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**THE ABUSE OF INTELLECTUAL PROPERTY RIGHTS AND
REGULATIONS IN CHINA: A LAW AND ECONOMIC ANALYSIS**

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Esame finale anno 2011

**TO MY DEAR MOTHER, LI YUFANG AND MY DEAR FATHER, GONG FUSHENG.
TO MY LOVELY DAUGHTER, GONG YICHENG.
TO REMEMBER THE TIMES DURING MY FIVE-YEAR STUDYING AT BOLOGNA
UNIVERSITY, FROM 2006 TO 2011.**

谨以此文献给我亲爱的母亲，李玉芳和亲爱的父亲，龚富生。

谨以此文献给我可爱的女儿，龚一晨。

谨以此文纪念 2 0 0 6 到 2 0 1 1 我在意大利博洛尼亚大学五年留学的日日夜夜。

Remember that the purpose of research is not just to complete a project and get a grade but to learn something you did not know before.

Seyler, Dorothy U. (1993): *Doing Research: The complete Research Paper Guide*. New York: McGraw-Hill, Inc.5

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GONG HONG BING
AT OPEN SPACE OF CICU, BOLOGNA UNIVERSITY
ITALY
15-03-2011

龚红兵
2011年3月15日于意大利博洛尼亚大学 CICU 图书馆
农历辛卯年贰零壹壹年贰月拾贰日

Declaration

This dissertation is the result of my own work, except where explicit reference is made to the work of others, and has not been submitted for another qualification to this or any other university.

GONG HONGBING

Abstract

From the institutional point of view, the legal system of IPR (intellectual property right, hereafter, IPR) is one of incentive institutions of innovation and it plays very important role in the development of economy. According to the law, the owner of the IPR enjoy a kind of exclusive right to use his IP(intellectual property, hereafter, IP), in other words, he enjoys a kind of legal monopoly position in the market.

How to well protect the IPR and at the same time to regulate the abuse of IPR is very interested topic in this knowledge-orientated market and it is the basic research question in this dissertation.

In this paper, by way of comparing study and by way of law and economic analyses, and based on the Austrian Economics School's theories, the writer claims that there is no any contradiction between the IPR and competition law. However, in this new economy (high-technology industries), there is really probability of the owner of IPR to abuse his dominant position. And with the characteristics of the new economy, such as, the high rates of innovation, "instant scalability", network externality and lock-in effects, the IPR "will vest the dominant undertakings with the power not just to monopolize the market but to shift such power from one market to another, to create strong barriers to enter and, in so doing, granting the perpetuation of such dominance for quite a long time."¹ Therefore, in order to keep the order of market, to vitalize the competition and innovation, and to benefit the customer, in EU and US, it is common ways to apply the competition law to regulate the IPR abuse. In Austrian Economic School perspective, especially the Schumpeterian theories, the innovation/competition/monopoly and entrepreneurship are inter-correlated, therefore, we should apply the dynamic antitrust model based on the AES theories to analysis the relationship between the IPR and competition law.

China is still a developing country with relative not so high ability of innovation. Therefore, at present, to protect the IPR and to make good use of the incentive mechanism of IPR legal system is the first important task for Chinese government to do. However, according to the investigation reports,² based on their IPR advantage and capital advantage, some multinational companies really

¹ Arezzo, Emanuela, (2007). Intellectual Property Rights at the Crossroad Between Monopolization and Abuse of Dominant Position: American and European Approaches Compared. forthcoming in *John Marshall Journal of Computer & Information Law*, Vol. 24, No. 3. P41

Available at SSRN: <http://ssrn.com/abstract=935047>

² There are two important investigation reports about the multinational companies' anti-competition activities in China, one is *The International Multinational Companies' Anti-competition Activities in China and their Related Regulations*, sponsored by the Bureau

obtained the dominant or monopoly market position in some aspects of some industries, and there are some IPR abuses conducted by such multinational companies. And then, the Chinese government should be paying close attention to regulate any IPR abuse. However, how to effectively regulate the IPR abuse by way of competition law in Chinese situation, from the law and economic theories' perspective, from the legislation perspective, and from the judicial practice perspective, there is a long way for China to go!

Key words: Intellectual property right, IPR abuse, regulate, the Schumpeterian theories, innovation, competition, monopoly, entrepreneurship.

of Fair-dealing of State Administrative and Commercial, and conducted by Prof. Shen Jieming, from Beijing University in 2004. Another is *The Investigation on the Abuses of Intellectual Property conducted by the International Multinational Companies in China and their related regulations*, the key project of state scientific researching plan sponsored by the State Scientific Bureau, conducted by Prof. Wang Xianlin, from Anhui University in 2005.

LIST OF ABBREVIATIONS

AIC	Administration for Industry and Commerce
AML	Anti-Monopoly Law
AEC	Austrian Economic School
CL	Competition Law
CJ	The Court of Justice of EU
CFI	The Court of First Instance of EU
EC	European Community
ECC	European Economic Community
ECJ	European Court of Justice
EU	European Union (On 1 December 2009)
EPC 1973	Convention on the European Patents (at Munich, 5 October 1973)
EPC 2000	European Patent Convention 2000 (which replaced the 1973 European Patent Convention)
ECHR	European Court of Human Rights
EPO	European Patent Office
FDI	Foreign direct investment
FIE	Foreign-invested enterprise
FTC	U.S. Federal Trade Commission
HNTE	High- and New-Technology Enterprises
ICC	International Chamber of Commerce
ICT	Information and communication technology
ITC	United States International Trade Commission
IP	Intellectual property
IPR	Intellectual Property Rights
ISO	International Organization for Standardization
IT	Information technology
IFPI	International Federation of the Phonographic Industry 国际唱片协会
OECD	Organization for Economic Co-operation and Development
OEM	Original equipment manufacturer
RAND	Reasonable and non discriminator
SAIC	State Administration for Industry and Commerce 国家工商总局

SIPO	State Intellectual Property Office 国家知识产权局
TBT	WTO Agreement on Technical Barriers to Trade
TEU	Treaty on European Union ('Maastricht')
TEC	Treaty establishing the European Community ((2002/C 325/01)
TFEU	Treaty on the Functioning of the European Union (2008/C 115/01)
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TTBER	Technology transfer Block Exemption Regulation (Re.772/2004)
USITC	U.S. International Trade Commission
USFTC	U.S. Federal Trade Commission
USDJ	U.S. Department of Justice
USDOJ	U.S. Department of Justice
USPTO	U.S. Patent and Trademark Office
USTR	U.S. Trade Representative (USTR)
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
337	Section 337 of the United States Tariff Act of 1930, as amended (19 U.S.C. § 1337)

