专利权行使的反垄断法规制

ZHUANLIQUAN XINGSHI DE FANLONGDUANFA GUIZHI

吴广海◎著

知识产权出版社
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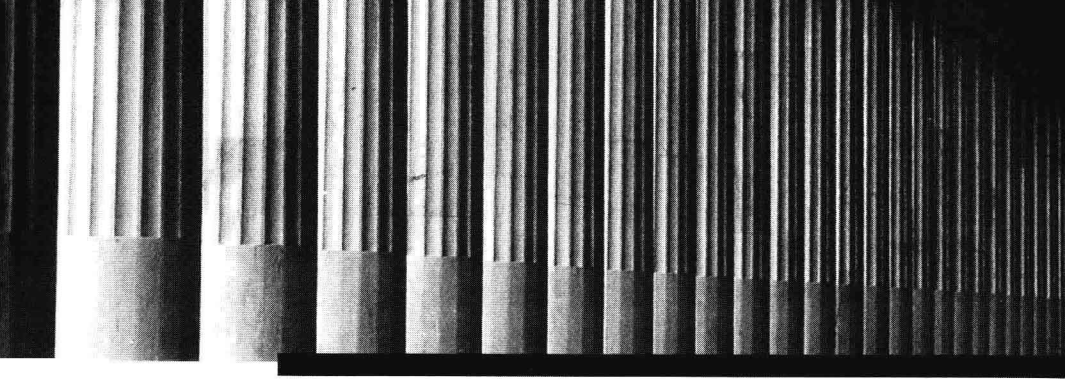

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本书出版得到南京理工大学自主科研专项计划（项目编号：2011YBXM146、2011pyxm10）、江苏省人文社会科学校外合作研究基地“江苏省知识产权发展研究中心”资助

序

专利权行使与反垄断法在实现目标的途径方面存在冲突，这种冲突在现代高科技时代尤为突出：专利权人排他使用权的行使必然会限制市场的自由竞争，而反垄断法的直接目标就是维护市场竞争的自由。如何充分发挥反垄断法对专利权行使的控制功能，在保护专利权与维护自由竞争之间寻求最大的平衡，在激励创新的同时最大限度地增进消费者福利，是世界各国面临的一个共同问题。

本书以促进竞争、激励创新、平衡专利权人和社会公共利益为核心指导思想，以现有的反垄断法理论研究成果为铺垫，以对竞争和消费者福利利弊影响比较为标准，以相关国家和地区法律、判例和相关理论之间的比较为基础，对专利权行使反垄断法规制的理论和实践进行了系统的、深入的、细致的探索。这一选题无疑具有重要的理论和实践价值。本书在对反垄断法规制专利权行使的一般理论进行分析、厘清的基础上，运用反垄断法相关理论，结合市场经济发达国家的相关立法和判例，依次对专利权人的拒绝交易（许可）、搭售、交叉许可和专利联营、合作设立标准和其他限制竞争行为及其反垄断法规制问题进行了深入的分析，并对我国现行相关法律规定进行了评价，就我国反垄断法规制专利权行使的一些具体问题提出了完善建议。

作为一本就知识产权和反垄断法领域进行交叉研究的论著，我认为，本书的特点主要体现在以下方面：第一，研究具有基础性、系统性和深入性。国内外学术界对专利权行使的反垄断法规

制虽然已有不少研究成果，但兼具基础性、系统性和深入性的研究成果还不多，本书恰恰在兼具这几个特征方面做得较为成功，这也是本书对该领域学术研究的最显著贡献。第二，在实体内容方面，开展了不少重要的学术梳理工作，并在此基础上提出了许多具有新意的观点。如作者对专利权滥用进行了新的界定，对专利权和市场力量的关系进行了新的论证，对拒绝交易的特征有新的认识，对关键设施理论的内涵以及搭售行为的性质也有新的发现。第三，在研究方法方面，本书不仅在总体上较好地贯彻了比较研究的方法，而且在论述每项制度和具体规范时，也着重比较分析。此外，作者还综合运用了历史分析、经济分析和案例分析等方法来探析事物的原理。第四，在资料的挖掘和应用方面，作者付出了很大努力，收集、整理第一手的英文资料，并对这些材料进行了很好的提炼和归纳，为该领域的进一步研究积累了丰富的素材。

