Regulating and Limiting the Regulation: Research on IP Licensing from China's Antimonopoly Law

- Concurrent discussion over formulation of China's *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights*

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[Abstract]

The idea of the "regulating and limiting the regulation" plays an important role in the anti-monopoly legislation, enforcement and juridical practice. The idea of "regulating and limiting the regulation" came into being on economic basis, jurisprudence basis and legal basis. Under the guidelines of such idea, the principles such as statutory principle of regulatory power**,** interests balancing principle, reasonable analysis principle, equal treatment principle, and case by case analysis principle become the major enforcement principles for the regulating of intellectual property licensing practices under the anti-monopoly law. According to the above implement principles, there are many analysis frameworks in the regulating of intellectual property licensing practices, i.e. from the regulatory structure of anti-monopoly law, to construct the analysis framework in the logic order of the basic principle, monopoly agreements, abuse of market dominant position, concentration of operators; from the possibility that it will be prohibited by the anti-monopoly law, to construct the analysis framework in the logic order of the intellectual property licensing practices that shall usually be prohibited by the anti-monopoly law, that it is necessary to make the detailed and specific anti-monopoly analysis, and that may be permitted by the anti-monopoly law; from the different forms of intellectual property licensing practices, in the logic order of vary in number of specific intellectual property licensing practices related to competition that operators engage in the economic life. The research of the idea, implementation principle, and analysis framework on the regulation of intellectual property licensing practices under anti-monopoly law, may provide the pertinent counter-policies and suggestions for the formulation of *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights* in China.

[Key words]

Regulation; limiting the regulation; Anti-monopoly law; Intellectual property licensing

It is a basic common sense in the anti-monopoly legislation, enforcement and judicial practices in all countries that the anti-monopoly law may and must regulate the intellectual property licensing practices which have impaired or might impair competition. However, it is the questions we must think about and be faced with how to regulate intellectual property licensing practices under anti-monopoly law, what specific or special problems will be encountered in the enforcement and judicial practices, what the analysis framework that anti-monopoly enforcement and judicial practices should follow to will be, which analysis factors will be considered with regard to various intellectual property licensing practices. This paper tries its best to sort out the system idea of regulating intellectual property licensing practices under anti-monopoly law, in combination with China's reality, and take such idea as the logic main line and research angle, to discuss the implementation principle and analysis framework of regulation of intellectual property

licensing practices under anti-monopoly law, so as to provide the concerned counter-policies and suggestions for the formulation of *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights* in China.

I. The system idea of regulating the intellectual property licensing practices under anti-monopoly law: "regulating and limiting the regulation"

Intellectual property rights which are the same as other property or rights may be certainly protected by laws, but should be regulated by the anti-monopoly law because there is the possibility that such rights might be abused so as to eliminate and restrict competition. The intellectual property right licensing practices are the same as other transaction form, it shows the obligee performs the right of freedom of contract, but it will be regulated by the anti-monopoly law when the performance of the right of contractual freedom might possibly eliminate and restrict competition. For example, many countries think that it is the abuse of intellectual property rights for the terms and conditions of "preventing challenges to validity of the patent" in the intellectual property right licensing agreement, since such behavior is a kind of typical monopoly of restricting competition.[1] The difficulty in the regulation of intellectual property licensing practices under anti-monopoly law is not whether the anti-monopoly law may regulate intellectual property licensing practices, but how the anti-monopoly law finds, defines and masters a "reasonable limitation" in regulating the intellectual property licensing practices. In essence, such "reasonable limitation" is to define the boundary between legal extent and illegal extent for intellectual property licensing practices in the horizon of anti-monopoly law. In order to ensure the regulation of intellectual property licensing practices by anti-monopoly law, while the legislative objectives such as the maintenance of market competition are achieved, it will not excessively impair an undertaking's intellectual property rights and the right of freedom of contract. Therefore, it is prominent for the importance of the idea of the "regulating and limiting the regulation" system.