Chapter One Introduction

1 The paper's background

1.1 The knowledge-based economy background and the legal institutional background

1.1.1 The importance of Intellectual property in the knowledge-based century

The 21 century is knowledge-based century, the knowledge plays an very important role in our society. In 17 century, Sir. Francis Bacon has keenly insighted that “Knowledge is power, and when embodied in the form of new technical inventions and mechanical discoveries it is the force that drives history.”³ Yes, that is truth! Further, L. C. Thurow (1996), the U.S. famous economist, points out and vividly illustrates “how a knowledge-based economy works and what it takes to generate wealth in this environment”⁴ and definitely concluded that “Knowledge is the new basis for wealth.”⁵ Therefore, in this era of intellectual capitalism, how to well management of intellectual property is the key important thing for the manager to think about.^{6 7}

³ In 17 century, Sir Francis Bacon, an English lawyer, statesman, “a great spokesman for the reform of learning and a champion of modern science”, has keenly insighted that “Knowledge is power, and when embodied in the form of new technical inventions and mechanical discoveries it is the force that drives history” See <http://www.iep.utm.edu/bacon/>. The last visiting time: 02-12-2011

⁴ In this knowledge-based world, or information society, “Knowledge is the new basis for wealth.”

Thurow, Lester C.(1999): *Building Wealth: The New Rules for Individuals, Companies, and Nations in a Knowledge-Based Economy*, 1st ed. Harper Business.

In this book, Thurow clearly pointed out that “The old foundations of success are gone. For all of human history, the source of success has been the control of natural resources—land, gild, oil. Suddenly, the answer is “knowledge.” The world’s wealthiest man, Bill Gates, owns nothing tangible—no land, no gold or oil, no factories, no industrial processes, no armies. For the first time in human history the world’s wealthiest man owns only knowledge.” Prologue viii

See http://www.amazon.com/Building-Wealth-Individuals-Companies-Nations/dp/0887309518#reader_0887309518

The last visiting time: 02-12-2011

⁵ Ibid.

⁶ Granstrand, Ove. (2000). *The Economics and Management of Intellectual Property---Towards Intellectual Capitalism*. Nothampton: Edward Elgar.

1.1.2 From the legal point of view, intellectual property law is a kind of effective legal institution to protect the valuable information in this knowledge-based economy

From the institutional point of view, the system of IPR law is one of incentive institution of innovation and it plays very important role in the development of economy. According to the law, the owner of the IPR enjoy a kind of exclusive right to use his IP, in other words, he enjoys a kind of legal monopoly position in the market.

How to well protect the IPR and at the same time to regulate the abuse of IPR is very interested topic in this knowledge-orientated market!

1.2 The cases background

1.2.1 U.S. vs. Microsoft case from 1997 to 2004

United States v. Microsoft,(CA No. 98-1232 (CKK))⁸ is “the century case”. On 18th March, 1998, U.S JOD and 20 states jointly launched an Anti-trust lawsuit against Microsoft, and this case shocked the world.⁹ At that time, I was a Master student studied in Chinese University of Political Science and Law, as soon as the US FTC published the detailed materials of this case, it stirred my great interests in cases. From that time, I kept the keen eyes on the development of this case till now. This case aroused my thinking about that in this knowledge-based economy, what the relationship between the IPR and competition?

1.2.2 EU vs. Microsoft in 2007

In 2007, I was a visiting scholar of Bologna University and conducting the IPR researches with Prof. Marina. Timoteo. On Oct.17,2007, the EFC published the final decision of EU vs. Microsoft. This again stirred my curiosity, because there are some similarities between these two cases, U.S. vs. Microsoft and EU vs. Microsoft, but, the results of these two cases are totally different! Why? According to what the legal and economic reasons behind the case? What the fundamental competition theories upon which the EU delivered her judgment? All these questions impulse me to collect all the information about the case, books, academic literatures, internet information, etc. And

⁷ The importance of intellectual property was highlighted by a statement from Ian Harvey, chief executive of the British Technology Group (BTG): “Intellectual property is one of the few ways that you can differentiate a product and enforce its uniqueness.” Ian Harvey, BTG’s chief executive, believes that his company can be described quite simply in just two words: intellectual property. He says: “Intellectual property is one of the few ways that you can differentiate a product and enforce its uniqueness. Competing on price or first-mover advantage are ephemeral in comparison.”

See Note 1 “Little-understood BTG aims to harness profit power of ideas”, The Times, 23 October 2000, from United Kingdom: *The Patents Act 1977 (Amendment) Bill*, Bill 9 of 2001-02, Working Reports (Papers) RESEARCH PAPER 01/84 31 OCTOBER 2001

See <http://www.parliament.uk/documents/commons/lib/research/rp2001/rp01-084.pdf>. The last visiting time: 02-03-2011.

⁸ See, http://www.justice.gov/atr/cases/ms_index.htm The last visiting time: 26-02-2011

⁹ See http://en.wikipedia.org/wiki/United_States_v._Microsoft The last visiting time: 26-02-2011.

then, from the EU vs. Microsoft, I have been focusing my attention on researching on EU's competition laws/regulations on the IPRs abusing and economic and legal analysis of EU vs. Microsoft case.¹⁰

Therefore, based on the above preliminary researches conducted from the two Microsoft cases, I have decided to choose this subject for my PhD research.

1.3 International trade background

---The Chinese IPR protection is the hot issue of the trade relationship among the U.S. EU and China

As the development of globalization, the product with the intellectual property rights, and the intellectual property are becoming the main steam of the international trade.¹¹ Now China is becoming an bigger export country, and there are great amount of volume of trade among China and U.S./EU. Therefore, the intellectual property protection is one of the key issues of the trade relationship among the U.S/EU and China.¹²

The U.S. always complain that the China do not effectively enforce the IPR protection.¹³ From May 25 1989, the USTR published the first Special 301 Report, in this report, the USTR announced that under the Special 301 intellectual property of Omnibus Trade and Competitiveness Act of 1988, China was placed on the Priority Watch List, and during 1989 to 2010, for 11 years, China is till remaining in such Priority Watch List.¹⁴

¹⁰ For the EU vs. Microsoft, I have conducted the following researches:

1 Researches on EU's competition laws/regulations on the IPRs abusing

(1) The structure of EU's regulations on the IPRs abusing

(2) The deeply analyses on some important articles of anti-IPR abusing

2 Economic and legal analysis of EU vs. Microsoft case

(1) On what kind of fundamental economic theories and legal theories, the decision was made?

(2) What kind of criteria for the judges to judge the Microsoft abusing its IPR?

(3) What the EU Anti-trust regulation (Article 82 of EU Treaty), the judges applied?

