On the Relation of Exercising of Patent Rights and Antimonopoly Law

DE LA RELATION ENTRE L'EXERCICE DU DROIT DE PROPRIÉTÉ INDUSTRIELLE ET LA LOI ANTITRUST

Ning Lizhi[1]

Abstract: Antimonopoly law provides exemption for the legitimate exercising of patent rights, casts regulation and control over the patent abuse. This article expounds the exemption subject, exemption condition, exemption occasion as well as exemption category, elucidates the relation of abuse behavior and antimonopoly law, puts forward concrete regulating approach on the patent abuse by antimonopoly law.
Key words: legitimate exercising of patent rights, patent abuse, antimonopoly law

Résumé: le juste exercice du droit de propriété industrielle est immunisé selon la loi antitrust, j'expose dans cette thèse l'objet, la condition, l'occasion et la catégorie de son immunité. Pourtant, l'abus du droit de propriété industrielle est restreint aussi selon la loi antitrust, j'explique la relation entre l'abus du droit de propriété industrielle et la loi antitrust, puis propose mon projet afin de restreindre l'abus du droit de propriété industrielle par la loi antitrust.
Mots-Clés: le juste exercice du droit de propriété industrielle, l'abus du droit de propriété industrielle, la loi antitrust

1. INTRODUCTION

As patent is a monopolistic right, the complex relation of the exercising of patent rights and antimonopoly law arises while antimonopoly law aims to cast blow on monopoly. Patent law consists with antimonopoly law on the purpose and function which aims to promote innovation and advance consumers' welfare. Nevertheless, patent law also conflicts with antimonopoly law latently on the game and balance of individual interests and public interests. These conflicts virtually reveal the contradiction between the private interests of patent law and the social interests of antimonopoly law. In light of this duality, it is stipulated according to Article 64, *Antimonopoly law of P.R of the China (Draft for examining),* "operator who exercises legal rights in accordance with the rule of *Copyrights Law of the P.R of China, Trademark Law of the P.R of China, Patent Law of the P.R of China* is free from restriction, any behavior which breaching any of these laws or abuse of intellectual property shall be restricted accordingly." All this actually indicates the attitude of antimonopoly law towards intellectual property: one is the exemption of justifiable exercise of intellectual property, the other is regulation and administration on abuse of intellectual property.

2. THE EXEMPTION ON JUST EXERCISE OF INTELLECTUAL PROPERTY BY ANTIMONOPOLY LAW

The exemption on legitimate exercising of intellectual property by antimonopoly law is substantially a reflection of the internal connection of patent law and antimonopoly law on legislation. Owing to the consistence of patent system and antimonopoly law on urging innovation and advancing consumers' welfare, Patent Law can effectively carry out its incentive on research and innovation, facilitate competition. Therefore, exemption is provided for the just exercise of patent rights by Antimonopoly law.

2.1 Subject of Exemption

Not all exercises of patent rights can be exempted from antimonopoly law. The subject of exemption can only be limited to the proper exercise of patent rights. Then

[1] Faculty of Law, Wuhan University, China.
* Received 7 July 2007; accepted 11 September 2007

how to determine the criterion of "proper exercise"? The author of this paper thinks that when making a judgment about whether a patent exercising behavior constitutes patent abuse, we should take two points into consideration: first is the behavior is in essence an act of "exercising of patent rights", second is the "proper" exercise. Only when these two points both meet, can the act be exempted from antimonopoly law correspondingly.

2.1.1 The act of exercising of patent rights. First of all, the actor must achieve the legal acquisition of the patent rights. If the actor exercises some so-called "patented" rights without virtual acquisition of the patent or exercises it in the name of patentee without substantive patented right**,** or continues to exercising his patent rights after the expiration of the patent, it is obviously not the case mentioned above. Secondly, the act must be in the scope of the patent. If it is beyond the scope of legal authorization by patent law, it definitely doesn't belong to "the exercising of patent rights". The behavior of exercising patent rights refers to the behavior conferred by patent law serving the purpose of realization of economic benefits. Therefore, we shall take patent law as legal basis.

