REGULATING AI POWER: HOW LAW CAN SAVE—OR SINK—U.S. DOMINANCE

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As China's DeepSeek challenges U.S. AI dominance with low-cost, open-access models that rival GPT-4-turbo, the future of AI is becoming less about who builds the best technology—and more about who controls the rules of the game. This column argues that the United States is falling behind not just in innovation, but in regulation. With the repeal of key AI safety mandates and outdated intellectual property laws, the U.S. is losing its ability to shape global norms and defend its technological edge. To stay competitive, America must treat AI law as a strategic lever—tightening export controls, modernizing IP protections, and streamlining M&A oversight—to protect innovation, contain foreign rivals, and reclaim leadership in the AI age.

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Introduction

The United States has long led the AI race, but China's DeepSeek is proving that efficiency, openness, and legal maneuvering can rival even the most advanced American models. DeepSeek-R1, trained for just $6 million, matches OpenAI's GPT-4-turbo (o1) in mathematics, coding, and reasoning while operating at 1/30th of OpenAI's cost.[1] Unlike OpenAI's black-box approach, DeepSeek has embraced an "open-weight" model, meaning that any researcher, startup, or competitor can modify it, run it independently, and build upon its innovations.[2]

By operating outside of U.S. jurisdiction, DeepSeek has been able to spread globally without triggering export or investment reviews.[3] Its low cost and broad accessibility make it the foundation of a growing AI ecosystem beyond U.S. control.

DeepSeek's rise signals a shift U.S. firms cannot counter with innovation alone. The future of AI will depend not just on better models, but on who shapes the legal and regulatory rules that govern them. This column argues that to stay competitive, the U.S. must treat AI law as a strategic lever. It examines three critical areas for action: (1) regulation and export controls; (2) intellectual property protections; and (3) merger and acquisition oversight. Each offers clear policy paths, from restoring federal AI mandates to modernizing patent law and refining merger review to protect national interests. The U.S. must move beyond technological dominance and use law as a strategic tool to shape the future of AI itself.

I. Regulation as a Strategic Lever: Why the U.S. is Falling Behind

Regulation is more than just a legal framework. It is also a strategic tool that can tilt the AI battlefield in favor of U.S. firms. By enforcing strict standards for safety, ethics, and transparency, the U.S. can raise costly compliance hurdles for foreign competitors like China's DeepSeek. American companies already navigate these rules, but for foreign firms, they represent major new barriers.

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[1] Elizabeth Gibney, *China's Cheap, Open AI Model DeepSeek Thrills Scientists*, 638 Nature 13, 14 (Feb. 6, 2025).

[2] Vanessa Parli, *How Disruptive Is DeepSeek? Stanford HAI Faculty Discuss China's New Model*, Stanford University Human-Centered Artificial Intelligence (Feb. 13, 2025), available at https://hai.stanford.edu/news/how-disruptive-deepseek-stanford-hai-faculty-discuss-chinas-new-model [https://perma.cc/A5ED-3MBT].

[3] Zeyi Yang, *Why Chinese Companies Are Betting on Open-Source AI*, MIT Tech. Rev. (July 24, 2024), available at https://www.technologyreview.com/2024/07/24/1095239/chinese-companies-open-source-ai/ [https://perma.cc/QZ93-XJMQ].

Europe's Digital Markets Act (DMA) shows how regulation can shape competition.[4] The DMA enforces strict rules on data access, interoperability, and platform behavior, forcing even U.S. tech giants like Google and Meta to adjust their AI services.[5] While burdensome, this has given U.S. firms a first-mover advantage in global compliance, an edge rivals like DeepSeek struggle to match. Broader adoption of similar standards could serve as regulatory gatekeeping, limiting the reach of low-cost alternatives.[6]

Yet instead of using regulation as a competitive tool, the U.S. is retreating. President Trump's 2025 repeal of Biden's AI Executive Order 14110[7] undermined America's leadership in global AI policy. The original order required top AI developers to share safety testing data with the government and set federal standards for model safety and transparency.[8] Its repeal opens a regulatory vacuum that China could fill, pushing AI standards aligned with its own governance model. While companies often follow the strongest or most comprehensive regulations globally (such as the EU's), the absence of U.S. leadership weakens the ability to coordinate like-minded allies and shape the direction of those standards, opening the door for China to push frameworks that reflect its interests and governance model. With that executive order revoked, the U.S. is abandoning its ability to shape the global AI playing field.