(4) What the historical influence of this case in EU and in the world?

(European Union v. Microsoft (short introduction) October 17, 2007

http://iblsjournal.typepad.com/illinois_business_law_soc/2007/10/european-union-.html.

The last visiting time: 25-02-2011.

¹¹ "Between 1987 and 1999, a period of only twelve years, annual U.S. receipts from foreign trade in intellectual property rose from \$10 billion to \$36.5 billion, versus U.S. payment to foreign owners of intellectual property in 1999 of only \$ 13 billion." From the note 14 p 3 of Landes, W.M. (2003).

¹² From 18th to 21th of January 2011, the Chinese president Hu Jintao has conducted his four-day state visit in the United States .

(<http://www.guardian.co.uk/world/2011/jan/18/hu-jintao-us-state-visit>, the last visiting time: 26-01-2011.

<http://www.time.com/time/world/article/0,8599,2042941,00.html>. The last visiting time: 26-02-2011.

During this four-day's state visit, just like the other official visit, besides the several top issues the leaders have been hotly discussed, such as: the RMB's exchange rate, the IPR issue is listed the second important issue of this discuss. See China is "Pricing" the IPR 中国“定价”知识产权, See <http://www.chinaiprlaw.cn/file/2011012718478.html>. The last visiting time: 26-02-2011.

¹³ USITC report (2010). *China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the U.S. Economy*. USITC publication 4199, November 2010. Investigation No.332-514

<http://www.usitc.gov/publications/332/pub4199.pdf> The last visiting time:25-02-2011.

¹⁴ The "Special 301" Report is an annual review of the global state of intellectual property rights (IPR) protection and enforcement, conducted by the Office of the United States Trade Representative (USTR) pursuant to Section 182 of the Trade Act of 1974, as

Are these complains made by the U.S. true or not? Besides the IPR protection in China, what about the situations of IPR abusing in China, especially the multinational companies? That is another thing I want to talk in this dissertation.

1.4 The reality of the protection of intellectual property in China

At present, China has established a well-organized IPRs legal protection system, and from the legal practice point of view, the owner of IPRs can enjoy very good protection. However, according to several markets investigation reports conducted by some Chinese authorities, there are some big companies abusing their IPRs and conducted some anti-competition activities. These anti-competition activities of big companies seriously destroyed the market competition order and prejudiced the interests of customers. But, even the worse, in China present legal system, there is no any specific law or regulation to deal with these IPRs' abusing.

Therefore, how to effectively restrict the IPRs' abusing in Chinese present situation becomes a very urgent question for the academic researcher to find suitable answer.

Therefore, there is one of most urgent reasons for me to choose this subject.

2 The research questions I am going to answer in this dissertation:

The basic research question of my dissertation is "How to restrict the IPR misuse (abuse) in China?" In order to well answer this basic question, I should deal with the following questions:

2.1 What is the IPR abuse?

In this dissertation, first of all, I want to make clearly answers to the basic question of my Dissertation, such as, what is the IP and what is the IPR? What are the differences between the use of IPR and the use of other tangible property? How to define and classify the IPRs' Abusing?

2.2 Why to regulate IPR abuse?

This is the theoretical foundations of my dissertation. In this part, I will try to find the reasons to answer this basic question, such as, according to what kinds of the legal and economic theories, we regulate the IPR abuse? In order to answer this basic question, I will deal with the following questions, such as, the law and economic reasons of why we protect the IPR and uphold the competition, why the IPR can be abused? What the characteristics of IPR abuse in this knowledge-based economy? What are the relations between IPR protection system and Anti-trust system?

2.3 How to regulate IPR abuse?

On the basis of the above theoretical research, I will try to find the answer to the following questions:

2.3.1 From the comparative study perspective

I will try to find the answers to the following questions: Why in EU and U.S., to apply the Anti-trust law or competition law to regulate the IPR abuse? In EU and U.S., what kinds of leading cases about the IPR abuses? What the legal principles can be draw from these cases? What are the legal and economic reasons of EC vs. Microsoft case? And other cases in EU or in U.S.? In what kind of ways that China can learn from?

2.3.2 From the Chinese situation perspective

In China, what kinds of IPRs' abusing activities exist? What are the characteristics of these IPR abusing behaviors? What are the consequences of these IPRs' abusing activities'? What can China learn from these Western legal and economic theories and principles? And how to regulate such activities within the present Chinese legal systems? According the Chinese economic situation, in what kinds of perspectives, China should be done?

3 The methodology

3.1 The Research Methodology I ---The law and Economic researching method¹⁵

To use the law and economic way to analyze some basic academic questions of my PhD dissertation is one of the key research methods in my paper.

The law and economics methodology is one of the key methods in my academic research. In the enforcement of antitrust law, to make a thorough economic analysis to the anti-competition activity is very popular analysis method.¹⁶ ¹⁷I will try to put my research questions into the economic

¹⁵ The law and economics methodology is the key way of my PhD. Because, from my personal education background, I have gradually found this methodology is great powerful and useful. For example, how to use the economic & legal way to access the consequences of market power of IPR-based company, how to evaluate the economic result of the legal legislation, etc.

¹⁶ In US FTC, there is the Bureau of Economics. The purposes of this Bureau are that "The Bureau of Economics provides economic analysis and support to antitrust and consumer protection investigations and rulemakings. The Bureau also analyzes the economic impact of government regulation, and provides Congress, the Executive Branch, and the public with policy recommendations relating to competition and consumer protection. The Bureau hosts many events drawing together economists and other experts to advance economic thinking. Finally, the Bureau conducts market analysis in a variety of industries of importance to the economy and to consumers. Many of these are published as economic reports." See <http://www.ftc.gov/be/index.shtml>. The last visiting time: 25-02-2011.

¹⁷ Besides these, in the following reports delivered by the US DOJ & FTC, and EU, concerning the IPR and antitrust law, there is strong tendency that all of these report pay more attention to apply the economic analysis to evaluate the market effect of one or

structure, that means that when I make some analyses of some legal principles, legal regulations and the judicial cases, the fundamental angle is that whether these legal principles, legal regulations and the judicial cases enjoy the economic efficiency or not; if there is no any economic efficiency, how can we change them and make them enjoy the economic efficiency.

There are many economics school, in my dissertation, I will mainly apply the Austrian economic approach and the institutional economic approach to analyze the IPR and the competition law.

