

中国反垄断法及其知识产权

Anti-Monopoly Law and Intellectual Property Rights in China

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序言 - INTRODUCTION

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中华人民共和国反垄断法起施行

经济宪法吗？

第五十五条 经营者依照有关知识产权的法律、行政法规规定行使知识产权的行为，不适用本法；但是，经营者滥用知识产权，排除、限制竞争的行为，适用本法。

序言 - INTRODUCTION

U.S. 1995 Antitrust Guidelines for the Licensing of Intellectual Property

“The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare.”

序言 - INTRODUCTION

U.S. 1995 Guidelines

“The intellectual property laws provide incentives for innovation and its dissemination and commercialization by establishing enforceable property rights for creators...”

“The antitrust laws promote innovation and consumer welfare by prohibiting certain actions that may harm competition with respect to either existing or new ways of serving consumers.”

序言 - INTRODUCTION

Landes and Posner — Economic Structure of IP Law 2003

“It may come as a surprise to many readers that the economic arguments that we make for intellectual property protection are **not based primarily on a belief that without legal protection the incentives to create such property would be inadequate.** That belief cannot be defended confidently on the basis of current knowledge.”

反垄断法 – Anti-Monopoly Law

第一条 为了预防和制止垄断行为，保护市场公平竞争，提高经济运行效率，维护消费者利益和社会公共利益，促进社会主义市场经济健康发展，制定本法。

反垄断法 – Anti-Monopoly Law

第三条 本法规定的垄断行为包括：

- （一）经营者达成垄断协议；
- （二）经营者滥用市场支配地位；
- （三）具有或者可能具有排除、限制竞争效果的经营者集中。

第六条 具有市场支配地位的经营者，不得滥用市场支配地位，排除、限制竞争。

反垄断法 – Anti-Monopoly Law

第十三条 禁止具有竞争关系的经营者达成下列垄断协议：

（一）固定或者变更商品价格；

（二）限制商品的生产数量或者销售数量；

（三）分割销售市场或者原材料采购市场；

（四）限制购买新技术、新设备或者限制开发新技术、新产品；

反垄断法 – Anti-Monopoly Law

第十五条 经营者能够证明所达成的协议属于下列情形之一的，不适用本法第十三条、第十四条的规定：

（一）为改进技术、研究开发新产品的；

（二）为提高产品质量、降低成本、增进效率，统一产品规格、标准或者实行专业化分工的；

反垄断法 – Anti-Monopoly Law

第二十七条 审查经营者集中，应当考虑下列因素：

（三）经营者集中对市场进入、技术进步的影响；

反垄断法 – Anti-Monopoly Law

第十七条 禁止具有市场支配地位的经营者从事下列滥用市场支配地位的行为：

（一）以不公平的高价销售商品或者以不公平的低价购买商品；

（二）没有正当理由，以低于成本的价格销售商品；

（三）没有正当理由，拒绝与交易相对人进行交易；

（四）没有正当理由，限定交易相对人只能与其进行交易或者只能与其指定的经营者进行交易；

反垄断法 – Anti-Monopoly Law

第十七条 禁止具有市场支配地位的经营者从事下列滥用市场支配地位的行为：

（五）没有正当理由搭售商品，或者在交易时附加其他不合理的交易条件；

反垄断法 – Anti-Monopoly Law

本法所称市场支配地位，是指经营者在相关市场内具有能够控制商品价格、数量或者其他交易条件，或者能够阻碍、影响其他经营者进入相关市场能力的市场地位。

If a business has a patent, can it be presumed to have the market power necessary for a “dominant position”?

U.S. Antitrust Law

Verizon v. Trinko - U.S. Supreme Court 2004

Scalia - The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free market system.