本书作者是我指导的博士生，在南京大学攻读经济法专业博士学位期间，学习态度端正，博士论文的写作尤为认真刻苦。本书是在作者博士论文基础上修改而成，凝聚了作者多年的心血。相信本书的出版对我国专利权行使反垄断法规制领域的学术研究将起到一定的推动作用，对相关领域的实践活动也具有一定的借鉴意义。

是为序！

邵建东

2011 年 11 月 26 日

摘　要

专利权是法律赋予专利权人对其专利技术所拥有的排他使用权，这一排他使用权使得专利权人在一定范围内对市场竞争进行的限制并不为反垄断法所干预，同时专利权和反垄断法在激励创新、促进竞争和增进消费者福利的目标方面具有一致性，但两者在实现目标的途径上却存在不可避免的冲突。当专利权的行使违背专利权创制的社会目的或精神，不正当地损害或可能损害他人或社会公共利益而构成专利权滥用，并且产生或可能产生非法限制竞争后果时，反垄断法就有必要对此进行规制。

专利权滥用的构成中，专利权人主观上可以是故意的，也可以是过失的。反垄断法规制专利权行使的目的在于在保护专利权和维持自由竞争之间寻求平衡，以在激励创新的同时最大限度地增进消费者的福利。就反垄断法规制专利权行使行为的立法而言，美国和欧盟都是在基本的反垄断法基础上，还制定了专门的适用于知识产权（专利权）许可的指南或条例。

市场力量是确定非法垄断是否存在的关键要素。一般意义上的市场力量并不等同于垄断力量或市场支配地位。垄断力量或市场支配地位在内涵上是指重大程度的市场力量。在专利权和市场力量关系的认识上，一种观点认为可以假定专利权拥有市场力量；而另一种观点则认为不能作这样的假定，应将专利权和普通财产权一样对待。这两种观点都有失偏颇。由专利权授权条件、排他性本质等决定，加之专利侵权等同原则的适用，客观上，专利权可能使得相关市场上与专利技术或产品能进行有效竞争的所

有相同的和大部分替代性的技术或产品遭到排斥。基于此及我国技术水平现状的考虑，在反垄断法适用中，应对专利权拥有市场力量作“可反驳假定”，即假定专利权人因专利权而拥有一般意义上而非重大程度的市场力量，并允许专利权人举证证明自己并无反垄断意义上的市场力量，从而推翻市场力量的假定，以更好地维持专利权人和社会公共利益之间的平衡。

专利权人拒绝交易（许可）既体现了合同自由，也是专利权排他性的内在要求，但任何权利都是为了实现某种社会目的而被创制出来的，具有相对性。因而，作为财产权形态之一的专利权也并非绝对。当具有市场支配地位的专利权人拒绝交易的专利技术或产品构成其他经营者参与相关市场的竞争所必需的“关键设施”，且拒绝交易可能产生非法限制竞争的结果时，反垄断法就有对此进行规制的必要。拒绝交易是专利权人对专利权进行利用的重要形式，因而《中华人民共和国反垄断法》（以下简称《反垄断法》）不应将“没有正当理由”视为非法拒绝交易的构成要件。

专利权人搭售行为既包括通常意义的搭售，也包括技术许可中以打包许可形式出现的搭售。专利权人的搭售既会产生对搭卖品市场的竞争构成阻碍、损害消费者利益等后果，也会产生降低交易成本、增加消费者福利等促进竞争的结果，因而应适用合理原则而非（附条件）自身违法原则对其进行反垄断法规制。《中华人民共和国合同法》（以下简称《合同法》）等法律法规对技术许可中的搭售采用“自身违法”的规定，不利于发挥搭售的积极作用。

在反垄断法意义上，专利权人的搭售行为既可视为滥用市场支配地位行为，也可视为限制竞争行为。我国《反垄断法》也应作此规定，以有利于对不具有市场支配地位的专利权人实施搭

售行为的规制。违法的搭售行为要求从事搭售的专利权人在相关市场上具有一定的市场力量或市场支配地位，搭售行为阻碍或可能阻碍相关市场的竞争且客观上不存在正当的理由或基于效率而具有合理性。专利技术打包许可在内涵、结卖品和搭卖品的区分、对竞争的影响等方面有区别于通常意义搭售的特点，对其进行反垄断法分析时，应充分考虑打包许可具有的特殊性，尤其对竞争的促进方面。