3.2 The Research Methodology II ----Comparative law method

Comparative analysis is one of important research methods applied in this paper. For the purpose of applying the comparative way to conduct the academic study, Prof. Robert P. Merges have clearly cut the point, “Of the many rationales for comparative law, one of the best is what many be learned by examining how different legal systems diverge and converge over the handling of the same set of issues.”¹⁸(Robert P. Merges, 2010)

In this paper, I have conducted my academic research by way of comparative method in the following way:

3.2.1 Geographical comparative study

I will focus my attention to researching on the legal systems of IPR laws and competition laws in US/EU and China. Because in US and EU, there are advanced IPR laws and competition laws which are worth researching. Being as the most advanced economic country, the US has firstly enacted her antitrust law in 1890, the US Sherman Act (15 U.S.C. § 1-4 & § 7-8).¹⁹ This is

several companies' activities. Such as, US DOJ & FTC. (1995) Antitrust Guidelines for the Licensing of Intellectual Property; See <http://www.justice.gov/atr/public/guidelines/0558.htm>. The last visiting time: 25-02-2011.

U.S.DJ& FTC. Report (2007). Antitrust enforcement and intellectual property rights: promoting innovation and competition. See <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf>. The last visiting time: 25-02-2011.

UNCTAD Report (2008). *Competition policy and the exercise of intellectual property rights*. Trade and Development Board-Commission on Investment, Technology and Related Financial Issues--Intergovernmental Group of Experts on Competition Law and Policy, Ninth session, Geneva, 15-18 July 2008, No. TD/B/COM.2/CLP/68 **Available at** http://www.unctad.org/en/docs/c2clpd68_en.pdf. The last visiting time: 25-02-2011.

U.S. Department of Commerce's white paper (2010): *Patent Reform: Unleashing Innovation, Promoting Economic Growth & Producing High-Paying Jobs*, A White Paper from the U.S. Department of Commerce, April 13, 2010.

See http://www.commerce.gov/sites/default/files/documents/migrated/Patent_Reform-paper.pdf. The last visiting time: 25-02-2011.

In EU, such as, (1) COMMISSION REGULATION (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements(Text with EEA relevance)

Technology Transfer Block Exemption regulation (TTBER2004) Commission Regulation No. 772/2004, [2004] OJ L 123/11. http://eur-lex.europa.eu/pri/en/oj/dat/2004/l_123/l_12320040427en00110017.pdf

COMMISSION NOTICE: Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements (2004/C 101/02) (Text with EEA relevance)

See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0002:0042:EN:PDF>. The last visiting time: 03-03-2011.

(2) European Commission Report (2007). *Competition policy and the exercise of intellectual property rights*. Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 17-19 July 2007 Available at

http://www.unctad.org/sections/wcmu/docs/c2clp_ige8p08EC_en.pdf. The last visiting time: 25-02-2011.

¹⁸ Ottolia, Andrea. (2010). *The public interest and intellectual property models*. Torino: G. Giappichelli. X III

¹⁹ Statutory Provisions and Guidelines of the Antitrust Division

regarded as “the genesis of the modern antitrust law era.”²⁰ And for the EU, the EU competition laws play very important rule in the process of internal market. These are what the Chinese legislature and judicial authorities should be learned from.

3.2.2 Historical comparative study

History is like a kind of mirror, from it, not only can you get the better understanding of the past, but also can you predict the future. Only from the historical point of view, can you clearly know the great changes of the US competition policy from the 50-70s to 80-90s. And so does in Chinese history.

During the analysis process of whether a kind of activities are the anti-competition or not, there are two of important principles to be used, one is the “per se” rule (“rule of structure”), another is “rule of reason”. At the beginning, the US apply the former, the economic theories which underpin it is the Harvard school, which is adhere to that “the big is bed”.

The arguments Harvard school are static and rigid, they do not apply a kind of flexible, efficient way to analysis the economic phenomena.

Latter come into being the Chicago school, which uphold the “rule of reason”, which means that to take everything into consideration to analysis whether a kind of economic activities is pro-competition or anti-competition.

3.2.3 Cases comparative study

For this method, the next part, I will give the explanation in detailed way.

3.3 The Research Methodology III-----Case-analysis

Just like the one of the most famous aphorisms to be drawn from the distinguished Judge Oliver Wendell Holmes, jr.²¹ in his outstanding book, *THE COMMON LAW*, occurs on the first page: “The

See <http://www.justice.gov/atr/public/divisionmanual/chapter2.pdf>. The last visiting time: 03-03-2011.

²⁰ Kallay, D. (2004). *The Law and Economics of Antitrust and Intellectual Property: An Austrian Approach*. Cheltenham: Edward Elgar. 27, Notes 1.

²¹ Oliver Wendell Holmes, Jr. (March 8, 1841 – March 6, 1935) was an American jurist who served as an Associate Justice of the Supreme Court of the United States from 1902 to 1932. Noted for his long service, his concise and pithy opinions, and his deference to the decisions of elected legislatures, he is one of the most widely cited United States Supreme Court justices in history, particularly for his “clear and present danger” majority opinion in the 1919 case of *Schenck v. United States*, and is one of the most influential American common law judges. Holmes retired from the Court at the age of 90, making him the oldest Justice in the Supreme Court’s history. He also served as an Associate Justice and as Chief Justice on the Supreme Judicial Court of Massachusetts and was Weld Professor of Law at the Harvard Law School, of which he was an alumnus.

Profoundly influenced by his experience fighting in the American Civil War, Holmes helped move American legal thinking away from formalism and towards legal realism, as summed up in his maxim: “The life of the law has not been logic; it has been experience.”(*Oliver Wendell Holmes, The Common Law. Boston: Little Brown, and Co., 1881, I.*) Holmes espoused a form of moral skepticism and opposed the doctrine of natural law, marking a significant shift in American jurisprudence. As he wrote in one of his most famous decisions, his dissent in *Abrams v. United States* (1919), he regarded the United States Constitution as “an experiment, as all life s an experiment” and believed that as a consequence “we should be eternally vigilant against attempts to check the

life of the law has not been logic; it has been experience.”²²

This key insight saying is the key point of the case-law²³, and the cases consist of the common law.²⁴ Though, what O. W. Holmes, JR. means is the importance of case in the common law system, I do believe that what the O. W. Holmes, JR. said are also functioning well in civil law system. So, the importance of the case is outstanding! From the case analysis, we can clearly know what are really happened in the reality, how the judge apply the abstract principle to deal with the specific case,

expression of opinions that we loathe and believe to be fraught with death.”(Abrams v. United States, 250 U.S. 616, 630 (1919)) During his tenure on the Supreme Court, to which he was appointed by President Theodore Roosevelt, he supported efforts for economic regulation and advocated broad freedom of speech under the First Amendment. These positions as well as his distinctive personality and writing style made him a popular figure, especially with American progressives,(Louis Menand, ed., *Pragmatism: A Reader. New York: Vintage Books, 1997, pp. xxix.*) despite his deep cynicism and disagreement with their politics.[5] His jurisprudence influenced much subsequent American legal thinking, including judicial consensus supporting New Deal regulatory law, pragmatism, critical legal studies, and law and economics.(Louis Menand, ed., *Pragmatism: A Reader. New York: Vintage Books, 1997, pp. xxix.*) http://en.wikipedia.org/wiki/Oliver_Wendell_Holmes,_Jr. the last visiting time: 06-02-2011.