Firstly, the system idea of the "regulating and limiting the regulation" came into being on economic basis. According to the theory of "bounded rationality", an operator is "rational economic man", his attention and purpose are to realize the maximization of self interests. However, the rationality is bounded, under some circumstances, when an operator is engaged in intellectual property licensing practices, his activities will impair free and fair competition and he won't modify or avoid his activities by himself, or it is difficult for him to do so. Therefore, the anti-monopoly law need regulate some intellectual property licensing practices to realize the maintenance of competitive mechanism and adjustment in market failure. At the same time, since the anti-monopoly enforcement authorities and judicial organs are also "rational economic men", when they regulate intellectual property licensing practices by the implementation of anti-monopoly law, the result that anti-monopoly law regulates intellectual property licensing practices might be low efficiency, no effect or even negative effect, possibly because of inadequate information, abuse of power, corruption and rent seeking, imperfect enforcement system, or lack of enforcement ability etc. In order to prevent from such result, the anti-monopoly law must make the necessary restriction on the regulation of intellectual property

[1] See Paragraph 2, Article 40, Section 8 of the *Agreement On Trade-related Aspects of Intellectual Property Right*.

licensing practices, to complete the adjustment in governmental failure. The idea of the "regulating and limiting the regulation" system came from the practice of the economic theory of "bounded rationality" in the regulation of intellectual property licensing practices under anti-monopoly law.

Secondly, the system idea of the "regulating and limiting the regulation" came into being on jurisprudence basis. The idea of "regulating and limiting the regulation" shows the thought of combination between empowerment and restriction of rights. It is neither purely the empowerment on the regulation of intellectual property licensing practices under anti-monopoly law, nor simply the restriction on the regulation of intellectual property licensing practices under anti-monopoly law. Since "regulating" and "limiting the regulation" need display in such a system, it is the organic combination between "regulating" and "limiting the regulation", and such organic combination may ensure the reasonableness and effectiveness of regulation of intellectual property licensing practices under anti-monopoly law. Bodenheimer ever pointed out: "we must conclude that each social order is faced with the task how to distribute rights, restrict the right extent, and coordinate some rights with other (possibly contrary) rights. The term of common good is a useful concept tool, for it means the distribution and performance of individual rights may not be beyond the external boundary, otherwise, the whole nation will suffer the grave impairment. It is one of main considerations to create a proper balance between individual rights and social welfare."[2] The system idea of the "regulating and limiting the regulation" means that when intellectual property licensing practices are regulated under anti-monopoly law, not only operators' performance of intellectual property rights and the right of contractual freedom is restricted by the anti-monopoly law, but the power that anti-monopoly enforcement authorities and judicial organs regulate intellectual property licensing practices is restricted by the anti-monopoly law as well, and only the organic combination between "regulating" and "limiting the regulation" can realize the maximization of social entire interests.

Thirdly, the system idea of the "regulating and limiting the regulation" came into being on specific legal basis. The idea of the "regulating and limiting the regulation" system came from the specific provisions of the Anti-monopoly Law of the People's Republic of China. Article 55 under the law prescribes that: "this law shall not apply to operators' performance of intellectual property rights according to laws and administrative regulations on intellectual property rights; however, this law applies to operators' abuse of the intellectual property rights to eliminate or restrict competition." The latter half of legal provision in the article means that if the intellectual property licensing practices results in the elimination and restriction of competition, the Anti-monopoly Law of China will regulate such behavior. The first half of legal provision in the article indicate literally that the fair performance of intellectual property rights is subject to the legal protection, and operators' fair performance of intellectual property rights will not be regulated by the Anti-monopoly Law. The essential meaning of such legal provision lies in the Anti-monopoly Law of China shall restrict the performance of intellectual property rights which is regulated under the anti-monopoly law, in order to ensure the fair performance of intellectual property rights will not be intervened in an unreasonable manner. Therefore, the provision of Article 55 under the Anti-monopoly Law of China implies the idea of the "regulating and limiting the regulation" system which China tries its best to realize.

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[2] See [United States] Bodenheimer, *Jurisprudence : The Philosophy and Method of the Law*, translated by Deng Zhenglai, China University of Political Science and Law Press (1999 edition), p 298.

