

知识产权与 竞争法贯通论

张世明 孙瑜晨◎著

*Comprehensive Research on the Law of
Intellectual Property and Competition*



中国政法大学出版社

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INTRODUCTION

Anti-monopoly Law and Anti-unfair Competition Law have a common protection goal, namely the protection of free competition. Although the two law is not same on competitive promotion method, there is tension in some aspects, but neither absolute repel each other. Anti-unfair Competition Law regulates how to use the freedom of competition, Anti-monopoly Law regulates whether there is freedom of competition. Anti-monopoly Law is committed to the existence of competition; Anti-unfair Competition Law is committed to the essence and the quality of competition. On the basis of the previous scholarship, the present paper aims to explore complex interactions between Anti-monopoly Law and Anti-unfair Competition Law in detail, in order to promote the further development of theory of Chinese competition law.

The amendment of *Anti-unfair Competition Law* provides an opportunity to review the relationship between trademark law and Anti-Unfair Competition Law. Based on these key features, such as exclusive application of the law and concurrence of right of claim, there are two theories of the relationship between the two laws: priority theory and symbiosis theory. Whether it is the relationship between German anti-unfair competition law, which was influenced by



Unfair Commercial Practices Directive 2005 in EU, and trademark law, or the relationship between British trademark law and passing off law which was regarded as the equivalent substitute to anti-unfair competition law have adopted the view of symbiosis theory. The reason is the competitive nature of trademark law and the independence of trademark protection function of anti-unfair competition law. Unfortunately, the fifth article of *Anti-unfair Competition Law (2016 Revised Draft for Official Review)* and the sixth article of *Anti-unfair Competition Law (2017 Revised Draft)* adopted the theory of priority. The relationship between the two laws should be correctly handled and the legal provisions in the revised draft should be correctly amended on the basis of the symbiosis theory. Fortunately, Article six of the *Anti-Unfair Competition Law*, which was finally passed by the legislature, corrected the issue of excessive preference towards the theory of priority to some extent. But the new provision still need to be improved. Specifically, the new provision should regulate the counterfeiting of registered trademarks, adopt a certain general concept of confusion, and accurately define the meaning of the constituent elements of “having certain influence”.

The sharing economy has spawned a range of regulatory issues. When Chinese regulators initially faced this novelty, they fell into “path dependence” and analogized sharing services to their traditional counterparts, resulting in excessive and outdated regulation. However, during the process of formulating new rules to legitimize online ride-hailing services nationwide, this analogy-based regulation was transformed into an innovation-friendly model. The sharing economy has been considered to be the quintessential business model of the innovative economy and has received great regulatory tolerance. At the same

time, the sharing economy, featuring innovative and regulatory disruption, opened the door to unfair competition. Many competition issues have arisen from the dominant position held by platforms, possible mergers, special agreements between firms and participants and administrative monopolies. However, Chinese regulatory authorities, to a large extent, have accepted the Schumpeterian hypothesis that monopolists favor innovation, and therefore, they left the above competition issues unregulated. Therefore, the regulatory framework for the sharing economy should be transformed again into a competition-oriented model and, more importantly, antitrust regulations should be at the core of this framework. Within the framework, the SSNIQ test should be considered when defining the relevant market, both price-related abuses and non-price abuses of dominant position need to be reanalyzed, the calculation method of threshold for merger reviews should be optimized, vertical integration and data concentration should be considered in merger reviews. In addition, regulators should pay attention to potential conspiracy, particularly to quartet agreements in the ride-hailing sector.

In the pharmaceutical industry of the United States, the patent litigation settlement agreement which includes 'reverse payments' from the patent holder to the alleged infringer, has aroused widespread concern. The typical purpose of this agreement is as exchange for the alleged infringer's agreement to delay or abandon market entry. Legitimacy analysis toward reverse-payment settlements becomes further complicated because of the innovative policy for brand-name drugs and the competition policy for generic drugs, which has caused great controversy in the judicial practice of the United States. The Eleventh Circuit Court utilized the scope-of-the-patent test and empha-



sized the deference to the patent exclusion scope. The Sixth Circuit Court concerned more about the fact that this agreement was an anticompetitive market-division arrangement in nature and utilized the per se rule. The Supreme Court analyzed this agreement under the traditional rule of reason and hoped to reduce the cost of mistake by comprehensively evaluating various factors. However, due to the existence of information asymmetry and the limitations of the rule of reason pointed out by Hovenkamp, the ‘presumptive illegality’ approach would presumably become the most appropriate rule in the United States. As a power in the field of intellectual property protection, as well as the Generic drugs production and consumption, China has the cultural, institutional and industrial possibilities of inducing reverse payment. Chinese Antimonopoly Law contains multiple goals rather than the single efficiency goal like American Antitrust Law. The reverse-payment agreement should be analyzed under the ‘prohibition and exemption’ framework, in order to achieve the balance of competition order maintenance, innovation incentives, human rights protection and other values.

