BOSHI WENKU
〔法学·民商法学〕

专利许可的反垄断规制

ZHUANLI XUKE DE FANLONGDUAN GUIZHI

郭德忠 著

知识产权出版社

BOSHI WENKU
〔法学·民商法学〕

专利许可的反垄断规制

ZHUANLI XUKE DE FANLONGDUAN GUIZHI

郭德忠 著

知识产权出版社

内容提要

专利许可的反垄断问题是当前我国知识产权领域热点问题。本书研究了其他国家特别是发达国家对专利许可的反垄断规制立法，通过分析专利许可过程中的各种垄断行为来对美国、欧共体的相关立法进行梳理，详细分析了欧共体《772/2004号条例》及《关于对技术转让协议适用欧共体条约第81条的指南》等最新进展，同时也关注了发展中国家相关立法，并结合我国司法实践对我国提出了比较详细的立法建议。

责任编辑：汤腊冬　于海东　　**责任校对**：韩秀天

装帧设计：SUN 工作室　　**责任出版**：杨宝林

图书在版编目（CIP）数据

专利许可的反垄断规制/郭德忠著. —北京：知识产权出版社，2007.6

ISBN 978-7-80198-936-9

Ⅰ.专…　Ⅱ.郭…　Ⅲ.①反托拉斯法-研究-国外②反托拉斯法-研究-中国　Ⅳ.D912.290.4　D922.290.4

中国版本图书馆 CIP 数据核字（2007）第 079843 号

专利许可的反垄断规制

郭德忠　著

出版发行：知识产权出版社

社　　址：北京市海淀区马甸南村 1 号　　邮　　编：100088

网　　址：http://www.ipph.cn　　邮　　箱：bjb@cnipr.com

发行电话：010-82000893　82000860 转 8101　　传　　真：010-82000893

责编电话：010-82000889　　责编邮箱：tangladong@cnipr.com

印　　刷：知识产权出版社电子制印中心　　经　　销：新华书店及相关销售网点

开　　本：880mm×1230mm　1/32　　印　　张：9.75

版　　次：2007 年 6 月第 1 版　　印　　次：2007 年 6 月第 1 次印刷

字　　数：250 千字　　定　　价：20.00 元

ISBN 978-7-80198-936-9/D·484

序

专利许可的反垄断问题是当前我国的一个热点问题，但我国相关立法还不完善，相关学术研究还较少，企业界也因经验不足而屡遭损失。不过，这方面的问题已经引起了我国政府相关部门和学术界的高度重视。作者对此问题的研究应该说是一次可喜的探索。专利许可的反垄断问题涉及多学科领域，研究起来相对比较难。首先，知识产权法特别是专利法本身属于科技、法律和管理相交叉的学科，从国内外大学的教学研究实践来看，知识产权法作为二级学科既可以设在法学院，也可以设在管理学院，但不论是设在法学院还是管理学院，对学习知识产权专业的学生往往要求其有理工科背景；其次，反垄断法本身属于法律和经济相交叉的学科，学习、研究反垄断法则要求具有经济学的一定知识；再次，本书题目为“专利许可的反垄断规制”，则是属于知识产权法和反垄断法的交叉了。

本书作者是我指导的博士生，其兼具法律和理工科教育背景，因此在专利研究方面具有一定优势。在校期间，该生踏实稳健，勤奋刻苦，热于公益事业，曾负责法学院研究生会学术部的工作，组织多次学术活动；2003 年至 2005 年，其还协助我进行世界知识产权组织世界学院面向中国的知识产权远程教学的辅导工作，由于我们的工作富有成效，曾获得世界知识产权组织官员的好评；在博士论文选题确定以后，因为国内相关资料很少，我推荐其于2004 年 10 月至2005 年2 月到美国纽约市的 Cohen Pontani Lieberman & Pavane 律师事务所进修，在此期间他一边实习，一边抓紧时间收集了大量的英文资料进行研究，他在该律师事务