²²Oliver Wendell Holmes, *LECTURE I. - EARLY FORMS OF LIABILITY. In The Common Law, available at :<http://biotech.law.lsu.edu/Books/Holmes/claw03.htm>* the last visiting time: 06-02-2011

²³ Case law is the reported decisions of selected appellate and other courts (called courts of first impression) which make new interpretations of the law and, therefore, can be cited as precedents in a process known as stare decisis. These interpretations are distinguished from statutory law which are the statutes and codes enacted by legislative bodies; regulatory law which are regulations established by governmental agencies based on statutes; and in some states, common law which are the generally accepted laws carried to the United States from England. Trials and hearings which are not selected as 'courts of first impression' do not have rulings that become case law; therefore, these rulings cannot be precedents for future court decisions.

(*Case law, Law.com.*) (*Black, Henry Campbell. Case law, Black's Law Dictionary, Fifth Edition, West Publishing Co., St. Paul, MN, 1979*)
http://en.wikipedia.org/wiki/Case_law, the last visiting time: 06-02-2011.

²⁴ Common law, also known as case law or precedent, is law developed by judges through decisions of courts and similar tribunals rather than through legislative statutes or executive branch action. A "common law system" is a legal system that gives great precedential weight to common law, [1] on the principle that it is unfair to treat similar facts differently on different occasions.[2] The body of precedent is called "common law" and it binds future decisions. In cases where the parties disagree on what the law is, an idealized common law court looks to past precedential decisions of relevant courts. If a similar dispute has been resolved in the past, the court is bound to follow the reasoning used in the prior decision (this principle is known as stare decisis). If, however, the court finds that the current dispute is fundamentally distinct from all previous cases (called a "matter of first impression"), judges have the authority and duty to make law by creating precedent.[3] Thereafter, the new decision becomes precedent, and will bind future courts.

In practice, common law systems are considerably more complicated than the idealized system described above. The decisions of a court are binding only in a particular jurisdiction, and even within a given jurisdiction, some courts have more power than others. For example, in most jurisdictions, decisions by appellate courts are binding on lower courts in the same jurisdiction and on future decisions of the same appellate court, but decisions of lower courts are only non-binding persuasive authority. Interactions between common law, constitutional law, statutory law and regulatory law also give rise to considerable complexity. However stare decisis, the principle that similar cases should be decided according to consistent principled rules so that they will reach similar results, lies at the heart of all common law systems.

Common law legal systems are in widespread use, particularly in England where it originated in the Middle Ages,[4] and in nations that trace their legal heritage to England as former colonies of the British Empire, including the United States, Malaysia, Singapore, Pakistan, Sri Lanka, India,[5] Ghana, Cameroon, Canada, Ireland, New Zealand, South Africa, Hong Kong and Australia.[6]

Reference:

- 1 Washington Probate, "Estate Planning & Probate Glossary", Washington (State) Probate, s.v. "common law", [htm], 8 Dec. 2008: <<http://www.wa-probate.com/Intro/Estate-Probate-Glossary.htm>>, retrieved on 7 November 2009.
2. Charles Arnold-Baker, *The Companion to British History*, s.v. "English Law" (London: Longcross Denholm Press, 2008), 484.
3. *Marbury v. Madison*, 5 U.S. 137 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.")
4. <http://www.britannica.com/EBchecked/topic/188090/English-law> ; British History: Middle Ages "Common Law - Henry II and the Birth of a State". BBC. http://www.bbc.co.uk/history/british/middle_ages/henryii_law_01.shtml. Retrieved 2009-07-23.
5. "India, being a common law country" (PDF). http://supremecourtsofindia.nic.in/new_links/Abu_Dhabi__as_delivered.pdf. The last visiting time: 2010-05-30.
- 6 "The Common Law in the World: the Australian Experience". W3.uniroma1.it. <http://w3.uniroma1.it/idc/centro/publications/43finn.pdf>. Retrieved 2010-05-30.
http://en.wikipedia.org/wiki/Common_law the last visiting time: 06-02-2011.

and how the important principles are evolved from one case to another. Generally, as what the famous seventeenth-century English jurist Sir Edward Coke's dictum that "Reason is the life of law" (E Coke²⁵, Commentary Upon Littleton (1628)²⁶)

In EC, the fundamental task of the EC is to shape the integration of a single market and keep the free movement of the goods and enhance the interests of the consumers. Being an important institutional branch of EC, the court of EC does play an important rule to enforce the EC' intention. (Still there are a lot of things for me to get further study, for example, what the importance of European Court of Justices, ECJ, what are the differences between the US case law and the ECJ case law? What the rules of ECJ case? And what the rules of EC legislations, such a , the regulation, the directives and guideline? etc.)

Therefore, case-analysis is one of key methods of my research, and by way of case-analysis of the cases in U.S., in EC, in China, we will get the vivid picture of what really happened in certain areas!

3.4 The Research Methodology IV----- Political economy method

According to the Marx' political economy theories, the superstructure of a society is depended on its economic infrastructure, and the social superstructure has play very important role to the development of the economic infrastructure. The legal system is one of the superstructures of a society, and should be reflected the economic development of a society. A well-organized legal system for the property and for the IPR are very important to promote the social development.

²⁵ Sir Edward Coke (pronounced "Cook") (1 February 1552 – 3 September 1634) was a seventeenth-century English jurist and Member of Parliament whose writings on the common law were the definitive legal texts for nearly 150 years. http://en.wikipedia.org/wiki/Sir_Edward_Coke the last visiting time: 06-02-2011

²⁶ *The Institutes of the Lawes of England* are a series of legal treatises written by Sir Edward Coke. They were first published, in stages, between 1628 and 1644 (Rutgers University Law Libray, Website, *Books of authority*). They are widely recognized as a foundational document of the common law. They have been cited in over 70 cases decided by the Supreme Court of the United States (LexisNexis search performed May 1, 2008), including several landmark cases. For example, in *Roe v. Wade* (*Roe v. Wade*, 410 U.S. 113, 134 (1973)), Coke's Institutes are cited as evidence that under old English common law, an abortion performed before "quickening" was not an indictable offense. In the much earlier case of *United States v. E. C. Knight Co.* (*United States v. E. C. Knight Co.*, 156 U.S. 1, 10 (1895)), Coke's Institutes are quoted at some length for their definition of monopolies.