Beyond domestic regulations, export controls are essential tools that protect American AI innovation, national security, and economic competitiveness.[9] Export controls are not just about national security. They serve as legal mechanisms that American businesses rely on to protect IP, prevent unfair competition, and maintain market dominance in critical AI sectors.[10] Yet recent policy shifts have raised serious concerns about whether the current legal frameworks are sufficient to restrict China's AI advancements while safeguarding U.S. business interests.

In its final days, the Biden administration issued a major Interim Final Rule (IFR) on January 13, 2025, representing the most aggressive effort yet

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[4] *See* Alexandre de Streel, *EU Digital Markets Act: Changing the Four 'Regulators' of the Digital Society*, 12 J. Antitrust Enforcement 221, 222 (2024).

[5] Foo Yun Chee & Bart H. Meijer, *Apple, Google, Meta Targeted in EU's First Digital Markets Act Probes*, Reuters (Mar. 25, 2024), available at https://www.reuters.com/business/media-telecom/eu-investigate-apple-google-meta-potential-digital-markets-act-breaches-2024-03-25/ [https://perma.cc/XA4D-CSFD].

[6] *See* de Streel, *supra* note 4, at 222.

[7] The White House, *Removing Barriers to American Leadership in Artificial Intelligence* (Jan. 23, 2025), available at https://www.whitehouse.gov/presidential-actions/2025/01/removing-barriers-to-american-leadership-in-artificial-intelligence/ [https://perma.cc/W62F-HWAX].

[8] *See* Exec. Order No. 14,110, 88 Fed. Reg. 75, 191 (Oct. 30, 2023).

[9] Martin Chorzempa, *Excessive Export Controls to Protect US National Security and Innovation Could Compel Firms to Move Overseas*, Peterson Inst. for Int'l Econ. (Oct. 20, 2020), available at https://www.piie.com/blogs/realtime-economics/excessive-export-controls-protect-us-national-security-and-innovation?gad_source=1&gbraid=0AAAADHO67UXuypDsBu_1B9dlbqZH05C-&gclid=Cj0KCQjw16O_BhDNARIsAC3i2GD2CpNniRDS8cZmbNaSpvJMdEuOpHok82WzCfo7sSJcpJAtBqLPaDYaApI6EALw_wcB [https://perma.cc/WH89-MTQJ].

[10] *Id.*

to limit the global diffusion of AI-enabling technologies.[11] The rule imposed new export licensing restrictions on advanced AI chips to 150 "middle-tier" countries, while maintaining existing embargoes on China, Russia, Iran, and other adversaries.[12] The rule also introduced, for the first time, controls on AI model weights—the "brains" of AI models—under Export Control Classification Number 4E091, creating a presumption of denial for exports to risky destinations.[13] The IFR aimed to close loopholes in earlier rules, adding data center security standards and creating tiered licensing paths.[14]

However, despite these sweeping measures, the rapid release of China's DeepSeek R1 chatbot immediately cast doubt on whether these new restrictions had come too late.[15] DeepSeek's emergence has been described by some U.S. policymakers as a "Sputnik moment" for AI, a sign that China has already overcome years of U.S. export restrictions and is now producing world-class AI models capable of competing globally.[16]