II. The implementation principles in the regulation of intellectual property licensing practices by anti-monopoly law under the direction of idea of "regulating and limiting the regulation"

In order to ensure the reasonableness and appropriateness of regulation of intellectual property licensing practices under anti-monopoly law, the main principles to be followed in the enforcement and judicial practices for regulation of intellectual property licensing practices under anti-monopoly law, should also be able to interpret and realize the system idea of the "regulating and limiting the regulation", so as to make the statutory principle of regulatory power, interests balance principle, reasonable analysis principle, equal treatment principle and case by case analysis principle become the main implementation principles for regulation of intellectual property licensing practices under anti-monopoly law.

Firstly, the regulation of intellectual property licensing practices under anti-monopoly law should comply with the statutory principle of regulatory power.

The statutory principle of regulatory power in the enforcement of anti-monopoly law means that the anti-monopoly enforcement authorities and judicial organs must regulate intellectual property licensing practices according to the anti-monopoly law. The specific contents, way, scope and power of regulation should be consistent with the provisions of the anti-monopoly law. Considering the abuse of intellectual property rights is a very broad concept, the behaviors that the obligee exercises intellectual property rights beyond the extent permitted by laws or the fair boundary belong to the abuse of intellectual property rights, but all abuses of intellectual property rights are not regulated by the anti-monopoly law, and the anti-monopoly law fails to complete such task. Therefore, it is necessary to comply with the statutory principle of regulatory power when the anti-monopoly law regulates intellectual property licensing practices. In China, according to the principle that rights may not be abused, the laws and regulations such as the Contract Law, the Anti-unfair Competition Law, the Patent Law, the Trademark Law, the Copyright Law, and Foreign Trade Law etc. regulate the abuse of intellectual property right from various angles, but there are some obvious differences in the targets and ways of regulation under such laws and regulations. For example, when an abuse of intellectual property right beyond the "legal boundary" stipulated by the intellectual property right law constitutes the illegal act under the intellectual property right law, it shall be subject to the principles such as compulsory license and right exhaustion under the intellectual property right law. When an abuse of intellectual property right beyond the "legal boundary" stipulated by the civil law constitutes the illegal act under the civil law, it shall be subject to the principles such as fairness, good faith, and public order and moral under the civil law. [3] The regulation of the abuse of intellectual property rights is on other legal basis, but such legal basis cannot become the legal basis of regulation of intellectual property licensing practices under anti-monopoly law. Thus, the word of "statutory" in the statutory principle of regulatory power implies the power granted by anti-monopoly law on regulation of intellectual property licensing practices, as well as the restriction imposed by anti-monopoly law on regulation of intellectual property licensing practices, and it shows the idea of "regulating and limiting the regulation".

Secondly, the regulation of intellectual property licensing practices under anti-monopoly law

[3] See Lv Mingyu: "Intellectual Property Rights Monopoly Claiming for the Innovation in Anti-Monopoly Legal System – the analysis under knowledge economy" 2009.4 China Legal Science, pp. 16-33.

should comply with the interests balance principle.

The interests balance principle in the implementation of anti-monopoly law, means that the implementation of anti-monopoly law harmonizes the conflicts of all kinds of interests, in order that the conflicting interests may reach the reasonable optimum or balanced state on the coexistent and compatible basis. Hel vétius, a French philosopher, thought that as the living basis, interests were the social development motive and social contradiction root that played a sole and universal role in the social life.[4] The major role of laws lies in the balance and harmonization of interests and conflicts in social life, to promote the economic development by means of the systematic power. The interests balance principle does not emphasize the absolute reciprocity between conflicting interests, but does require that the anti-monopoly law as a kind of systematic design, should give full consideration to the value orientation of various interested parties, take overall consideration of various parties' interests and the public interests, and take no impairment of the other party's interests as the value target.[5] As the law is a product of interests balance, the interests balance is the legislative principle of anti-monopoly law, as well as, the implementation principle of anti-monopoly law. When intellectual property licensing practices are regulated under anti-monopoly law, the interests balance principle can protect the interests of the obligee's intellectual property right, to make the creative labor obtain the fair compensation and promote the innovation, as well as, can effectively prohibit the hindrance of technological innovation and maintain free and fair competition.

Thirdly, the regulation of intellectual property licensing practices under anti-monopoly law should comply with the reasonable analysis principle.