The patent linkage system refers to the system that links the patent status and the pharmaceutical administrative approval. In order to achieve the linking function, the coordination within the pharmaceutical approval authority, the coordination between the approval authority and the judicial system, and the coordination between the approval authority and the patent administrative department are required. In a word, the patent linkage system includes a lot of institutional elements, therefore a broad conception should be adopted. Under the influence of unilateralism and hegemonism, the United States, through unilateral or bilateral trade agreements, attempts to transform its domestic Hatch-Waxman patent linkage system into a

global standard. Canada, Australia, South Korea, India and many other countries are affected by this “rule hegemony”. Different countries responded differently. Canada completely transplanted the American-style patent linkage system, which hindered the formidable generics industry. Australia selectively transplanted the system, adding anti-competition and anti-evergreening clauses into the patent linkage system, which reduced the impact of the American-style linkage regime on its domestic pharmaceutical industry. The central government of China released a new guideline on reforming drugs approval procedures on October 8th, 2017. According to this guideline, the regulators will explore the establishment of patent linkage system. When submitting the generics applications, the applicants must state the status of patent ownership. If there is any dispute about the patent right, the parties have the right of filing a lawsuit. If the suit is filed, the marketing approval will be delayed but the technical approval will continue. Considering the insufficiency of China’s pharmaceutical research and development capabilities, the slowness of innovation cultivation, and the situation that China relies heavily on the generics, fully transplanting the linkage regime as similar as Hatch-Waxman system will cause serious competitive risks to the generics industry. Brand pharmaceutical companies can delay the entry of generic drugs into the market by abusing patent information registration system, reaching anti-competitive agreements (mainly reverse-payment agreements), implementing product-hopping strategies, and abusing authorized generics, result in damaging affordable drug accessibility. Only the transplantation of a patent linkage system that doesn’t impede the generics competition is justified. Specifically, China’s patent linkage system should introduce the legal fiction of infringement, build the



Chinese version of the Orange Book system, stipulate the damage provisions, and regulate anti-competitive agreements actively.

Confined by the huge deterrent of antitrust law, market players rarely used overt protocol cartel or resolution cartel, while they elaborately developed ‘underground cartel’ and struggled to hide information communication. Thus, cognizance and regulation of price concerted practice becomes a conundrum in competition law. Posner and other scholars proposed that the existence of concerted practice should be proved by objective economic evidence, regardless of subjective aspects. However, the theory of oligopolistic interdependence in economics, ‘Oliver Black’ logic analysis in analytic philosophy and the legal demonstration for the particularity of “meeting of the minds” in concerted practice, all illustrated that the cognizance of price concerted practice must adhere to the subjective aspects. Focusing on subjective aspects, through the type analysis and efficiency balance of information behavior, the regulators should try to establish the regulatory system with ‘communication’ as the core, which might be an effective way to fight against concerted practice. It should be noted that the anti-monopoly law should have a cautious attitude to the regulation and cooperate with department laws such as the price law.

The patent pool and the patent alliance can be used interchangeably, but there are certain differences between the two concepts. The essence of the patent pool is a collection of patent rights based on the agreement. The patent alliance is a collection of patent owners in the pool; the patent alliance is the subject, and the patent pool is the object. The members of the patent alliance are patent holders, and the patent pool is composed of the patent; in the information technology

industry, forming a pool around common technical standards is relatively simple and can determine which patents are essential for the standard. The standard essential patent organization is mainly responsible for the formulation of standards. The patent joint venture mainly involves patent licenses. It is an important tool for enterprises to promote technical standards and obtain economic benefits. In biotechnology and pharmaceuticals, patent pool formation is often more difficult, precisely because technical standards are difficult to define precisely. The standards organization does not identify essential and non-essential patents. However, the standard of the necessity of entering the pool patent is one of the most important standards of the patent pool, and it is also the basis for the patent joint venture to determine the license fee of the patentee. The three types of patents, namely competition patents, barrier patents, and complementary patents, have different levels of demand, and the impact on market competition is also significant. When the patent pool participants form a competitive relationship, it is very likely that the patent pool will restrict the effective competition in the relevant market. While intellectual property law also focuses on anti-competitive restrictions, its concerns should be broader, including the act of weakening these intellectual property policies, even if they do not violate antitrust laws. The anti-monopoly law is only intended to identify certain types of hazards and cannot solve all patent policy issues. The scope of adjustment of the abuse law should not be defined by anti-monopoly law. Abuse of market dominance related to patent pooling includes monopoly high prices, refusal to deal, tying, return terms, patent license fees for expired patents, discriminatory clauses, and non-question clauses.



