

Presentation Outline:

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Topic: Intellectual Property Licensing – Competitive Benefits and Antitrust Pitfalls

Panel: Technology Dissemination and Antitrust Law

I. Competitive Benefits of Intellectual Property Licensing

A. Intellectual property rights provide important benefits by fostering innovation incentives through protection against copying; permitting disclosure of information that otherwise would be maintained as trade secrets; and facilitating the transfer of information and technology

B. Intellectual property licensing enables the combination of intellectual property with complementary productive assets, such as laboratories, manufacturing facilities, and other intellectual property. It may promote the coordinated development of technologies that are in a blocking relationship. This provides benefits to consumers, to licensees, and to licensors.

C. Intellectual property licensing offers an important economic opportunity to an emerging economy such as China's. It facilitates foreign investment in Chinese manufacturing facilities, joint ventures, and cooperative research arrangements.

II. Antitrust Pitfalls

A. Competition is also an important driver of innovation – firms that fail to innovate risk losing ground to their rivals. Competition also provides consumer benefits by keeping price down and output levels up.

B. Licensing may occur between firms that would not compete absent the license. If so, the license may bring a competitive force to the market that otherwise would not have been present. In contrast, licensing also may occur between firms that would have been actual or likely potential competitors even without the license, that is, between firms in a “horizontal relationship.” If so, there is a possibility that the competitors may use the license to limit their competition. This gives rise to antitrust concerns.

C. Examples – market divisions for goods and for research and development.

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<sup>1</sup> The views expressed are those of the speaker. They are not necessarily the views of the Commission or of any individual Commissioner.

### III. One Need for a Functioning Competition System in China.

Licenses may include a variety of terms and conditions. A licensor with market power may seek to preserve that power through exclusive arrangements or by requiring access to the licensee's intellectual property. Antitrust laws serve to defend the competitive process and may limit anticompetitive licensing practices. This protects consumers, although it does not directly control price levels. In some settings it may prove particularly beneficial to an emerging economy's firms.

### IV. An Analytic Framework

#### A. Three Guiding Principles

1. Intellectual property is essentially comparable to other forms of property for purposes of antitrust analysis.
2. Intellectual property does not necessarily create market power.
3. Intellectual property licensing allows firms to combine complementary assets and is generally procompetitive.

#### B. A comparison of anticompetitive harms and procompetitive benefits

example: exclusive dealing

example: grantbacks

### V. Cross Licensing and Pooling Arrangements.

A. The problem of patent thickets: In some industries innovation is cumulative and producing a single product requires access to multiple patents from multiple sources. The cost of negotiating multiple licenses can be high.

B. Cross licensing and pooling are ways to cut through the thickets and assemble the intellectual property necessary for moving ahead.

C. Cross licensing and pooling are often procompetitive, but they can have anticompetitive effects in certain circumstances. Questions center around collusion, exclusion, and innovation.