To safe guard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*

U.S. Antitrust Law

Verizon v. Trinko

Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities

U.S. Antitrust Law

Illinois Tool Works v. Independent Ink – SC 2005

- No presumption of market power
- Therefore the plaintiff who claims there is a tying arrangement (搭售商品) must prove that the defendant has market power

技术合同 Licensing

合同法 1999

第三百二十九条 非法垄断技术、妨碍技术进步或者侵害他人技术成果的技术合同无效。

技术合同 Licensing

最高人民法院关于审理技术合同纠纷案件适用法律若干问题的解释 - 二〇〇四年十二月十六日

Article 10 –

1. (a) restricting new research
(b) restricting use of improvements
(c) non-reciprocal terms – voluntary assignment of improvements
2. Restricting access to competitive technology
3. Restricting full exploitation of the technology
4. Requiring the acceptance on non-essential technology
5. Restricting access to raw materials, parts etc.
6. Prohibiting challenges to the validity of the IPR

技术合同 Licensing

U.S. 1995 Guidelines

Less specific approach

- concerns if they are likely to affect prices, quantities, qualities or varieties of goods and services
- exclusive dealing is a concern if parties are in a horizontal relationship

技术合同 Licensing

U.S. 1995 Guidelines

- Restrictions on using competing technology is a concern
- Resale price maintenance – now may be allowed
- Tying may be pro-competitive

技术合同 Licensing

U.S. 1995 Guidelines

- Cross-licensing and pooling may be OK, and may be exclusive
- Grantbacks may be pro-competitive especially if non-exclusive

技术合同 Licensing

E.U. Technology Transfer Block Exemption
(TTBE) 2004

Hardcore Prohibitions

- no exclusive grantbacks of a licensee's own severable improvements
- no-challenge clauses not allowed

技术合同 Licensing

E.U. TTBE

Hardcore Prohibitions

- where license is to non-competitor –
restrictions on licensee's ability to exploit
its own technology or develop new
technology

技术合同 Licensing

E.U. TTBE

Hardcore restrictions divided into

- provisions that apply between competitors
- and those that apply between non-competitors

技术合同 Licensing

New AML Regulations

- Not as strict as 2004
 - Tied selling – Interpretation – 10(4) is an abuse – AML 17(5) -没有正当理由 – “competition on the merits”
 - Restrictions on restricting output, allocating market – Interpretation 10(3) and (5) – AML 13(2) and (3) have the exemption in Art. 15 if done to improve technology

标准制定 Standard Setting

Future Source of Trade Tensions?

- U.S. prefers to let standards be set on the market, in a de-centralized manner
- Europe prefers centralized, regulated and inclusive approach

标准制定 Standard Setting

- U.S. approach – alleged abuses – Rambus, Unocal – but courts have not yet rendered the final verdict
- Proposed solutions in U.S. – prior disclosure of all patents – FRAND royalties etc.

专利池 Patent Pools

- Example – DVD3C – pool of all the patents needed to make DVD players to a certain standard of interoperability
- Manufacturers are given license to use the patents

专利池 Patent Pools

- Some in China considered the DVD3C patent pool an abuse of IPR – pool contained a non-essential patent
- 张平 – brought action to invalidate the patent, it was removed from the pool
- But the license fee did not change – was there really an abuse?

问题

- Many U.S. and other foreign companies want to know what is an abuse of IPR in the AML – want guidelines
- Unofficially some in the U.S. government are concerned that if China issues guidelines they will be too strict

问题

U.S. 1995 Guidelines

“The intellectual property laws provide incentives for innovation and its dissemination and commercialization by establishing enforceable property rights for creators...”

问题

- Bessen & Meurer — Patent Failure March 2008
- Efficient and effective property rights should:
 1. be predictably valid
 2. have discernable boundaries
 3. Not have an overly fragmented ownership structure
- Do IPRs have these?

问题

- TRIPS promotes strong IPRs based on assumption that strong IPRs benefit all economies equally – is this correct?
- Or should different economies have a different balance of incentives and competition?
- And what about uniform principles of competition law?

Summary

- There will be trade disputes – consider this possibility in business plans based on IPR
- 2005 Report - 入世后我国知识产权重大涉外案件研究 – Chinese companies need to better understand and use IPRs
- But remember there are different interpretations of IPRs and how they work

Summary

- Understand the other interpretations – in business planning consider the possibility of greater intervention by competition authorities – in China or in other countries
- Use economics when analyzing the law and business strategies
- Be wary of adopting business plans based on excluding competitors – remember Microsoft in Europe

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