专利联营是市场对“专利丛林”现象的回应，具有减轻许可费叠加问题、减少侵权诉讼风险及成本、清除阻碍专利等积极意义，但其也可能在相关市场上产生非法限制竞争的结果。专利联营对技术市场竞争的限制主要表现为，当专利联营中包含相互替代关系的专利或无效专利时，就会限制技术市场中本应发生的竞争；专利联营对产品市场竞争的限制表现为固定价格、限制产量、转售价格维持、排他性许可、许可费超高定价、许可费歧视等；专利联营对创新市场竞争的限制集中表现为专利许可中排他性回授条款对创新的损害。

反垄断法对专利联营的规制主要应关注其是否结合了“必要的”专利。鉴于专利联营可能产生的效率，对专利联营及许可行为应更多采用合理分析原则，通过其对竞争影响的利弊比较最终决定其合法性问题。我国《合同法》等规制（专利联营）技术许可的法律法规尚有缺陷，对回授条款等的规制未能建立在合理分析基础上。

标准与专利技术相结合，在促进技术创新、发挥新技术的社会价值等作用的同时，也使专利权人因标准设立而获得超越专利权内含的市场力量，并可能凭借这一市场力量，在标准设立后从事索取高额许可费的劫持行为。劫持行为产生了限制竞争、损害消费者福利等后果。为了减轻专利权人的劫持行为，标准设立组

织制定了相关专利政策，主要有披露规则、许可规则以及事前许可协商规则。鉴于合同法、专利法规制专利权人违反专利政策的不足，反垄断法有对此规制的必要性。

专利权人违反披露规则这一欺骗行为体现了专利权人垄断相关技术市场、排斥竞争对手的意图，可能构成反垄断法上的“企图垄断”。在标准设立过程中，专利权人违反许可规则，损害相关技术市场的竞争，可能构成“企图垄断”，在标准设立后，其违反许可规则索取许可费，则可能构成市场支配地位的滥用。专利权人违反事前许可协商规则可能构成价格固定、市场支配地位的滥用等。反垄断法对专利权人违反专利政策的行为一般应采用合理分析原则进行规制。我国《反垄断法》应将损害竞争的欺骗性行为（如违反披露规则）视为非法垄断的一种形态（“企图垄断”）。

我国对专利权行使进行规制的反垄断立法尚不完善，应借鉴美国和欧盟等国家和地区较为成熟的经验或做法，并结合中国目前的技术水平状况构建我国的反垄断法规制专利权行使的法律体系，以合理地平衡国内市场的专利权保护和自由竞争的维持，增进消费者的福利。

ABSTRACT

A patent right is an exclusive right conferred by law for a patentee's patented technology, to which anti-monopoly law won't be applied even if it entails restriction on market competition within certain scope. Meanwhile, they share the same goals in promoting innovation and enhancing consumer welfare, but conflicts between them are also inevitable in the ways to achieve the goals. When a patent right conducted abusively, improperly doing harm to others or public interests, resulting or likely resulting in illegal restrictions of competition, all of which go against the social purpose or spirit of creating patent rights, it is necessary for the application of anti-monopoly law to the abusive conducts.

The abuse of patent rights involves patent rights conducted abusively in subjective intent and fault. The goal of the regulation of anti-monopoly law for the exercise of patent rights is to achieve balance between patent right protection and free competition, stimulate innovation and enhance consumers' maximum welfare as well. In the cases of the USA and EU, specific regulations or guides to the license of IP rights (Patent Rights) are formulated based on their basic anti-monopoly laws.

Market power is the key element to judge whether there exists illegal monopoly, but it does not always imply monopoly power or market domination position that connotes great market power. There are

two main opinions concerning the relationship between patent rights and market power. One view is that patent rights can be presumed to have market power, but the others don't agree with this presumption, they argue that patent rights should be treated as common property rights. In my view, each of them has its own one-sidedness. All the other identical or substitutionary technologies or products, competing with the patented technology or product, may be excluded objectively from the relevant market due to the granted terms of a patent, the essentiality of exclusive rights and the application of the doctrine of equivalents in patent infringement, therefore, in order to better balance interests between patentees and the public, patent rights are required to raise a "rebuttable presumption" of market power in the application of anti-monopoly law, which means patentees are presumed to have the common but not the great market power arising from the patent rights, and they are permitted to produce evidences to prove they do not own the market power in anti-monopoly law.

