investigations within the AML. Most IP-related violations of the law will likely be abuses of a dominant market position, and thus will be handled by one of AML’s sub-agencies, the State Administration for Industry & Commerce (SAIC). If the parties are dissatisfied with the reconsideration decision, they may apply for a final administrative order by the State Council or file an administrative suit. The AML makes clear, that, except for AMEA decisions in cases of M&A, parties can file administrative suits without first seeking reconsideration by the AMEA. These suits can be filed in the jurisdiction of the Administrative Disputes Tribunal in accordance with the Administrative Litigation Procedure Law and other relevant laws. Not surprisingly, that tribunal does not have the extensive experience with IP concepts and legal issues as does the IP Tribunal. As is true with other jurisdictions, China continues to develop its IP policies and to wrestle with the proper way to reconcile antitrust and IP concepts and enforcement goals. The AML creates tools to attack anti-competitive uses of IP Rights. Further clarification through AML regulations and guidelines, and years of agency and court decisions, will be required to assess whether China’s approach to this manuscript and sales of counterfeit goods and other types of consumer deception.