Reconsideration of Chinese Anti-monopoly Law Applied to the Field of Intellectual Property

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ABSTRACT

Since Chinese anti-monopoly law was implemented in August 2008, it has been of great significance in safeguarding the free and fair competition mechanism and economic vitality as well as ensuring the allocation of resources according to the demand and effective purpose. While in the implementation process of Anti-monopoly Law of People's Republic of China, how to guarantee its effective implementation and the best interest of the public and consumer have become the important problems, and the resolving of this problems is not only related to various issues such as enforcement procedure and legal regulations, but specific complex conditions of implementation in different areas covered by the law. This paper rethinks the relevant problem of Chinese anti-monopoly law applied to the field of intellectual property and provides some reference for the effective application of this law.

KEYWORDS
Anti-monopoly law; Intellectual property; Complexity

PREFACE

Anti-monopoly Law of People's Republic of China (hereinafter referred to as anti-monopoly law), plays a great role in protecting the rational allocation of resources and preventing the impact of monopolistic behavior on the economic market, after the ten-year operation. While intellectual property protection also is one aspect of anti-monopoly law protecting resources to some extent. At the age of knowledge and economy, people’s knowledge and economy concept have increasing, and how to maintain the intellectual property and confine the irrational competition are the essential effect of anti-monopoly law applied to the field of intellectual property. However, the reconsideration with its application contributes to realizing its role of guidance when its application method and practice are immature.

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CURRENT STATUS ANALYSIS OF CHINESE INTELLECTUAL PROPERTY PROTECTION

Intellectual property belongs to one significant concept in the knowledge and economy era, and its generation and development are related with the realistic development of Chinese knowledge and economy market, and knowledge of property right occupies a significant position in the knowledge and economy stage, also the important basis of Chinese social production, science and technology development. While along with the rapid expansion of economic globalization, the flow of international knowledge capital has been more frequently, and competition among countries have change from single competition with resource and influence to knowledge. Talents, as the important resources at the age of knowledge and economy, have become the new elements under the circumstances of global new economy and culture and had significant influence on the development and evolution of international political, economic and cultural patterns.

As for our country, the protection of intellectual property is still in the position of weakness, mainly expressing in the following aspects:

Firstly, the whole level of intellectual property protection is enhanced. Viewing from the aspect of intellectual property quantity, quality and structure as well as the core technology possessed by our country, Chinese intellectual property condition has made a great progress; while from the data, the application and registration number of intellectual property with various main types in 2016 have increased to a great extent, handling 1.339 million invention patent application with year-on-year growth of 21.5 percent and ranking the first in the world for continuous six years; receiving 41,000 PCT international patent application with year-on-year growth of 49.9 percent and 3.691 million trademark application with year-on-year growth of 28.4 percent. The application development index of intellectual property also has a great advance, marking that Chinese intellectual property development based on the year of 2010 has made a great progress .

Secondly, there is a larger total number of intellectual property with a steady trend in the eastern area, and the development potential in the central and western regions is increasing. The intellectual property comprehensive development index, with the representative of Shanghai, Jiangsu and Zhejiang, totally shows a rapid development and larger base, which is of great significance in promoting our intellectual property protection and forming benign market atmosphere, while the western provinces also have the corresponding development in recent years, and the central and western provinces with the representative of Shannxi and Gansu express their great vitality in trademark registration and patent application.

Finally, the entire development of Chinese intellectual property still has some drawbacks compared with Western countries, and infringement act often occurs. The relatively famous intellectual property case of “Jordan case” in 2016 explained the status from the side. Although our country is experiencing gradual development and increasing in the comprehensive development index and overall status of intellectual property, there still exists the deficiency in the entire protection awareness and application awareness compared with Western developed countries, mainly showing the lower international ranking and larger fluctuation of intellectual property development ability, imperfect concept and development potential of intellectual
property protection as well as the lower mature degree of market cultural environment which is obviously inferior to Japan, America and Europe.