A patentee's refusal to deal or license is not only the embodiment of freedom of contract but also the inherent requirements of exclusive patent rights. For all the rights are created for some social purpose, any right has its relativity, including patent rights, as one form of property rights. However, when the patented technologies or products refused to deal or license by a market-dominating patentee constitute "essential facilities", the refusal can't be immune from anti-monopoly law because of its anticompetitive effects. Refusal to deal is important for a patentee to exercise his patent right, therefore, "no proper reason" shouldn't be regarded as one of the constitutive requirements for illegal refusal to deal in China's Anti-monopoly Law.

Patent tying arrangements include the tying in common sense and the packaged tying. The negative effects of patent tying conducts are the possible foreclosure on the market competition of the tied products, and therefore, harming consumer welfare. In addition, tying may lead to the procompetitive effects, by reducing transaction costs and enhancing consumer welfare. Accordingly, the rule of reason, instead of "the *per se* unlawful" should be adopted concerning the regulation of anti-monopoly law on the tying conducts. The provision of "the *per se* unlawful" is introduced in China laws and regulations, such as Contract Law, to analyze tying arrangements in the licensed technologies, which is not conducive for tying arrangements to play their positive role.

In the perspective of the regulation of anti-monopoly law, tying arrangements are considered as an abuse of a patentee's market dominant position and an illegally restrictive competition agreements. Relevant provisions should be adopted in China Anti-monopoly Law to regulate the tying arrangements conducted by the patentees who have no market-dominating position. Tying arrangements are regarded illegal when the patentees have certain market power or in a market-dominating position in relevant markets, and the market competition has been or potentially been impeded by the patent tying arrangements with no proper reason or any efficiencies. Packaged licenses of patented technologies are different from the common tying in their connotations, distinguishing tying products from tied products, and their effects on competition. All of these characteristics of packaged licenses, especially the pro-competitive effects, should be considered in the analysis of anti-monopoly law.

Patent pools are effective means used to respond to a patent thicket, which have positive significance in mitigating royalty stacking problems, minimizing litigation risks and costs, clearing blocking patents, but they are also considered potentially anti-competitive as restricting competition on relevant markets. For technology markets, competition may be restricted by patent pools containing substitutionary or invalid patents. For product markets, patent pools can place restrictions on competition in fixed price, restricting production, resale price maintenance, exclusive license, aggressive pricing for royalties, discriminatory royalties, *etc.* For innovation markets, the restrictions on competition focus on the hindering brought by exclusive grant-back clauses on innovation.

The regulation of anti-monopoly law on patent pools should focus on whether "essential" patents are combined. The rule of reason should be applied to analyze patent pools and licenses in view of the likely efficiencies promoted by them, but it hasn't been adopted in China's Contract Law and other laws to analyze its regulation on grant-back clauses. So some regulations of relative law on (Patent pools) technology licenses should be perfected.

The integration of standards and patent technologies can not only promote technology innovation and produce the social value of new technologies, but also make patentees acquire some inherent market power beyond the patent rights through the standard-setting and charge excessive royalties, i. e. hold-up which can restrict competition and harm consumer welfare. In order to mitigate a patentee's holdup by demanding high royalties after collaboratively setting standards are set, some related patent policies have been formulated by standard setting

organizations, including a patentee's disclosure rules, licensing rules, and ex ante licensing negotiation rules. Considering the imperfection of contract law and patent law applied to regulate the violation of the patent policies, it is necessary to put hold up under regulation of anti-monopoly law.

The misrepresentation of violating the disclosure rules denote the patentee's intention of monopolying relevant technology markets and excluding the rivals, which may constitute the "attempted monopoly" in anti-monopoly law. During standard-setting, the patentee's violation of the licensing rules may harm the competition in relevant technology markets, constituting the "attempted monopoly." After standard-setting, the patentee's violation of the licensing rules charging royalty may constitute an abuse of dominant position. The patentee's violation of the ex ante licensing negotiation rules may constitute the price-fixing, an abuse of dominant position, *etc.* Under anti-monopoly law, the rule of reason should be applied to analyze the patentee's violation of the patent policies. China Anti-monopoly Law should treat some fraud conducts, for example, violation of the disclosure rules as one type of illegal monopoly, i. e. attempted monopoly.

For the benefit of keeping a reasonable balance between the protection of patent rights and the maintenance of free competition, enhancing consumer welfare, a anti-monopoly law system should be established in China, by combining the ripe experience and practices of US and EU with our current national technology level, to perfect the regulation of the exercise of patent rights by anti-monopoly law.

目　录