所的表现也得到了美国同行的好评。

本书研究了其他国家特别是发达国家对专利许可的反垄断规制立法，通过分析专利许可过程中的各种垄断行为来对美国、欧共体的相关立法进行梳理，特别研究了美国2002年联邦贸易委员会和司法部联合举行的“知识经济时代的竞争和知识产权”的听证会，欧共体2004年的《772/2004号条例》及《关于对技术转让协议适用欧共体条约第81条的指南》（2004/C 101/02）等的最新进展，同时基于我国属于发展中国家这一国情，也关注了发展中国家的相关立法，并结合我国司法实践中的某些相关判例，对我国相关立法提出了比较详细的建议。

本书注意到了国内外相关研究的已有成果，所用资料新颖、充实。值得提出的是，该书在研究与吸收欧共体、美国等的最新立法和判例经验的基础上，结合我国属于发展中国家这一实际情况，提出了具体的立法建议：制定《反垄断法》，并在该法中规定禁止知识产权滥用的原则性条款；修改《专利法》，起码要加入禁止滥用专利权的原则性规定；在专利许可的反垄断方面同时制定两个法律文件，一为《专利许可的反垄断法规》，另一为《对专利许可进行合理性分析的指南》。本人相信，该书的出版对学术界和实务界都有很好的借鉴作用。

郑胜利

2007年2月3日

摘　要

考虑到我国专利许可现实中的紧迫问题、我国相关立法的缺失、美国和欧共体在相关方面的最新进展，特别是国内以前的相关学术研究没有涉及美国2002年的联合听证会及欧共体2004年的《772/2004号条例》、欧共体《指南》的内容，本书选定了“专利许可的反垄断规制”这个题目。本书研究了其他国家特别是发达国家对专利许可的反垄断规制立法，通过分析专利许可过程中的各种垄断行为（限制竞争行为）来对美国、欧共体的相关立法进行梳理，同时基于我国属于发展中国家这一国情，也关注了发展中国家的相关立法，并结合我国司法实践中的个别相关判例，最后对我国相关立法提出了比较详细的建议。

本书正文共分五章。

第一章探讨了对专利许可进行反垄断分析的一般性原则，共分五节。第一节为专利法与反垄断法的“冲突”与一致性，首先论述了专利法的目标和反垄断法的目标，接着讨论了专利法与反垄断法的根本目标的一致性；第二节分析了专利许可协议与竞争关系所需的基本概念，包括货物市场、技术市场、创新市场、市场支配力、互惠协议与非互惠协议、竞争企业等；第三节为“安全区”（“白色条款”、被豁免的条款），首先介绍了1995年的美国《指南》划定的反托拉斯“安全区”，接着介绍了欧共体《240/96号条例》和《772/2004号条例》给予的豁免及欧共体《指南》划定的“安全区”和“白色条款”；第四节为本身违法原则，首先介绍了美国明确列出的本身违法行为；接着介绍了欧共体《240/96号条例》和《772/2004号条例》列出的本身违法

行为（“黑色条款”）；第五节为合理原则，分别讨论了美国《指南》中根据合理原则评估许可安排的一般原则和欧共体《指南》的分析框架。

第二、三、四章研究了专利许可中的各种垄断行为。

第二章为横向限制协议，共分四节。第一节为固定价格，讨论了固定许可专利产品的价格、被许可方与许可方协议固定价格和固定依方法专利制造的非专利产品的价格三种情形；第二节为划分市场，分析了适用本身违法原则的划分市场行为和不适用本身违法原则的划分市场行为；第三节为交叉许可，分析了不含其他限制的“纯粹”交叉许可，交叉许可与其他限制的结合，交叉许可与专利侵权纠纷和解等问题；第四节为专利联营，讨论了联营专利的性质、与专利联营许可有关的个别限制等问题，介绍了欧共体管理专利联营的制度框架。

第三章为纵向限制协议，共分六节。第一节为纵向的价格、产量、销量限制，分析了转售价格限制、纵向产量限制和纵向销量限制；第二节为纵向的地域、应用领域、客户限制，分析了地域限制、应用领域限制、客户及再销售形式限制；第三节为搭售，论述了搭售的构成条件、专利许可中搭售的分类、搭售的法律规制和专利许可中可被允许的搭售等问题；第四节为排他交易，分析了许可方要求被许可方不竞争、被许可方要求许可方不竞争的限制；第五节为回授，分排他性回授和非排他性回授进行了论述；第六节为使用费条款，讨论了使用费的上限、无真正专利权的“专利”使用费和计算使用费的方法等问题。