**RECONSIDERATION OF CHINESE ANTI-MONOPOLY LAW APPLIED TO THE FIELD OF INTELLECTUAL PROPERTY**

Implementation complexity of Chinese anti-monopoly law applied to the field of intellectual property

Chinese anti-monopoly law can not only be applied to the economy market, but the field of intellectual property, which is the important development in the implementation process of anti-monopoly law. While intellectual property itself has the problem of inappropriate control and complex identification, so the application of anti-monopoly law in the field of intellectual property is equipped with certain complexity and challenge. For a long time, Chinese law circle has been making the continuous research of mutual relation among the anti-monopoly laws, especially the related relationship between anti-monopoly law and intellectual property and how to correctly treat certain complexity existing in the various intellectual property behaviors when anti-monopoly law is implemented, which has a great challenge.

What is rather explicit is the typical abusing behavior of intellectual property in our country, for instance: if the subject is the right owner or the licensee with exclusive licensing and there is no legitimate right but harm others, it belongs to the tort rather than the abuse of rights; subjectively, the actor has the intention to harm the interest of other people or society, and objectively, he adopts the illegitimate behavior such as not implementing, improperly restricting the trading and unfair trading. However, Chinese anti-monopoly only put forward in the article 55 that “This law shall not apply to the behavior of intellectual property rights prescribed by administrative regulations; however, this law is applicable to operators who abuse their intellectual property and exclude or restrict the competition”. According to the related infringement and abuse condition of intellectual property in our country, there is no doubt that the regulation of *Anti-monopoly law* is the expression of aggravating the application complexity of this law in the field of intellectual property. The reason is that the interpretation with the clause is diversified, for example, it will highlight the principle viewed from the positive angle, and establish the legal regulation and position of our intellectual property protection behavior. But also, some scholars think that the rationality and necessity of this regulation has considerable problems that it is unable to complement the original deficiency and loophole when *Anti-monopoly law* is applied to the field of intellectual property protection, but this clause lacks the normative interpretation with how to make specific intellectual property protection, which causes the confusion of judicature and enforcement practice.

However, the article 55 in the *Anti-monopoly law*, lacking the detailed regulation, highlights the issue that anti-monopoly law is currently applied to the field of intellectual property to make the intellectual property protection, therefore, this article is supposed to make some adjustment on the legislative direction, and its improvement should be based on the development direction of deleting the exclusive clauses and regulating the implementation rules of anti-monopoly law in the intellectual property cases.
Reconsideration of the regulation of Chinese anti-monopoly law on the intellectual property abuse

The anti-monopoly regulation restricting the competitive behavior of intellectual property license agreement may be confined by the intellectual property license terms of anti-monopoly regulation (for example, tying clause, restricting resale and competition clauses), which also is the common competition-restricting behavior affected by the anti-monopoly regulation in the field of intellectual property. Because the restriction added by these clauses don’t belong to the rights range prescribed by the intellectual property, while what it includes is exactly the competition-restricting content regulated by the anti-monopoly law.

Meanwhile, protection degrees of anti-monopoly law with rights and intellectual property subject of different patterns are various, these industries of cultural market, and high-tech enterprises with many knowledge fruits should be specially regulated by anti-monopoly law, but due to the large number of enterprises and heavy network, the propagation velocity is rapidly expanding with a series form, weakening its market power. So it is not simple as the intellectual property regulation of traditional economy and industry enterprise that can deliberately do the beneficial behavior but hurting the market consumers. As is said by some scholars that intention itself is an element to restrict and define fraud and one of the inherent attributes, and fraud will not be fraud if without the element. Intention is that the actor deliberately did it or permit the result but he knew that his behavior is harmful to others. While the fault is that the actor should have foreseen that his actions could harm society, but he failed to foresee due to his negligence or credulity to avoid although he has foreseen the result. And the main difference of intention and fault is on the pursuit of attitude with the result, namely, under the attitude of intention, it will always not violate the will of actors whether the damage result happened or not, while under the attitude of fault, actors are against the occurrence of harmful result. In specific, the rights abuse behavior of operators or rights subject have bad even vicious motive, and what we call the vicious motive of actors means that the defendant should be blamed on the mentality and behavior for he has the subjective purpose to manipulate the opposite side into a wrong awareness so as to obtain the illegal interest. By contrast, if the economic behavior implemented by operators is not aiming at the illegal interest subjectively, only making consumers have misunderstandings and resulting in a harmful result because of the objective fault, which is not an infringement. From the above analysis, it can be seen that identification part of Chinese anti-monopoly is equipped with intellectual property infringement same with the ones in the ordinary consuming actions, but the professional and technological anti-monopoly law intensifies its wide regulation power in various departments, such as economy and law. However, when facing the field of intellectual property, how to make the specific interpretation and regulation with the behavior of abuse and infringement need lots of staffs who are familiar with laws and regulations and good at law enforcement as well as decree research members.