2.1.2 Proper exercise. As to this point, the criterion is whether the behavior is prohibited by antimonopoly law or other related laws. The patentee's exercise of patent rights may bring about restriction and adverse effect on competition more or less. But on measuring the legislative purpose of patent law, it is tolerable by antimonopoly law anyhow. Examples are negotiating using category, scope of rights, field of use, period of using and so on when patentee formulates patent assignment or licenses agreement. Those acts not violative of the principle of competition may be excluded from antimonopoly law. Nevertheless, if the patentee abuses his rights or departures from the doctrine of good faith and causes adverse effect on competition, his act should not be justified simply by the form of exercising rights, such as, tie-in practices in license agreement, set unreasonable restrictions for licensees, etc, that will constitute infringement of antimonopoly law. In other words, as for the recognition of "proper", we shouldn't judge from whether it conforms with the stipulations of patent law ex facie, but from whether it is inherently harmful to competition or whether it is against the legal principle of fairness and justice.

2.2 Exemption Occasion

Exercising patent rights would not necessarily cause adverse effect or restriction on competition. In fact, when patentee makes utilizations of his patent, the State is unable to interfere in the operation under the name of fair dealing for there is no harm done to the dealing order. Likewise, under the circumstances that licensee manufacturer is unable to sell, as far as the technology is concerned, the licensee manufacturer can be deemed as part of production line of the licensor factory, then the possibility of interference of antimonopoly law and patent law may require further deliberation. The exercising of patent rights herein refers to the substantial meaning of patent itself, therefore is far from discussion of exemption. Only when the exercising of patent rights affects market dealing, can we have the issue of maintaining fair dealing order. Therefore, the exemption system of justifiable exercising of patent rights by antimonopoly law is applicable only when involving market dealing.

2.3 Exemption Category

Comprehensively inspecting the legislation of various countries and regions around the world, exemption mainly falls into two categories: one is the exemption for practices that basically have no influence on competitions; the other is the exemption for those that are extralegal per se but have negligible impact on competition. As for the former, it can be reasoned out according to the fundamental spirits of patent law; as for the latter, a final choice is made after weighing the advantages of exercising patent rights and the disadvantages of competition restriction. Consequently, the exemption of proper exercising of patent rights is still the result of balancing interests in essence.

3. ON THE REGUALATING OF ABUSE OF INTELLECTUAL PROPERTY BY ANTIMONOPOLY LAW

3.1 the Relationship Between the Abuse Behavior of Patent Rights and Antimonopoly law

As to the relationship between the abuses behavior of patent rights and antimonopoly law, the core is the relationship between patent rights abuse behavior and competition restraint behavior.

"Rights are not allowed to be abused." is a basic idea in law. To avoid the abuse of rights, the exercising of rights should be restricted to certain extent. The exercising of patent rights is essentially the exercising of private rights, and then it firstly must be subject to good faith doctrine, principle of rights abuse prohibition and principle of public order and good moral of Civil Law. Secondly, as the fundamental law of patent system, mandatory rules as compulsory license and reasonable use are set to prevent patent abuse. Thirdly, base on the inborn "kinship" of patent rights and monopoly, the examining of its abuse behavior from the angle of antimonopoly law is also indispensable. Owning to the concept ambiguity of the fundamental principle of civil law, the applying field is not objective enough, and it

may cause destabilizing law application. Therefore, the regulating of patent abuse can only be auxiliary and complementary. Scholars discuss more on the unitary regulating mode of Patent Law, the dualistic regulating mode of Patent Law combining with Antimonopoly law as well as which should enjoy the application superiority.

The author agrees with dualistic regulating mode. The reasons are as following:

3.1.1 Patent Law aims to protect patents, promote innovation, accordingly, it has a inclination to emphasize the protection of patent rights, being unable to make explicit stipulation to patent rights abuse behavior; while anti-monopoly law realizes its maintenance for competition mainly through the regulation of anti-competition behavior, it is why its regulation towards rights abuse behavior are more concrete and more powerful

3.1.2 If rights abuse behavior must be regulated through paten law, it must be patent office's responsibility. Whereas, considering the manpower and professional experience of patent office, they seem to be skilled in the qualification of the technology applying for patent registration; while professional antimonopoly institution having the specialty to estimate of market influence caused by economic behavior. To regulate patent behavior incurring competition impediment by special antimonopoly institution could save law enforcement cost and enhance law enforcement efficiency.