第四章为滥用市场支配地位及集中，共分六节。第一节为拒绝许可，分析了单方拒绝许可、专利权人和非排他被许可人的协议拒绝许可、不使用等行为；第二节为滥发侵权警告，论述了滥发侵权警告的表现及其解决方式；第三节为价格歧视，首先介绍了歧视性费率的典型案例——去虾壳机案，接下来讨论了与价格

歧视有关的其他特殊问题；第四节为无效专利的执行，分析了对于通过欺诈获得的专利的执行和对于缺陷专利的执行；第五节为不质疑条款，分析了被许可方质疑专利有效性、原专利权人质疑专利有效性两种情形；第六节为专利的集中取得，讨论了通过获得许可达到专利权的集中、通过取消已有许可达到专利权的集中两种情形。

第五章对相关规定进行了总体评述并对我国立法提出了建议，共分四节。此章又分国别评述了专利许可的反垄断规制，每一国别又是按历史的发展进行评述。第一节、第二节和第三节分别对美国，欧共体，其他国家、地区和国际组织的相关规定进行了总体评述，第四节对我国立法提出了建议，包括制定《反垄断法》、制定专利许可的反垄断法规及相关指南和完善《专利法》、禁止专利权滥用三方面。

本书在涉及美国法时特别注重对相关判例的分析，在涉及欧共体法时，主要论述欧共体《指南》的内容。

专利权滥用原则在美国法院经历了产生、兴起——被修正——重新流行——受抑制这样一个过程，从联邦巡回上诉法院的态度来看，专利权滥用原则受到了极大的抑制。同样，美国法院对于专利法与反垄断法态度的变化也可总结为类似于钟摆的摇摆运动，法院在某个时期会倾向于优先保护专利权，而在另一时期会优先适用反垄断法。

总的来说，欧共体《240/96 号条例》是偏结构主义的，其主要缺点在于过于形式化、过于复杂，同时适用范围又窄；对于品牌间问题没有给予足够的重视，对于许可方和被许可方之间的竞争关系的处理没有遵循前后一致的原则。

欧共体《772/2004 号条例》的特点是：（1）强调专利许可协议对竞争的正面效果。（2）简化规则框架，加强经济分析。（3）区分竞争者和非竞争者。（4）注意到了网络效应。（5）注

意动态监督。

欧共体《指南》的主要特点是：采用经济效益主义，大量使用以经济效果为基础的分析方法，向美国1995年《指南》靠拢；区分处理竞争者和非竞争者之间的协议；跟踪监测竞争者和非竞争者的地位随经济形势变化而发生的变化。

笔者的立法建议是：制定《反垄断法》，并在该法中规定禁止知识产权滥用的原则性条款；修改《专利法》，起码要加入禁止滥用专利权的原则性规定；在专利许可的反垄断方面同时制定两个法律文件，一为《专利许可的反垄断法规》，另一为《对专利许可进行合理性分析的指南》。对于《专利许可的反垄断法规》，建议将专利许可协议的条款分为三类，即“白色条款”、“黑色条款”和“灰色条款”，“白色条款”是指法律明确允许存在的条款，“黑色条款”是指法律绝对禁止的条款，“灰色条款”是指法律并不明确规定其效力，而是要根据许可协议的具体情况以合理原则进行分析的条款。

基于我国目前的实际，笔者认为在制定这样的法规时应突出一个字——“严”。原则上说，美国、欧共体、日本、我国台湾地区现行法律中明确禁止的条款我们当然地都要将其视为“黑色条款”，而上述立法中明确允许的条款我们则要一一分析而不一定将其归为“白色条款”，有可能归为“灰色条款”，甚至有可能归为“黑色条款”。在设计具体条文时不能忽略有关国际组织的立法（草案）中反映发展中国家立场的那些条款，同时还要考虑我国专利许可实践中的经验教训，特别是技术进口过程中遇到的各种限制性做法，做到有的放矢。

关于《对专利许可进行合理性分析的指南》，建议借鉴美国《指南》和欧共体《指南》的规定，引进经济分析的方法，注重市场支配力的作用。笔者希望这样的指南是一部非常详尽的指南，建议要点如下：(1) 阐明专利权和反垄断法的关系；(2) 建立