Infringement of intellectual property should be equipped with certain countermeasures of punishment and compensation
Punitive damages, as one kind of accountability mechanism, originally appeared in England and its application was strictly confined due to the factors of British judicial system and development conditions of state. By contrast, it prospered and developed to a system that commonly protects the rights and interests of consumers. In 1964, British House of Lords made the judgment with Rooksv. Barnard, which not only has an effect on this case, but plays a significant role in the development of punitive damages system around the world, showing the three types applicable to this system. At first, legal provisions or judicial precedents explicitly point out the applicable situations; secondly, cases of monopoly, persecution or extreme danger enforced with government departments, such as state organs and government; thirdly, the case deliberately done by infringer with the purpose of subjectively making profit. On the basis, the court should adopt punitive damages cause and application standards (this standard originated from the case of ABv. South WestWater Services Ltd approved by English Court of Appeal in 1993), and strictly control the situation of subjective vicious lawsuit of infringer, personal imprisonment with the illegal purpose and personal attack with nasty contusion. In addition, English Court of Appeal also made the prohibitive regulations applicable to the following types: the illegal discrimination with disability, race and gender; the infringement behavior of vicious fraud, infringing others’ patent protection right and obstructing public order. But the later Britain made the close restraint and further narrowed the applicable range to: (1) The subject qualification of the plaintiff shall be the infringed and victim in the process of infringement; (2) The judge can be applied only under the circumstance that application of compensatory damages cannot protect rights and interests of the consumer and able to curb the illegal trading, coupled with the premise of social stability and trade order settlement. (3) The legal provisions are not applicable to the infringer who have received the punishment for this. (4) It also cannot be applied if the defendant can prove or the judge can confirm that he has fulfill his obligation to be honest in the trading process; (5) When the infringed has fault in the infringement behavior, the compensation responsibility of infringer should be considered to be lessen or eliminated; (6) When there are many infringed persons and the court is unable to verify the specific infringed one or actually not been hunted after the court checking the accuser, the application of punitive damages system should be restricted.

The punitive damages system should also be explicitly introduced when Chinese anti-monopoly law makes the protective regulation with intellectual property, in order to make the normalized regulation.

THINKING OF NORMALIZING CHINESE ANTI-MONOPOLY LAW APPLIED TO THE FIELD OF INTELLECTUAL PROPERTY

Enforcement of anti-monopoly law belongs to a vital, complex and sensitive task, while law enforcement not only needs advanced concept and enforcement innovation in the field of intellectual property, but the accurate enforcement of our anti-monopoly law enforcement agencies, exact using intellectual property of related proprietors as well as efficiency and transparency of enforcement. And all of the above, complexity of mutual relationship between anti-monopoly law and intellectual property, thinking of anti-monopoly law applied to the field of intellectual property and norm with punitive behavior, are contributory to constructing rational anti-monopoly law enforcement environment and achieve regarding anti-monopoly law as the the
significant task to protect intellectual property rights owner and subject. In the meantime, the legal regulations and practice of legislation and enforcement of related countries are supposed to positively used for reference, which is beneficial to improve the application of Chinese anti-monopoly law to the field of intellectual property.

CONCLUSION

To sum up, this paper made some reconsideration with the actual problems of anti-monopoly law applied to the field of intellectual property coupled with the current condition of intellectual property protection field in our country, mainly highlighting the complexity and non-integration expressed by Chinese anti-monopoly law in the process of mutual compatible development with intellectual property field. Meanwhile, it made the research on the related regulation of Anti-monopoly Law and clarified the relevant behavior of applying anti-monopoly law to the field of intellectual property, in order to provide good executive suggestion on the issue of Chinese intellectual property protection.

REFERENCES