The Institutes are divided into four parts:

1. The First Part of the Institutes of the Laws of England, or, a Commentary upon Littleton. Often called "Coke on Littleton" or abbreviated "Co. Litt."

2. The Second Part of the Institutes of the Laws of England; Containing the Exposition of Many Ancient and Other Statutes.

3. The Third Part of the Institutes of the Laws of England; Concerning High Treason, and Other Pleas of the Crown and Criminal Causes.

4. The Fourth Part of the Institutes of the Laws of England; Concerning the Jurisdiction of Courts. Commentary Upon Littleton (1628) 97b the life of the law." [1]

http://en.wikipedia.org/wiki/Institutes_of_the_Lawes_of_England , the last visiting time: 06-02-2011

When we conducted the researches of the history of US' IPR, we find that the period throughout the 1970s and well into the 1980s (and in some quarters into the 1990s)²⁷ is a very important period in the US IPR protection history. The main characteristics of this period is from this period, the US is constantly increasing and strengthening the IPR protection. In 1976, the US congress conducted major amendment of the US Copyright Law. And in 1982, "of particular significance for judicial policy was the creation of the US court of Appeals for the federal circuit, which was given a monopoly of appeals in patent cases."²⁸ Why? What are the reasons for these great changes in the legislation and the judicial practices? Only from the political economics point of view, can we find the clearly answers. The political economic reasons are that "there was widespread belief in the United states that the nation was in decline, that it was being outcompeted by other nations, particularly japan, and that the decline could be halted only by a renewed emphasis on technological innovation as a stimulus to economic growth."²⁹ In summary, the IPR policy and competition policy are controlled by the political force, and the political forces are consisting of the dominant interest groups.

Therefore, from this point of view, we also can clearly explain why on the February 8, 2011, the US present, announced her Executive Order -- Establishment of the Intellectual Property Enforcement Advisory Committees (Senior Intellectual Property Enforcement Advisory Committee, and Intellectual Property Enforcement Advisory Committee).³⁰

The same is true for we conduct the researches IPR and competition law in China. That is, only from the Chinese economic and development situation, can we fully understanding what are happening in China.

²⁷ See, for example, Lester Thurrow, (1992). *Head to head: The coming economic battle among Japan, Europe and America*. From Landes, W. M. & Posner, R. A. (2003). *The economic structure of intellectual property Law*. London: Harward University Press.p2

²⁸ Ibid.p2

²⁹ Ibid p2

³⁰ For Immediate Release February 08, 2011 Executive Order -- Establishment of the Intellectual Property Enforcement Advisory Committees

The purposes of these activities are "in order to strengthen the efforts of the Federal Government to encourage innovation through the effective and efficient enforcement of laws protecting copyrights, patents, trademarks, trade secrets, and other forms of intellectual property, both in the United States and abroad, including matters relating to combating infringement, and thereby support efforts to reinvigorate the Nation's global competitiveness, accelerate export growth, promote job creation, and reduce threats posed to national security and to public health and safety,"

<http://www.whitehouse.gov/the-press-office/2011/02/08/executive-order-establishment-intellectual-property-enforcement-advisory>

4 Literatures review³¹

This PhD paper is focusing on IPRS and competition from the law and economics aspects. In order to get better understanding the relations between two more and more important disciplines in this knowledge-based world (or information-aged world), I have conducted my academic researches through the following three-step research programs, and according to my three-step research program, I will make the general review of the relevant literatures about these two disciplines.

Step one: Making the thorough reading on the classical economics text books, to lay solid foundation of economics;

Step Two: Making the thorough reading on excellent books of EU laws, EU competition law, U.S Anti-trust law;

Step Three: Making the thorough reading on the literatures of IP and IPRs, the relationships between the IPR and competition, especially from the law and economic point of views.

4.1 Point of view of literature review I

----The Classical Economics Text book and Classical IP Text Books

4.1.1 The Classical Economics Text Books³²

It is in the Bologna that I start my Western Economics learning. The first excellent Economics text book is the *Microeconomics* (18th ed.), written by Samuelson, Paul A. and Nordhaus, William D., published by New York: The McGraw-Hill Companies (New York) in 2005.³³ The knowledge structure of this economic text book, and what the beautiful language in this text book gave me very deep impression. This economic text book just like a door opening for me to enter the world of economics. Another interested economics text book is *Microeconomics: a modern approach*,

³¹ My research paper is inter-discipline research, the law (IPR law and completion law) and the economics. For my personal knowledge background, in this part for the literatures review about this inter-discipline subject, I can not say that this is the formal style of literature review. Because, for a Chinese scholar, like me, to absorb all the relevant knowledge of this subject in English is a long way to go, but the way is much pleasant and self-satisfied. And now, till this time, I just find the right direction and a beginning of my research! Therefore, in this part, I just want, according to my readings, to make some summary of the books or literatures about this subjects which I have read or I should read in the future. I will focus my attention on the academic books concerning about my research subject, and for some important academic literatures, I will list them out.

For this part, I really want to express my great thanks to the top-quality service of libraries of Bologna University, especially, Biblioteca di CICU, Biblioteca dell'Economia e dell'Azienda. Biblioteca Economiche.

³² Before 2006, Western Economics is a totally completely new world for me. Although I have learned some Marx's political and economics theories and read the Capital.

³³ Samuelson, Paul A. & Nordhaus, William D.(2005). *Microeconomics* (18th ed.), New York: The McGraw-Hill. [美] 萨缪尔森, 诺德豪斯 著 经济学 (第 18 版) 萧琛 主译.北京: 人民邮电出版社, 2008 年 01 月, 第 194. (Paul A. Samuelson, Economics(16th ed. p179))

written by Schotter, Andrew, published by Mason, OH: South-Western Cengage Learning in 2009. This book is recommended by Prof, Antonelle. And also I get a lot of knowledge from it.

Besides the above two important economics text book, I also read and found the following economics text books are very good, such as, Paul R.Krugman's International Economics(5th ed.), Debraj Ray's Development Economics.

The institutional economics is one of important economics school. For my understanding of this important economics school form the excellent book, *Institutions, Institutional Change and Economic performance*, written by Noth, Douglass C., published by Cambridge: Cambridge University Press in 1990. And then other books written by North, D.C., such as, *The Rise of the Western World*. (another writer is Thomas, R.P., Cambridge: Cambridge University Press. 1973), and *Structure and Change in Economic History* (New York: W.W. Northon & Company, in 1981).