三种“安全区”：基于市场份额的“安全区”、基于替代技术个数的“安全区”、基于创新实体个数的“安全区”；(3) 关于对专利许可进行分析的一般框架，建议我国制定相关规章时采用欧共体《指南》的分析框架。在进行实例分析时，应注意竞争者与非竞争者之区别、动态监管、网络效应等问题。

ABSTRACT

Having regard to the hot problems of actual patent licensing in our country, having regard to the absence of relative law in our country and having regard to the new development in this domain in the USA and EU, especially 2002 combined hearing in the USA, Commission Regulation (EC) No 772/2004 and Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements (2004/C 101/02) which were not mentioned in the relative researches of Chinese scholars before, the author selected this topic: Applying Antimonopoly Law to Patent Licensing. The dissertation researches the manners to control patent licensing by antimonopoly law in other countries, especially in developed countries. By analyzing all sorts of monopoly conducts in patent licensing, the author concludes the relative law in the USA and EU. In the meantime, having regard to the condition that China is still a developing country, the author also pays attention to the relative law in other developing countries and some Chinese cases. At last, the author brings forward elaborate suggestion to Chinese legislation.

The text is divided into five chapters.

Chapter 1 discusses general rules of analyzing patent licensing by antimonopoly law and is divided into five sections. Section 1 is conflict and consistence between patent law and antimonopoly law. After discoursing upon objects of patent law and antimonopoly law, the author addresses himself to the consistence between the essential objects

of patent law and antimonopoly law. Section 2 defines the basic concepts that will be used in analyzing the relationship between patent licensing agreement and competition. These concepts are goods market, technology market, creativity market, market power, reciprocal agreement, non - reciprocal agreement, competing undertakings. Section 3 is safe harbor, white clauses or exempt clauses. After presenting the safe harbors of USA 1995 Antitrust Guidelines for the Licensing of Intellectual Property, the author introduces the exemption of Commission Regulation (EC) No 240/96, No 772/2004 and EC Guidelines (2004/C 101/02). Section 4 is rule of per se and black clauses. The author respectively introduces the black clauses in the USA, Commission Regulation (EC) No 240/96 and No 772/2004. Section 5 is rule of reason. The author respectively discusses the general framework for analysis in USA 1995 Guidelines and EC 2004 Guidelines.

Chapters 2, 3 and 4 research all sorts of monopoly conducts in patent licensing.

Chapter 2 "horizontal agreement" is divided into four sections. Section 1 "fixing price" discusses 3 conducts: fixing price of patented product, fixing price with agreement between licensor and licensee and fixing price of unpatented product that is manufactured by patented method. Section 2 "dividing market" analyzes dividing market conducts to which rule of per se will be applied and dividing market conducts to which rule of per se will not be applied. Section 3 "cross licensing" analyzes pure cross licensing, cross licensing including other restrictions and the relation between cross licensing and settlement of patent infringement dissension. Section 4 "patent pool" discusses the nature of pooled patents, patent pool including other restrictions and the institutional framework governing the pool of EC.

Chapter 3 "vertical agreement" is divided into six sections. Section 1 analyzes vertical price restriction, amount restriction of production and distribution. Section 2 analyzes vertical restriction of territory, field of use and customer. Section 3 "tying agreement" dissertates the composing and kinds of tying agreement, applying law to tying agreement and permitted tying agreements. Section 4 "non – compete obligations" analyzes the case that licensor requires licensee not to compete and the case that licensee requires licensor not to compete. Section 5 "grant back" dissertates exclusive grant back and non – exclusive grant back. Section 6 "royalty" discusses the maximal royalty, royalty of not real patent and the measure to count royalty.

Chapter 4 "misuse of market power and centralization" is divided into six sections. Section 1 "refuse to license" analyzes unilateral refuse to license, refuse to license by agreement between licensor and its non – exclusive licensee and non – use. Section 2 "misuse of infringement alarm" dissertates the representations and treatment of misuse of infringement alarm. Section 3 "price discrimination" introduces representative case, the Laitram Corporation v. King Crab, Inc. and other specific problems. Section 5 "non – challenge clause" analyzes the case that licensee challenges the validity of patent and the case that licensor challenges the validity of patent. Section 6 "centralization of patent" discusses the centralizations by getting patent licensing and canceling the existing patent licensing.