The reasonable analysis principle in the implementation of anti-monopoly law means that in the regulation of intellectual property licensing practices, the anti-monopoly enforcement authorities and judicial organs should fully make the comprehensive comparison, analysis and judgment of all factors affecting market competition, appraise the active promotional role and negative hindering role of intellectual property licensing practices on competition, so as to reach the conclusion that whether the anti-monopoly law tolerates or prohibits the intellectual property licensing practices through weighing advantages and disadvantages. The per se illegal principle and the reasonable analysis principle will apply to the implementation of anti-monopoly law, but due to the particularity of intellectual property licensing practices, the per se illegal principle is applied under fewer circumstances, and the reasonable analysis principle is the main principle to analyze whether an intellectual property right licensing act violates the anti-monopoly law. The *Antitrust Guidelines for the Licensing of Intellectual Property* issued by the United States Department of Justice and Federal Trade Commission in 1995, thinks that the licensing of intellectual property right usually is in favor of competition, and the antitrust law makes the analysis of the intellectual property licensing practices by the rule of reason.[6] The application of reasonable analysis principle under the anti-monopoly law in the regulation of intellectual property licensing practices can well realize the idea of "regulating and limiting the regulation".

Fourthly, the regulation of intellectual property licensing practices under anti-monopoly law should comply with the equal treatment principle and the case by case analysis principle.

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[4] See Zhang Wenxian, *Jurisprudence*, Higher Education Press (2003 edition), p. 369.

[5] See Feng Xiaoqing, *Theory of Interests Balance under Intellectual Property Right Law*, China University of Polictical Science and Law Press (2006 edition), pp. 10-11.

[6] United States Department of Justice and Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property*（1995）, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,132 (Apr. 11, 1995).

The equal treatment principle in the implementation of anti-monopoly law means, when judging whether the intellectual property right licensing act is legal or illegal under the anti-monopoly law, the intellectual property rights belonging to intangible property, shall be treated equally with other tangible property, the authorities may neither grant stricter regulation due to the stronger exclusiveness of intellectual property rights, nor grant easer regulation because intellectual property are the legal exclusive right. The *Antitrust Guidelines for the Licensing of Intellectual Property* of the United States, also lays the special stress on the equal treatment between intellectual property rights and other property rights, the same anti-trust legal principles are applicable to them.

The case by case analysis principle in the implementation of anti-monopoly law means, when judging whether the intellectual property licensing act is legal or illegal under the anti-monopoly law, the authorities need make the specific analysis based on the specific circumstances in each case, in addition to the general applicable legal norms. The equal treatment principle and the case by case analysis principle is the relationship between generality and particularity, between commonness and individuality. When the anti-monopoly law regulates intellectual property rights, the authorities should adopt the same ways of regulating other property rights, comply with the equal treatment principle, and need pay attention to the differences and complexity from other tangible property by means of complying with the case by case analysis principle. The Untied States report of *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* points out: some common terms and conditions in the licensing agreement of intellectual property right might cause the attention on competition, but the individual case should be analyzed on basis of full possession of facts. For example, the terms and conditions that the rights may not be claimed, makes the company reduce transaction costs through the avoidance of litigation, while the innovation is hindered because of the restriction of the licensee's charging loyalty on its intellectual property rights. The grantback provision facilitates the licensing to downstream enterprises, but the invention is refrained because it is convenient for the original licensor to charge all remunerations of the subsequent inventions, and it will unfairly extend the market power of the patent holder, resulting in the concerns on competition law.[7]

III. The analysis framework for the regulation of intellectual property licensing practices by anti-monopoly law under the direction of idea of "regulating and limiting the regulation"

In accordance with the idea of "regulating and limiting the regulation" and the statutory principle of regulatory power, interests balance principle, reasonable analysis principle, equal treatment principle and case by case analysis principle which should be complied with in the regulation of intellectual property licensing practices under anti-monopoly law, there is the logic system in the construction of analysis framework for the regulation of intellectual property licensing practices under anti-monopoly law.

