

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

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Regulating and Limiting the Regulation

- 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.

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

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

- 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.

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

- Firstly, the system idea of the “regulating and limiting the regulation” came into being on economic basis.
- Operator is “rational economic man”, the anti-monopoly law need regulate some intellectual property licensing practices to realize the maintenance of competitive mechanism and adjustment in market failure.

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

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- Anti-monopoly enforcement authorities and judicial organs are also “rational economic men”, anti-monopoly law must make the necessary restriction on the regulation of intellectual property licensing practices, to complete the adjustment in governmental failure.

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

- 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. 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.

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

- 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.

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

- 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 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

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”

- 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.

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”

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

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”

- 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.

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”

- 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.
- 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 easier regulation because intellectual property are the legal exclusive right.

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”

- 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.

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”

- 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 concentration of operators, so as to complete the highly consistent with the provisions of the anti-monopoly law.

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”

- 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.

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”

- 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.

IV. Some suggestions for the formulation of 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.

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

- 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.

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

- 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*.

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

- According to the statutory principle of regulatory power, 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”.

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

- 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.

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

- 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.

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

- 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”.

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

- 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 e

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

- 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.



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

- 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*.

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- Questions?

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- Thank you for your attention!
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