Meanwhile, the broader international framework for regulating emerging technologies is cracking. The Wassenaar Arrangement, a multilateral agreement among countries meant to limit dual-use tech transfers, has stalled due to Russian obstruction.[17] This leaves countries like the U.S., Japan, and the Netherlands to act alone, creating fragmented rules that China can sidestep through tactics like cyber theft, academic partnerships, and offshore acquisitions.[18] Chinese firms have become adept at exploiting such gaps—using shell companies and regulatory gray zones to legally access U.S. chips and services.[19] Vague definitions like "end use" and "military end user" have allowed these firms to operate in legal limbo.[20]

To counter these tactics, the U.S. must strengthen both the clarity and enforcement of its export control rules by closing definitional loopholes, tightening commercial licensing pathways, and improving coordination with allies to prevent adversaries from exploiting jurisdictional gaps. Without these

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[11] Pablo E. Carrillo et al., *U.S. AI Export Controls and Strategic Shifts Under the Trump Administration*, Nat'l L. Rev. (Feb. 17, 2025), available at https://www.natlawreview.com/article/us-ai-export-controls-and-strategic-shifts-under-trump-administration [https://perma.cc/7UYM-FYEW].

[12] *Id.*

[13] Brandon L. Van Grack et al., *BIS Issues Interim Final Rule on Artificial Intelligence Diffusion as Biden Exits*, Morrison & Foerster LLP (Feb. 4, 2025), available at https://www.mofo.com/resources/insights/250204-bis-issues-interim-final-rule [https://perma.cc/X9AC-PDWP].

[14] *Id*.

[15] Carrillo et al., *supra* note 11.

[16] *Id.*

[17] Ian J. Stewart, *Are New US Export Controls Rules on Chips and Other Critical Tech Good Enough?*, Bull. Atomic Scientists (Sept. 13, 2024), available at https://thebulletin.org/2024/09/are-new-us-export-controls-rules-on-chips-and-other-critical-tech-good-enough/ [https://perma.cc/P3LQ-5749].

[18] *Id.*

[19] Ryan Fedasiuk, Jennifer Melot & Ben Murphy, *Harnessed Lightning: How the Chinese Military Is Adopting Artificial Intelligence*, Ctr. for Sec. & Emerging Tech. 33–35 (Oct. 2021).

[20] *Id.*

steps, the regulatory terrain will continue to favor foreign actors willing to exploit the gray zones of global AI governance.

II. The Missing Shield: Stronger IP Protections

As artificial intelligence becomes central to geopolitical competition, intellectual property (IP) protections have emerged as a critical, yet overlooked, front in the AI arms race. Without modernized IP laws, American AI firms risk losing ground to foreign competitors, who can exploit gaps in U.S. legal frameworks to gain an unfair advantage.

One of the most glaring vulnerabilities lies in the outdated state of U.S. patent laws regarding AI-generated inventions. Currently, AI-generated inventions cannot be patented—only human inventors are recognized.[21] This puts American firms at a disadvantage compared to competitors in countries where AI-generated patents are already being recognized.[22] While U.S. companies can and do seek patent protection in these more permissive jurisdictions, they remain unable to secure equivalent rights domestically, and thus are exposed to competition from U.S.-based rivals who are not bound by foreign protections.[23] This creates a troubling paradox: American firms may hold exclusive rights to their AI breakthroughs abroad, yet be unable to stop copycat use within the United States.

Further complicating matters, AI systems themselves operate across borders—leveraging global data, cloud-based compute, and training pipelines that defy clear jurisdiction.[24] In this virtual, borderless environment, it becomes nearly impossible to uniformly enforce national patent or IP laws, as jurisdictions overlap and foreign actors remain outside the effective reach of U.S. regulators.[25] As a result, the lack of U.S. recognition for AI-generated inventions not only limits legal protection domestically but also weakens the overall regulatory posture, allowing systemic IP risks to persist unchecked across national boundaries.[26]

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[21] Kevin J. Hickey & Christopher T. Zirpoli, *Artificial Intelligence and Patent Law*, Cong. Rsch. Serv. (Dec. 12, 2024), available at https://www.congress.gov/crs-product/LSB11251#:~:text=One%20important%20issue%20for%20patent,inventors%20make%20with%20AI%20assistance\ [https://perma.cc/G2JW-XHYQ].