Firstly, for the regulation of intellectual property licensing practices under the anti-monopoly law, the analysis framework may be constructed on basis of the statutory principle of regulatory power and equal treatment principle, from the regulatory structure in the anti-monopoly law, in the logic order of basic principles, monopoly agreement, abuse of market dominant position, and

[7] See *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, available at http://www.justice.gov/atr/public/hearings/ip/222655.pdf， access date: May 11, 2011.

concentration of operators, so as to complete the highly consistent with the provisions of the anti-monopoly law. The *Guidelines for the Use of Intellectual Property* under the Antimonopoly Act issued by the Japan Fair Trade Commission on September 28, 2007, basically adopted the analysis framework in conformity with the logic order of Japan's antimonopoly act. In the Guidelines, after the preface of Chapter 1, Chapter 2 illustrates the basic principles for the restriction of intellectual property rights applicable to the antimonopoly act; Chapter 3 analyzes Japan Fair Trade Commission's basic opinions for refusal of licensing, limitation of licensing scope and patent pool, multiple licensing arrangement and cross license from the angles of private monopoly and unreasonable trade restriction; Chapter 4 analyzes Japan Fair Trade Commission's basic opinions for the refusal of licensing and all restrictive behaviors in the licenses from the angle of unfair trade behavior. [8] The analysis of intellectual property licensing practices in the horizon of anti-monopoly law by means of the application of logic framework in conformity with regulatory structure under the anti-monopoly law, is helpful to maintain the consistence between the anti-monopoly enforcement in the field of intellectual property rights and that in other fields, as well as, beneficial to mutual references of anti-monopoly enforcement experience in various fields.

Secondly, for the regulation of intellectual property licensing practices under the anti-monopoly law, the analysis framework may be constructed on basis of the reasonable analysis principle and interests balance principle, from the aspect of possibility that the anti-monopoly law might prohibit, in the logic order of the intellectual property licensing practices that will be usually prohibited by the anti-monopoly law, that it is necessary to make detailed and specific anti-monopoly analysis, that may be permitted by the anti-monopoly law. When the anti-monopoly laws of the United States, EU and Japan regulate intellectual property licensing practices, there are some differences in the details of analysis framework, however in general, the behaviors or terms and conditions involved in intellectual property licensing practices are divided into the following three kinds: i.e. (1) the restrictive terms and conditions which are illegal, or presumed to be illegal in need of further analysis; (2) the restrictive terms and conditions which need make detailed analysis based on some principles in order to define the legality; (3) the restrictive terms and conditions which are legal, or presumed to be legal in need of further analysis.[9]

The application of such analysis framework may effectively take advantage of the limited anti-monopoly enforcement and judicial resources, and provide the relatively definite expectation when operators judge their activities. Firstly, the intellectual property licensing practices which will usually be prohibited by the anti-monopoly law, refer to the intellectual property licensing practices which may be analyzed by the application of the per se illegal principle. *The Antitrust Guidelines for the Licensing of Intellectual Property* issued by the United States Department of Justice and Federal Trade Commission in 1995 thinks that the price restriction in the licensing of intellectual property right shall be subject to the principle of per se illegal; EU also thinks the price restriction in the licensing of intellectual property right is an illegal act, and it is unnecessary to

[8] See Japan Fair Trade Commission: *Guidelines for the Use of Intellectual Property under the Antimonopoly Act*, available at http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/070928_IP_Guideline.pdf, access date: May 17, 2011. See also Wang Xianlin, Pan Zhicheng: "Basic Policies and Claims for the Anti-monopoly Law Applicable to Intellectual Property Rights – Introduction and comment on *Guidelines for the Use of Intellectual Property under the Antimonopoly Act* of Japan" 2008.1 *Electronic Intellectual Property Rights*, pp. 36-40.

[9] See [United States] Jay Dratler, Jr, *Licensing of Intellectual Property Rights (the latter half part)*, translated by Wang Chunyan, Tsinghua University Press (2003 edition), p 609.

analyze the rule of reason. Secondly, the intellectual property licensing practices which need make detailed and specific anti-monopoly analysis refer to the intellectual property licensing practices which should be analyzed by the application of rule of reason. It is necessary to take the systematic analysis and judgment of obligee's market position, the market situation and competition conditions in the licensing field, licensing act intention, way, content and result etc. Finally, the intellectual property licensing practices which may usually be permitted by the anti-monopoly law refer to the intellectual property licensing practices may be exempted from the anti-monopoly review. Under the guidelines for anti-monopoly enforcement, it is usual to construct "safe zone" system or "exemption system" to specify those licensing practices.