The study of patent-holdup in the related areas of licensing of standards-essential patents (SEPs) has proven problematic. On the one hand, the academic community has a different opinion on this aspect. On the other hand, there are huge differences in the different legal remedies of the two major legal systems in Europe and the United States. SEPs are actually instruments encompassing various strategic uses, which lead to anti-competitive behaviors of abusing market dominance, and could also become a tool for patent-holdup in the microeconomic sense. FRAND is related to both the standard necessary patent holders and the standard essential patent implementers, both the buyer monopoly and the seller's monopoly are its two objections. The bias is the taboo, and avoiding lean to either side is important to keep the FRAND commitment. The FRAND defense in cases of standard essential patents has two elements: one is market dominance, and the other is violating FRAND commitment from the SEP holders. This actually has the effect of extending the scope of the anti-monopoly law, not only including the abuse of litigation rights and the reverse patent holdup, but also being equivalent to the total conception of abusing of market dominance, such as monopoly high prices, refusing to deal and price discrimination.

经济法与法人类学研究文库(已出书目)

- ◇ 世界学者论中国传统法律文化
- ◇ 清代司法演变内在逻辑贯通论：新历史法学实践
- ◇ 砧木与嫁接：近代中国公司制度贯通论
- ◇ 中国早期经济法文献研究
- ◇ 经济法基础文献会要
- ◇ 中国经济法基础理论
- ◇ 经济法体系化与方法论：竞争法的新发展
- ◇ 企业并购法贯通论
- ◇ 经济法哲学贯通论
- ◇ 知识产权与竞争法贯通论

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反垄断法与反不正当竞争法关系论

反不正当竞争法和反垄断法从复杂的经济竞争现状出发，致力于保护竞争，构成竞争法的两大支柱，被视为反对竞争的干扰影响的确保竞争反应法。反不正当竞争法的主要价值在于确立经营者的行为准则，禁止不正当竞争行为，将经营者的竞争行为纳入促进社会整体利益的轨道，维护正当经营者的合法权益。反垄断法的价值目标是保护有效竞争，以实现社会公共利益为主要追求，其关注的是市场竞争的总体状况，无意保护和偏爱特定的企业，而反不正当竞争法首先保护的是受不正当竞争行为损害的善意经营者的利益，以维护公平竞争的市场秩序。本章力图探讨二法冲突、竞合与融合的互动关系，希冀对竞争法基础理论探索有所裨益。

第一节 源流论

欲探寻反不正当竞争法与反垄断法之间的差异，就不能不从其渊源说起。欧洲各国历史发展不同，法律制度的建构亦大相径庭，相同问题所采取的解决方法迥异自然无足讶异。例如，法国学术界就“竞争法”（droit de la concurrence）的性质、范围的意见产生了相当大的分歧，可谓众说纷纭，大体上可以归纳为广义和狭义两说。其中，狭义的竞争法是指“反限制竞争行为法”（le droit des pratiques anticoncurrentielles），与美国反托



拉斯法相埒。而广义的竞争法则通常被认为包括反限制竞争法与“反不正当竞争法”（le droit de la concurrence déloyale）。法国于1850年通过适用无正当理由而对他人造成损害必须承担责任的一般民法原则，推出了“不正当竞争”的概念。法国的法院以《法国民法典》第1382条之侵权行为规范为出发点，将不正当竞争视为一种特殊的侵权行为加以制裁，并在此基础上形成了一系列制止不正当竞争的判例，借助刑法和行政法的手段得以保护消费者。法国于1953年8月9日出台的《关于保持与重建工商业自由竞争的法规》（*Le décret no 53-704 du 9 août 1953 relatif au maintien ou au rétablissement de la libre concurrence industrielle et commerciale*），是第一部以保持充分、有效的竞争为目的的法律文件，涉及治安管理和竞争政策。直到1986年，新的、统一的法国竞争法才被制定，其全称为《1986年12月1日86-1243号关于价格及竞争自由法令》（*Ordonnance n°86-1243 du 1 décembre 1986 relative à la liberté des prix et de la concurrence*），亦称“新法国竞争法”。〔1〕该项法令建立起了一整套的规则，形成了一个协调一致的整体。

德国国内反不正当竞争法的历史，相较于反限制竞争法的历史更为久远。不正当竞争的概念（unlauterer Wettbewerb）在语源学上源于法语，在法律上源于民事侵权法。源初意义的反不正当竞争法是侵权法的特别形式，旨在为作为竞争者的企业提供侵权法保护。1869年《工商条例》没有包含反对不正当竞争的规定。当时的人们相信刑法上的禁止即为足矣。然而，在莱茵河地区适用的法国法中所包括的当时已经被发展出来的基本原则中，不诚实的竞争（concurrency déloyale）就表现为一种

〔1〕〔法〕罗歇·布特：“法国竞争法概要”，陈鹏译，载《法学家》1999年第3期。