[22] *See* Ryan Abbott, *Allow Patents on AI-Generated Inventions*, 620 Nature 699 (Aug. 24, 2023).

[23] *See id.*

[24] Paul O'Brien, *The Challenges of Regulating AI in a Borderless Digital World*, Medium (Jan. 4, 2025), available at https://seobrien.medium.com/the-challenges-of-regulating-ai-in-a-borderless-digital-world-319ab6dd9e66 [https://perma.cc/Y8BZ-CJGF].

[25] *Id.*

[26] *See generally* Ryan Abbott, *The Reasonable Robot: Artificial Intelligence and the Law* (Cambridge Univ. Press 2020) (arguing that lack of global harmonization creates competitive disadvantages for firms unable to enforce rights across borders).

This issue is more than theoretical. AI-generated inventions are increasingly common in fields like drug discovery, materials science, and autonomous systems, but the U.S. legal system remains stuck in an outdated framework that does not recognize non-human inventors.[27] Scholars like Ryan Abbott and Tshimanga Kongolo warn this gap could allow foreign firms to dominate emerging AI sectors.[28] Courts and the U.S. Patent and Trademark Office (USPTO) also frequently reject AI-related patents under the "abstract idea" doctrine, treating algorithms as unpatentable.[29] This deters investment and stifles innovation.

Because current U.S. patent laws do not recognize AI-generated inventions, and given the broader uncertainty in international IP regimes, many AI companies are effectively pushed toward relying on trade secrets to protect their innovations.[30] Unlike patents, trade secrets do not require public disclosure and can last indefinitely so long as they remain secret.[31] OpenAI, for example, has shifted from its earlier open-source philosophy to a closed, proprietary approach, largely to guard against IP theft from foreign competitors such as DeepSeek.[32]

But trade secrecy has limits. Legal scholar Emily Campanelli notes that trade secrecy offers no protection against independent discovery or reverse engineering, both of which are real risks in today's fast-moving AI sector.[33] Campanelli also warns that relying on trade secrecy hinders scientific progress and regulatory transparency, since firms must avoid disclosing their innovations to maintain protection, despite growing public and legislative demands for algorithmic transparency.[34] Furthermore, there is little clarity on what reasonable protective measures look like for AI-generated works, creating uncertainty for companies trying to protect their models.[35] Altogether, this underscores why modernizing U.S. patent law to address AI-generated inventions is essential: trade secrets alone cannot sustain U.S. leadership in AI.

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[27] *See* Abbott, *supra* note 22, at 699.

[28] *See id.*; *see* Tshimanga Kongolo, *Intellectual Property and Artificial Intelligence, in* Intellectual Property and Emerging Technologies: Generated Global IP Issues and Challenges 20 (Tshimanga Kongolo ed., Taylor & Francis 2024).

[29] Wen Xie, *The Case for Patenting AI: U.S. Patent Laws Better Get Smart or Get Left Behind*, IPWatchdog (July 14, 2022), available at https://ipwatchdog.com/2022/07/14/case-patenting-ai-u-s-patent-laws-better-get-smart-get-left-behind/id=150204/ [https://perma.cc/J9YU-UXVA].

[30] Kongolo, *supra* note 28, at 45.

[31] *Id.*

[32] Sarah Jackson, *Sam Altman Explains Why OpenAI Went Closed-Source with Its AI Models*, Bus. Insider (Nov. 2024), https://www.businessinsider.com/sam-altman-why-openai-closed-source-ai-models-2024-11 [https://perma.cc/8M29-BHHX].

[33] Gina L. Campanelli, *Can ChatGPT Keep a Secret? An Evaluation of the Applicability and Suitability of Trade Secrecy Protection for AI-Generated Inventions*, 24 Duke L. & Tech. Rev. 1, 19–21 (2024).

[34] *Id.* at 1.

[35] *Id.* at 20–21.