Thirdly, for the regulation of intellectual property licensing practices under the anti-monopoly law, the analysis framework may be constructed on basis of the reasonable analysis principle and case by case analysis principle, from the different forms of intellectual property licensing practices, in the logic order of vary in number of specific intellectual property licensing practices related to competition that operators engage in the economic life. For example, the Untied States report of *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* makes the statement in the following order: Chapter 1: the strategic use of licensing: unilateral refusals to license patents; Chapter 2: competition concerns when patents are incorporated into collaboratively set standards; Chapter 3: antitrust analysis of portfolio cross-licensing agreements and patent pools; Chapter 4: Variations on intellectual property licensing practices; Chapter 5: antitrust issues in the tying and bundling of intellectual property rights; Chapter 6: competitive issues regarding practices that extend the market power conferred by a patent beyond its statutory term. The application of such analysis framework may display various intellectual property licensing practices which restrict and eliminate competition in the real life one by one, as well as, may take the earliest analysis of the most common intellectual property licensing practices that will possibly impair competition.

IV. Some suggestions for the formulation of China's *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights*

The formulation of *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights* in China will be helpful to improve the enforcement efficiency of China's anti-monopoly enforcement authorities, to maintain the consistent of the enforcement strictness among various anti-monopoly enforcement authorities in China, to coordinate and interact on the question how to regulate the intellectual property licensing practices between the anti-monopoly enforcement authorities and the intellectual property rights competent authorities. In the formulation of the guidelines, it is significant for the idea of "regulating and limiting the regulation", implementation principles and analysis framework for regulation of intellectual property licensing practices under anti-monopoly law to formulate China's *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights*.

Firstly, China should lay importance to the system idea of the "regulating and limiting the regulation" in the formulation of *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights*, especially the idea of "limiting the regulation", to ensure the accurate implementation of the anti-monopoly law of China.

Any rights are restricted to some degree, and there is no absolutely unlimited right. It is easy to understand the point under any legal culture. In China, due to many reasons such as the special

economic, cultural, legal systems and administrative systems etc., while the legal systems rectify the market failure, it is relatively lack of effective control of governmental failure. Therefore, when China formulates the *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights*, in contrast with the idea of "regulating", China should lay more importance to the idea of "limiting the regulation". The system idea of the "regulating and limiting the regulation" should be coexistent in the anti-monopoly legislative, enforcement and judicial practices, because it inherently comes from the anti-monopoly law, and can promote the correct interpretation of the anti-monopoly law, ensure the reasonableness of regulation of intellectual property rights under the anti-monopoly law and the accuracy of implementation of the anti-monopoly law. It may prevent the regulation of intellectual property rights under the anti-monopoly law from evolving into the excessive intervention and infringement of intellectual property rights and the right of freedom of contract, as well as, will not reduce or lower the extent or power that the anti-monopoly law regulates intellectual property rights.

In fact, China's formulation of *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights* is to restrict the regulation of intellectual property right under the anti-monopoly law, and the organic combination between the idea of "regulating" and the idea of "limiting the regulation". The legal provisions on the regulation of intellectual property rights under the anti-monopoly law are more and more abstract, the regulatory power of anti-monopoly enforcement authorities is more unrestricted, and it is easier to infringe the operational independent rights and properties of operators; vice versa, the legal provisions on the regulation of intellectual property rights under the anti-monopoly law are more and more specific and definite, the regulatory power of anti-monopoly enforcement authorities is more restricted, and it is more impossible to abuse the regulatory power to infringe the legal rights and interests of operators. Furthermore, under the direction of the idea of "regulating and limiting the regulation", when China formulates the *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights*, China will lay importance to design of the enforcement procedures and system, and make all necessary restrictions of the anti-monopoly enforcement authorities in the regulation of intellectual property rights, so as to ensure the reasonableness of regulatory activities. China will restrict the anti-monopoly enforcement authorities in the regulation of intellectual property rights by means of "safe zone system" or "exemption system", to ensure the appropriateness of regulatory activities.

Secondly, when China formulates the *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights*, it should show the statutory principle of regulatory power, interests balance principle, reasonable analysis principle, equal treatment principle, and case by case analysis principle, to ensure the effectiveness of implementation of the anti-monopoly law in China.