Chapter 5 in the mass comments on the relative legislation and puts forward legislative suggestion for our country. The chapter includes 4 sections, which respectively review relative legislation in the USA, EC, other countries, other regions and international organizations according to history and at last bring forward proposal for China.

The proposal includes constituting antimonopoly law, constituting antimonopoly rule in patent licensing and relative guidelines and amending patent law to forbid misuse of patent.

This dissertation especially pays attention to case law as referring to the USA law and mainly discusses the EC 2004 Guidelines as referring to EC law.

The applying of patent misuse doctrine in the USA courts has come through the experience of establishing, rising, being revised, prevailing again and being restrained. As to the age of CAFC (The United States Court of Appeals for the Federal Circuit), patent misuse doctrine has been largely restrained. Similarly, the applying of antitrust law to patent licensing in the USA courts also has experienced a process like the movement of a pendulum. In one period, the courts leaned to protecting patent and in another period, the courts leaned to applying antitrust law more.

Anyway, Commission Regulation (EC) No 240/96 leaned to structure doctrine, its main disadvantages include too formalization, too complex, field of applying being too narrow, not paying enough attention to inter - brand problems, not according to consistent manner as treating the competitive relation between licensor and licensee.

The characters of Commission Regulation (EC) No 772/2004 include emphasizing positive effect of patent licensing agreement to competition, predigesting framework of rules and emphasizing economic analyzing, distinguishing competitors and non - competitors, paying attention to network effect, noticing dynamic intendance.

The characters of EC 2004 Guidelines include adopting economic benefit doctrine, largely using analyzing method based on economic effect, closing to the USA 1995 Guidelines, distinguishing agreements

between competitors and non – competitors, overseeing change of status of competitors and non – competitors with the change of economic situation.

The author's legislative proposal includes constituting antimonopoly law and prescribing the principal of forbidding misuse of intellectual property in it, revising patent law and prescribing the principal of forbidding misuse of patent in it and in respect of applying antimonopoly law to patent licensing constituting two legislative documents: antimonopoly rule in patent licensing and guidelines for applying rule of reason to patent licensing. As to antimonopoly rule in patent licensing, the author advises to classify the clauses of the patent licensing into three sorts: white clauses, black clauses and gray clauses. White clauses means clauses permitted by the rule, black clauses means clauses forbidden by the rule and gray clauses means clauses that should be analyzed by the rule of reason according to the particular conditions.

Based on the present condition of our country, the author thinks that this rule should be a strict rule. In principal, we certainly should prescribe the clauses that are forbidden in the USA, EC, Japan and Taiwan region of China as black clauses. As to the white clauses in the USA, EC, Japan and Taiwan region of China, we should analyze them one by one and need not describe them as white clauses, maybe as gray clauses, even as black clauses. We should not ignore the provisions that represent the wishes of developing countries in the legislation documents of international organizations. In the meantime, we should also pay attention to the experiences and lessons of the actual patent licensing in our country, especially various restrictive conducts in the technology importing and do as having a definite object in view.

In respect of guidelines for applying rule of reason to patent licensing, the author suggests that we should use the USA Guidelines and EC Guidelines for reference, introduce into economic analyzing and pay attention to the market power. The guidelines which the author wishes to be elaborate should include: 1. clarifying the relation between patent law and antimonopoly law; 2. setting up three kinds of safe harbors: safe harbor based on market share, safe harbor based on the quantity of substitute technologies and safe harbor based on the quantity of creative authorities; 3. using the analyzing framework of EC 2004 Guidelines as reference and paying attention to the difference between competitor and non - competitor, dynamic supervising and network effect.

本书缩略语对照表

美国《指南》——美国1995年《知识产权许可的反托拉斯指南》

欧共体《240/96号条例》——欧共体1996年《对技术转让协议适用第81（3）条的条例（第240/96号）》

欧共体《772/2004号条例》——欧共体2004年《关于将条约第81（3）条适用于技术转让协议的条例（第772/2004号）》

欧共体《指南》——欧共体2004年《关于对技术转让协议适用欧共体条约第81条的指南（2004/C 101/02）》