Indeed, recent developments suggest that leading AI firms are increasingly aware of the limits of relying solely on trade secrets and are shifting toward patent protection. OpenAI, for instance, has recently pivoted toward building a substantial patent portfolio, filing numerous patents in 2023 for AI-driven technologies such as code generation and image editing.[36] Importantly, these patents generally cover AI-enabled inventions—tools and applications created with AI or related to how AI functions—not inventions created autonomously by AI systems.[37] That distinction is key. Under current U.S. law, only inventions with a human inventor are patentable; fully AI-generated inventions, where no human qualifies as the inventor, are not eligible. As a result, OpenAI and others can patent technologies related to how AI is used or structured, but they cannot obtain patents on outputs generated entirely by AI systems. This legal gap limits what can be protected and leaves U.S. firms vulnerable to competitors in jurisdictions with more flexible rules. OpenAI's current strategy may offer near-term benefits, but broader patent reform is essential to keep U.S. firms competitive in the long run.

III. Strategic AI Acquisitions and the Legal Battle for Market Control

In the global race for AI dominance, strategic acquisitions have also become essential tools for U.S. firms to secure tech, talent, and block rivals like DeepSeek. But these deals are shaped by antitrust law, merger rules, and national security reviews.

With the AI market expected to grow by 154% in coming years, acquiring AI startups is now a critical strategy for U.S. firms to maintain technological leadership, a strategy that operates within and is constrained by existing merger, antitrust, and intellectual property laws.[38] Through acquisitions, companies gain not only proprietary AI models and algorithms but also the patents, trade secrets, and engineering talent needed to stay competitive in a rapidly evolving field.[39] Importantly, these acquisitions also serve as a defensive legal strategy, preemptively preventing foreign rivals from acquiring transformative AI technologies.

Major firms like Apple, Microsoft, Google (Alphabet), Meta, and IBM have been especially aggressive, completing over 4,354 AI-related acquisitions

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[36] *OpenAI's Shift from Trade Secrets to Patent Protection*, Bryn Aarflot (Jan. 16, 2024), https://baa.no/en/articles/openais-overgaopenai-s-shift-from-trade-secrets-to-patent-protectionng-fra-forretningshemmeligheter-til-patentbeskyttelse [https://perma.cc/3W7U-MDEC].

[37] *Id.*

[38] Nathan Thompson, *AI Acquisition: Strategies for Success in 2025*, Copy.ai Blog (Jan. 21, 2025), available at https://www.copy.ai/blog/ai-acquisition#:~:text=AI%20acquisition%20has%20become%20a%20critical%20strategy%20for%20companies%20looking,innovate%20faster%20and%20more%20effectively [https://perma.cc/D38W-WK53].

[39] *Id.*

from 2014 to 2023, and typically buying AI startups earlier than other firms.[40] By acquiring AI startups early, U.S. firms effectively lock down key technologies under U.S. IP law, often before they are fully commercialized, and before foreign actors like DeepSeek can make competing offers.

However, while AI acquisitions are essential for U.S. competitiveness, they are increasingly scrutinized under U.S. antitrust and merger laws, including the Sherman Act, Clayton Act, and FTC Act. The concern is that Big Tech firms might engage in "killer acquisitions," buying AI startups not just to innovate, but to eliminate future competition.[41] Research on the pharmaceutical industry by Cunningham, Ederer, and Ma illustrates how incumbents often acquire innovative rivals to shut down overlapping projects that threaten their market power, finding that such projects were 23.4% less likely to be developed post-acquisition, with many halted immediately to eliminate potential competition.[42] While their study focuses on pharma, the logic applies powerfully to AI, where early-stage startups working on transformative models could be quietly acquired and shelved to protect incumbents' dominance.

These "killer acquisitions" are often structured to evade regulatory review by staying just below antitrust reporting thresholds, raising concerns that early-stage AI startup acquisitions, especially small, cutting-edge firms working on foundational AI models, could be quietly neutralized before they challenge Big Tech incumbents.[43] As AI becomes central to critical sectors like healthcare, finance, and defense, this risk is no longer theoretical.