The statutory principle of regulatory power requires that the formulation of *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights* should be highly consistent with the legal articles of the Anti-monopoly law of China on contents, and such guidelines are only the interpretation and understanding of China's Anti-monopoly law, rather than create the regulatory principles, objects and extent which are different from China's Anti-monopoly law. At the same time, "the antimonopoly law is not applicable to all performance of rights which are departure from the basic target of intellectual property rights. It is necessary to review the purpose and ways of such behaviors, and the extent that such behaviors affect

competition, and to decide whether to regulate such behaviors under the anti-monopoly law", [10] therefore, the *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights* of China should definite the relationship between the anti-monopoly law and other laws in the regulation of abuse of intellectual property rights. The guidelines should specify: "where an operator's other abuse of intellectual property rights violates the laws and administrative regulations on intellectual property rights, anti-unfair competition, foreign trade, and contract etc., the settlement of such behavior shall be consistent with the corresponding laws and administrative regulations".

The interests balance principle requires that in the formulation of *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights*, China should pay attention to the balance among various interests to construct the "safe zone system" or "exemption system" in conformity with China's reality. Intellectual property licensing practices play an active role of encouraging the innovation, and the imposed excessive restriction on such practices will possibly reduce the market vigor. In order to effectively implement the anti-monopoly law, when the anti-monopoly laws of United States and EU regulate intellectual property licensing agreement etc., the intellectual property licensing practices in conformity with some conditions may be directly exempted by means of the "safe zone system" or "exemption system". For example, the *Antitrust Guidelines for the Licensing of Intellectual Property* in 1995, provides that under absent extraordinary circumstances, the Agencies will not challenge a restraint in an intellectual property licensing arrangement if (1) the restraint is not facially anticompetitive, and (2) the licensor and its licensees collectively account for no more than twenty percent of each relevant market significantly affected by the restraint. This "safety zone" does not apply to those transfers of intellectual property rights to which a merger analysis is applied. In China, if it is deemed that the intellectual property licensing practice of an operator imposes infinitely small effects on the concerned market competition under some specific circumstances, such licensing may be exempted from the anti-monopoly law, consequently, it is necessary to make the specific provisions on "safe zone system" in the *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights* of China.[11]

The reasonable analysis principle requires when China formulates the *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights*, China should make the provisions on operator's conditions, behavior conditions and result conditions that the anti-monopoly law prohibits the performance of intellectual property rights, to safeguard the regulatory accuracy of intellectual property rights under the anti-monopoly law. As in the

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[10] See Japan Fair Trade Commission: *Guidelines for the Use of Intellectual Property under the Antimonopoly Act*, available at http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/070928_IP_Guideline.pdf, access date: May 17, 2011. See also Wang Xianlin, Pan Zhicheng: "Basic Policies and Claims for the Anti-monopoly Law Applicable to Intellectual Property Rights – Introduction and comment on *Guidelines for the Use of Intellectual Property* under the Antimonopoly Act of Japan" 2008.1 *Electronic Intellectual Property Rights*, pp. 36-40.

[11] The specific contents of the "safe zone system" constructed in the China's *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights* (draft): "safe zone: If an operator is under one of the following circumstances, the agreement of intellectual property rights may be deemed as the infinitely small effects on the concerned market competition, and the anti-monopoly enforcement authorities of the State Council shall file no case for investigation, unless the agreement of intellectual property rights contains the terms and conditions in Item (1) to (5) of Article 13, and Item (1) to (2) of Article 14 in the Guidelines: (1) the total market shares of the operators with a competitive relationship are not exceeding 20% in the concerned market; if the market shares fail to be calculated, there are at least four operators with the replaceable intellectual property rights on the concerned market otherwise; (2) either party's market share between the operator and the other transaction party is not exceeding 30% in the concerned market; if the market shares fail to be calculated, there are at least two operators with the replaceable intellectual property rights on the concerned market otherwise."

intellectual property licensing practices, the relationship between the operators mostly is the vertical relationship, whether the intellectual property licensing practices which might constitute the monopoly agreement, or the intellectual property licensing practices which might constitute the abuse of market dominant position, or the combination of both, even if the particularity of intellectual property rights is not considered, according to the equal treatment principle, the method for reasonable analysis should be applied mostly to judge whether the anti-monopoly law is violated on basis of the double-side and complexity of the effects of such vertical behavior on competition. The *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights* of China should make the reasonable analysis principle detailed so as to let it operational to some degree.