Certainly, it doesn't mean that regulation performed by antimonopoly law alone is sufficient. There indeed exists abuse behavior being judged as rights misuse, which does not obstruct competition order. "Patent abuse" is usually the behavior which patentee intends to extend the rights unable to be endowed by patent law; but the prohibited behaviors specified in antimonopoly law have different constitutive requirement. In litigation practice, "patent abuse" conduct does not necessarily refer to the behavior prohibited by antimonopoly law; but on the contrary, the behavior prohibited by antimonopoly law may roughly constitute "patent abuse". That is to say, "Between lawful utilization of rights and violation of antitrust law, many behaviors constitute patent abuse, though not enough to constitute a breach of antitrust law, for which they will be deprived of patent as a temporary punishment." [2] Regarding regulation of these abuse behavior, they should be implemented through amendment and supplement of patent law, and the application interpretation of fundamental principle of civil law.

3.1.3 In the nature of private law, patent law protects private interests directly; antimonopoly law, as public law, protects the overall social interests. Generally speaking, when private interests conflict with public interests, it's the public interests that should be protected preferentially, namely the application of public law is superior in principle.

3.2 The Regulation of Patent Rights Abuse by Antimonopoly law in China

The stipulation in Article 64, *Antimonopoly Law(draft for examining)* of our country is virtually borrowed from the legislative experience of Japan and Taiwan Region of P.R of China, making principle rules of patent exercising in Antimonopoly law.

Since antimonopoly law is incapable of making overall and detailed regulations on the patent exercising, it's indispensable for us to borrow relevant experience from U.S.A, E.U., Japan, etc, that is, the antimonopoly law enforcement institution solve the monopoly problem involving patent exercising by setting special guidelines and rules and regulations according to different periods and specific condition. Based on the stipulation of Article 6, *Antimonopoly law(draft for examining)*,P.R of China, the antimonopoly law enforcement institution in China is a special branch established under the jurisdiction of commerce administrative department of the State Council. According to this act, the branch is still an administrative institution, hence performs administrative power as before. Hereby the stipulation made by antimonopoly law enforcement institution is still administrative regulation in nature. In China, administrative code is one of the legal basis applied in court case inspection, this kind of stipulation thereby can not only be applied as guideline in administrative law enforcement but also applicable in judicial practice, even beneficial to the intervention and inquisition of lawsuit by court.

As for how to normalize patent abuse behavior, the author thinks that, first and foremost we should handle properly the relationship between patent protection and competition maintenance from a guiding ideological angle, and shouldn't be too strict in the delimitation of justifiable patent exercising while strengthen the sense of protection. The possession of patent itself is not the ground of monopoly position, even if the acquisition of market monopoly is resulted from patent acquisition, it does not necessarily constitute monopoly. It's a common trend that many countries are loosening up the regulation of antimonopoly law. Through inspecting, the antimonopoly law legislation on patent by different country is on the loose to certain extend, [3] and also have made multiple exclusion rules; secondly, on legislation mode, the exercising of patent rights can take the combination of generalization and enumeration, combining the general defining with specific enumerating, the method performed by E.U. and Japan

[2] Arthur R. Miller& Michael H. Davis. *Intellectual Property*. West Publishing Co.1990,p,137

[3] Wang Bingyin, Wang Jianfeng. Development and Evolution of Patent System: Technology Monopoly and Antimonopoly , *Guangxi Social Science*, 2004, Volume 3.

may also be introduced, which is to divide the patent licensing restriction into three categories so as to meet different means of identification and principle of inspection to facilitate effective and convenient regulation of patent licensing behavior; Thirdly, as to system allocation, the measure taken in Taiwan region may be recommended, an advance-notice procedure on monopolistic position is set to inform the enterprise when it has reached the monopolistic position so as to urge it to act cautiously and avoid any abuse behavior, hereby save unnecessary resource cost. Lastly, special attention must be paid that. the specific measure of antimonopoly law restriction on patent exercising is intricate and elaborate, while the borrowing of foreign advanced experiences, the general investigation to domestic situation is also indispensable. The legislator must give special concern and consideration on how to design corresponding system detail so as to suit the actual situation of China and get better implementation.

4. CONCLUSION

From above we can conclude that patent, being monopolistic rights, is not necessarily violative of antimonopoly law. Antimonopoly law can tolerate the legal monopoly of patent, thus it is immunized from antimonopoly law. However, antimonopoly law casts regulation and even blow on patent abuse which damages market competition order by means of public power, so as to ensure the balance of individual interests maintained by patent monopoly and social interests assumed by free competition.

THE AUTHOR

Ning Lizhi, Doctor, Vice-Professor, Faculty of Law, Wuhan University, Wuhan, Hubei, 430072, P. R. China.

E-mail: ning_lizhi@sohu.com