Foreign firms have also exploited loopholes in U.S. investment review laws to gain access to sensitive AI technologies. As documented in an earlier congressional investigation, Chinese state-linked companies have used shell companies, front entities, and indirect acquisitions routed through jurisdictions like Hong Kong to avoid triggering review by the Committee on Foreign Investment in the United States (CFIUS).[44] In one notable case, the PLA-affiliated company CATIC attempted to acquire a Seattle aerospace supplier, MAMCO, only to reroute the deal through other Chinese firms after the U.S. government blocked the initial transaction.[45] These examples illustrate the need to modernize investment screening mechanisms to deter indirect foreign control over emerging U.S. AI assets.

Thus, this section argues that U.S. regulators must strike a balance: preventing anti-competitive consolidation while avoiding overly restrictive reviews that stifle strategic acquisitions essential to national competitiveness.

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[40] Jack Corrigan, Ngor Luong & Christian Schoeberl, *Acquiring AI Companies: Tracking U.S. AI Mergers and Acquisitions*, Ctr. for Sec. & Emerging Tech. 1, 1 (2024).

[41] *See* Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 129 J. Pol. Econ. 649, 649 (2021).

[42] *Id.* at 652.

[43] Thompson, *supra* note 38.

[44] *See* H.R. Rep. No. 105-851 (1999).

[45] *Id.* at 44–45.

Rather than reducing scrutiny across the board, the U.S. should modernize its merger review process by developing clearer, faster pathways for acquisitions that promote innovation and serve the public interest. This may require creating safe harbors or fast-track reviews for acquisitions involving AI firms with clear national security relevance.

As legal scrutiny intensifies, companies are already shifting toward alternative deal structures such as strategic partnerships, minority investments, and licensing agreements that allow access to cutting-edge AI technologies without triggering regulatory alarms.[46] Microsoft's $10 billion partnership with OpenAI, structured as an investment rather than an acquisition, illustrates how firms are navigating this landscape.[47]

Altogether, these trends suggest that the future of AI M&A will be shaped as much by evolving regulatory strategies as by technological breakthroughs. If the U.S. wants to maintain its edge, merger law must not only guard against monopolization, but it must also enable the kind of strategic consolidation that supports long-term innovation, national security, and economic leadership.

Conclusion

In the global race for AI dominance, the battle will not be won by technology alone, but by those who control the legal and regulatory frameworks that govern it. While American firms have led in AI innovation, China's DeepSeek is demonstrating that cost, openness, and strategic use of international loopholes can rival even the most advanced U.S. models. Without decisive action to strengthen AI regulation, intellectual property protections, export controls, and merger law, the U.S. risks ceding ground in what is not just a technological contest, but a geopolitical struggle for control over the future of AI.

To stay ahead, the U.S. should take concrete steps: revive executive-level AI safety standards, coordinate with allies to close export control gaps, reform outdated patent law to include AI-generated inventions, and streamline merger review processes for AI-driven acquisitions that serve the national interest. These actions won't resolve every challenge, but they are necessary first steps toward reestablishing American leadership in AI governance.

To maintain leadership, U.S. firms and policymakers must stop treating AI law as an afterthought and start using it as a strategic tool to protect American innovation, limit foreign adversaries, and shape global AI norms. In this new era, who writes the rules will matter as much as who writes the code. If the U.S. fails to lead, others will step in to define the AI world on their terms.

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[46] *See* Van Grack et al., *supra* note 13; Corrigan et al., *supra* note 40.

[47] Cade Metz & Karen Weise, *Microsoft to Invest $10 Billion in OpenAI, the Creator of ChatGPT*, N.Y. Times (Jan. 23, 2023), https://www.nytimes.com/2023/01/23/business/microsoft-chatgpt-artificial-intelligence.html [https://perma.cc/SU7K-JH9T].