The equal treatment principle requires China's *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights* should specify such a basic principle in the part of general rules of the Guidelines, the specific provisions may be "it shall not be presumed the operator has the market dominant position in the concerned market because the operator possesses the intellectual property rights, although such intellectual property rights might play an important role in the forming of market dominant position". The case by case analysis principle requires, when China formulates the *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights*, China may stipulate specifically the factors which should be considered in the anti-monopoly analysis and specific analysis steps respectively for refusals to license intellectual property rights, tying and bundling of intellectual property licensing practices, intellectual property licensing practices in the setting and implementing standards, and patent pools etc.

Thirdly, when China formulates the *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights*, China should have the clear anti-monopoly analysis framework system, to ensure the logicality of the implementation of anti-monopoly law in China.

Based on China's reality, the *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights* should be consistent with the regulatory structure under the *Anti-monopoly Law* to the fullest extent possible, to construct the analysis framework in the logic order of basic principles, monopoly agreement, abuse of market dominant position, concentration of undertakings, and mixed behavior, and to constitute the logic structure of the *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights*. The general rules part of the Guidelines should specify: "The operator's abuse of intellectual property rights to eliminate and restrict competition is not an independent monopoly, but constitutes respectively or concurrently the monopoly agreement, abuse of market dominant position, or concentration of undertakings eliminating and restricting competition stipulated by this law according to the nature and form of the activity."[12]

The *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights* of China should respectively prescribe the specific anti-monopoly analysis steps on the abuse of intellectual property rights for elimination and restriction of competition which might separately or concurrently constitute the monopoly agreement, abuse of market dominant position, or concentration of undertakings eliminating and restricting competition. Firstly, to analyze the agreement of intellectual property rights which might constitute the monopoly agreement

[12] See Wang Xianlin, "Discussion of China's Anti-monopoly Law Implementation in the Field of Intellectual Property Rights" 2009.6 *Journal of Shanghai Jiao Tong University (philosophy and social science)*, pp. 13-22.

according to the mode combining the principled prohibition with the statutory exemption. Whereas the horizontal or price monopoly agreement usually will constitute the prohibitive act under the anti-monopoly law, when the authorities make the anti-monopoly analysis on the agreement of intellectual property rights which might constitute the monopoly agreement, it is necessary to analyze the factors such as horizontal or vertical, price or non-price etc. in the agreement of intellectual property rights, at the same time, they need pay attention to whether the intellectual property licensing agreement which might constitute the monopoly agreement is consistent with the provisions on "safe zone system" or "exemption system". Secondly, to analyze the agreement of intellectual property rights which might constitute the abuse of market dominant position in the logic order of operator-behavior-result. When the anti-monopoly law regulates such behavior, it is necessary to analyze whether the doer possesses the market dominant position, whether the behavioral expression may be attributed to the type of abuse of market dominant position listed under the anti-monopoly law, whether the behavior is based on the reasonable commercial reason, and whether the result eliminates or restricts market competition. Then the authorities may conclude whether such behavioral violates the provisions under the anti-monopoly law. Finally, to analyze the agreement of intellectual property rights which might constitute the concentration of undertakings eliminating and restricting competition according to the path of whether to reach the application and declaration standard – whether there is the possibility of eliminating or restricting competition – whether there is any statutory exemption reason.

Due to the broadness of social relations, complexity of interested relations, the abstractness of the anti-monopoly law, and the particularity of nature of intellectual property rights, no matter how China exerts itself to the formulation of *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights*, more discretionary powers will be granted to the anti-monopoly enforcement authorities and judicial organs. Therefore, in order to ensure the achievement of such a target of "maintaining consumers' interests and social public interests", the system idea of the "regulating and limiting the regulation" will play an important role in the implementation of the *Anti-monopoly Law* of China and the future *Guidelines for Anti-monopoly Enforcement in the Field of Intellectual Property Rights*.