4.1.2 The Excellent Intellectual Property Text Books

Generally, till now for the IP text books which I can find and read, there are three books giving me very deep impressions. There are *Intellectual Property in the New Technical Age*, (Fourth Edition), written by Merges, Robert P., Menell, Peter S. and Lemley, Mark A., published by New York: Aspen Publisher in 2006; *The Law of the Intellectual Property*, written by Craig Allen Nard, David W. Barnes and Michael J. Madison, published by Aspen Publishers in 2006; *Intellectual Property Law (third edition)*, written by Bently, Lionel and Scheman, Brad, published by New York: Oxford University Press in 2009.

4. 2 Point of view of literature review II

----The Excellent Books of Law & Economics

For the books concerning about the law and economics, in China, the first book concerning about this subject which I have read is the book named *Law and Economics* (3th ed.) in Chinese, written by Cooter, R. and Ulen, T., published by Pearson Addison Wesley in New York in 1993³⁴. Because at that time, it was the first time that the Chinese publisher published this book in Chinese version.³⁵

Another important book of Law & Economics is Judge Posner, R.A.'s works, such as, Posner, R. A. (1976): *Antitrust Law, an Economic perspective*, Chicago; London: University of Chicago;

³⁴. Cooter, R. & Ulen, T. (2008). *Law and Economics (5th ed.)*. New York: Pearson Addison Wesley.

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³⁵罗伯特·考特、托马斯·尤伦著：《法和经济学》，张军等译，上海三联书店、上海人民出版社1994年版。p185

此书的英文版自己没有看过，常常引用的一句话：这恰如法律经济学对知识产权提出的一个悖论：“没有合法的垄断绝不会有足够的信息生产出来，但是有了合法的垄断又不会有太多的信息被使用。”(There is a paradox. If there is no any legal monopoly (IPR), there is no sufficient information be produced. However, if there exist a kind of legal monopoly, there are a lot of information do not be applied) 转引自；王先林著：《知识产权滥用及其法律规制》，中国法制出版社，2008 P7

(2003). *Economic Analysis of Law*. (6th ed). New York: Aspen; (1987).The law and economic movement. *The American Economic Review*, Vol. 77, 1-13.etc.

4. 3 Point of view of literature review III

----The Excellent Books of applying the Law & Economics way to analysis the IPRS

For the books concerning about the economics of IPR, I think the seminal book is Landes' book.³⁶ In this book, from the beginning of the economic theory of property, Prof. Landes, applied the economics method to make very vivid analysis of IPRS, such as, how to think about the copyright in the economics way, the economics of trademark law, the economics of patent law, the economics of trade secrecy law. Besides these, Prof. Lands, used one chapter (Chapter 14) to make a certain detailed analysis of "Patent Tie-Ins and Other Forbidden Attempts to "Extend" the Patent Monopoly, and some other patent cases involving the antitrust problems.", and the most important highlight of this chapter is the topic named *Antitrust and Intellectual Property in the New Economy*, Prof. has clearly illustrated the differences between the traditional industries and the new-economy industries.

*The traditional industries were characterized by multi-plant and multi-firm production(including that economies of scale are limited at both the plant level and firm level, or in other words that average total costs are, beyond relatively modest output levels, rising), stable markets, heavy capital investment, modest rates of innovation, and slow and infrequent entry and exit. The new-economies tend to be characterized instead by falling average costs(on a product, not firm, basis) over a broad range of output, modest capital requirements relative to what at least until recently was available for new enterprises in the global capital market, very high rates of innovation, quick and frequently entry and exit, "instant scalability"(the ability of a firm to multiply the output of a product very rapidly with no increase in marginal cost), and economies of scale in consumption ("network externalities," as they are more commonly called), the realization of which may require either monopoly or inter-firm cooperation in standing setting.*³⁷

The very high rates of innovation, the network externalities, the economies of scale in consumption, the switching costs, the path dependent,³⁸ etc., all the important terms for us to help us get better understanding of the relationship between the IPR law and competition law.

³⁶ (美) 威廉·M.兰德斯, 理查德·A.波斯纳, 金海军翻译: *知识产权法经济结构*. 北京: 北京大学出版社, 2005. Landes, W. M. & Posner, R. A. (2003). *The economic structure of intellectual property Law*. London: Harvard University Press.

³⁷ Landes, W. M. & Posner, R. A. (2003). *The economic structure of intellectual property Law*. London: Harvard University Press. 390.

³⁸ Ibid.p396,Note 39.

"If network externalities are large, they may give the monopolist a natural-monopoly cost advantage that exceeds the benefit of a superior new technology. This is the issue of "path dependence": an industry may be stuck with an inferior technology because of the cost advantage of the existing network."

According to Lands (2003), “Economic analysis of intellectual property can be dated to brief discussions by Smith, Bentham, Mill, and other classical economists and by early twentieth-century economists such as, Pigou, Taussig---and perhaps most notably Arnold Plant³⁹, who published path-breaking articles on patents and copyrights in the 1930s.”⁴⁰

There are excellent academic literatures collections concerning about the economics of intellectual property law, one is named *The Economics of Intellectual Property (4 Volume)*, edited by Towse, Ruth & Rudi, Holzhauser, and published by Edward Elgar in 2002. Another is named *Economics of intellectual property law., edited by Merges, Robert P.*, and published by Elgar in 2007.

4. 4 Point of view of the literature review IV

---Books about the Austrian Economics and about Schumpeter

The law and economics methodology is one of the key methods in my academic research, and I will mainly apply the Austrian economic approach to analyze the IPR and the competition law. Because, according to Professor Czarnetzky (1999) “the Austrian economic approach---holds tremendous potential for the profitable study of legal institutions, particularly in fields such as antitrust, intellectual property and corporate law.”⁴¹

The Austrian school of economics, which has drawn increasing in recent year,⁴² takes its name from a group of Austrian scholars who established it. Such as Carl Menger, Ludwig von Mises, Joseph Schumpeter, Friedrich Hayek and other. As the Austrian school development has been evolving for nearly 130 years there are different perspectives among “Austrian” economics.⁴³

For Austrian economic school, I will apply the Schumpeter’s “Creative destruction” theory as main way to analysis the basic research questions in my dissertation. There are three key words in Schumpeter’s theory, these are Entrepreneurship, Innovation and Competition, and through the diligent learning about Schumpeter’s theory, I believe that the Schumpeter’s theory can best illustrate the relation among these Entrepreneurship, Innovation and Competition, and these are the key points for me to get understanding.

Schumpeter is one of great economist, for the books which I have read are the following:

³⁹ Plant, Arnold (1934 a): The Economic Theory Concerning Patents for Inventions, *Economica*, New Series, Vol. 1, No. 1. 30-51; available at <http://www.jstor.org/stable/2548573>. The last visiting time: 06-02-2011

(1934 b): The Economic Aspects of Copyright in Books, *Economica*, New Series, Vol. 1, No. 2. 167-195; available at <http://www.jstor.org/stable/2548748> The last visiting time: 06-02-2011

⁴⁰ Ibid. p2 note 5.

⁴¹ Czarnetzky, Jone M. (1999). Time, Uncertainty, and the law of corporate reorganization, 67 *Fordham L. Rev.* 2939. Adapted from Note 108 of Chapter I of Kallay, D. (2004). *The Law and Economics of Antitrust and Intellectual Property: An Austrian Approach*. Cheltenham: Edward Elgar. p36.

⁴² Ibid.p19

⁴³ Ibid.p19

In order to get better understanding the theory of Schumpeter, I have carefully read the Pulitzer Prize winner McCraw's book, named *Prophet of innovation: Joseph Schumpeter and creative destruction*. Cambridge (MA), published by London: Belknap Press of Harvard University in 2007.⁴⁴ This book is well written in the very excellent language style. After finishing reading of this book, not only I get the full understanding Schumpeter's great ideas, but also know his life story. There are book comments illustrate exactly what I have got from the book.

Recensioni

Recensioni editoriali - Library Journal vol. 132 iss. 6 p. 99 (c) 04/01/2007

*Austrian-born Harvard economist Joseph Schumpeter (1883–1950) was a proponent of dynamic capitalism, arguing that economic progress under capitalism stems from innovation-driven and entrepreneurial enterprises continuously superseding static businesses in what he termed "creative destruction." Schumpeter's ideas are most pertinent(切中肯綮、恰当、中看) today when innovative companies like Toyota, Google, Apple, and Genentech operate in an ever-changing, highly competitive global marketplace. In this biography, Pulitzer Prize winner McCraw neatly divides his emphasis between Schumpeter's professional and personal life. He portrays his subject as a somewhat self-absorbed insatiable scholar not entirely comfortable with his contemporaries, which might explain marriages and affairs with much older and younger women, as well as his affinity with students and often-strained relations with colleagues of his own generation. McGraw lucidly addresses Schumpeter's economic theories through an examination of his letters, lectures, addresses, articles, and major works: *The Theory of Economic Development; Business Cycles; Capitalism, Socialism and Democracy; and History of Economic Analysis*. McCraw's insightful and highly readable biography is essential for all but the smallest academic and public library business collections.—Lawrence R. Macted, Gannon Univ. Lib., Erie, PA⁴⁵*

Recensioni degli utenti

Recensioni utente - getAbstract - Segnala come inappropriato

Joseph Schumpeter was brilliant, magnetic, cultured, urbane, witty and engaging. He was superbly educated and he taught at the best universities. He was an accomplished scholar and prolific writer, a snappy dresser and bon vivant, elegant, charismatic and handsome. Colleagues revered him, students loved him and women adored him. His ambition: to become the best economist, horseman and lover in the world. He confessed that, sadly, he failed to meet his goal with horses. Schumpeter was one of the world's leading economists while he lived, and has become an iconic figure since his death. John Maynard Keynes is widely considered the doyen of economists. However, Schumpeter's ideas have more impact in our postmillennial era, which some economists have termed the "century of Schumpeter." Scholar Thomas K. McCraw paints a vivid portrait of this remarkable man, his economic theories and his far-reaching influence. Get abstract suggests that being familiar with Schumpeter is

⁴⁴ McCra, Thoms K.(2007). *Prophet of innovation: Joseph Schumpeter and creative destruction*. Cambridge (MA). London: Belknap Press of Harvard University.

⁴⁵ <http://www.getabstract.com/summary/9324/prophet-of-innovation.html>
http://books.google.it/books?id=wBXQOuQ73vwC&dq=Prophet+of+innovation+:+*Joseph+Schumpeter+and+creative+destruction&sitesec=reviews

*pivotal to understanding today's entrepreneurial economy. McCraw's book is a good place to get to know him.*⁴⁶

Another book which I have read and benefit a lot is the book, named *The contribution of Joseph A. Schumpeter to economics: economic development and institutional change*, edited by Arena, Richard. & Dangel-Hagnauer, published by Routledge in New York in 2002.

In order to fully understand, I think, the following books I should read in the future:

Arena, Richard. & Dangel-Hagnauer. (Eds.) (2002). *The contribution of Joseph A. Schumpeter to economics: economic development and institutional change*. New York: Routledge;

Chakravarty, Sukhamoy. (1982). *Alternative approaches to a theory of economic growth: Marx, Marshall and Schumpeter*. New Delhi: Orient Longman;

Flaschel, Peter. (2009). *The macrodynamics of capitalism: elements for a synthesis of Marx, Keynes and Schumpeter*. Berlin; Heidelberg: Springer;

Heertje, Arnold (Ed.) (1981). *Schumpeters vision: capitalism, socialism and democracy after 40 years*. Eastbourne: Praeger Publishers;

Langlois, Richard N. (2007). *The dynamics of industrial capitalism : Schumpeter, Chandler, and the new economy*. London ;New York: Routledge;

Martinelli, Alberto. (1999). *Economia e società : Marx, Weber, Schumpeter, Polanyi, Parsons e Smelser*. Torino: Edizioni di Comunità;

Ranchetti, Fabio, & Silva, Marshall.(2002). *Antologia del pensiero economico: Smith, Ricardo, Marx, Cournot, Marshall, Pareto, Schumpeter, Keynes, Friedman, Coase, Arrow, Stiglitz*. Milano: Einaudi;

Reisman, David. (2004). *Schumpeter's market: enterprise and evolution*. Cheltenham, UK; Northampton, MA: Edward Elgar.

Schumpeter, Joseph A (1950). *Capitalism, socialism and democracy*. (3th ed.). London : Allen & Unwin;

⁴⁶ Ibid.

Wagener, H. J. & Drukker, J.W. (Eds.) (1986). *The economic law of motion of modern society: a Marx-Keynes-Schumpeter centennial*. Cambridge [etc.]: Cambridge university press. (Articoli presentati al Marx-Keynes-Schumpeter symposium, Groningen, Netherlands, 7-10 settembre 1983).

4.5 Point of view of the literature review V

---Books about applying the Austrian Economics method to analysis the IP

Prof. Dina Kallay has written a book named *The Law and Economics of Antitrust and Intellectual Property: An Austrian Approach*, published by Edward Elgar in Cheltenham in 2004, and just like the name of this book, the most significant characteristics of this book is that to apply the Schumpeter's theories to analysis the IP. It is very useful book for me to get better understanding of Schumpeter's theories and for my writings of my dissertation.

4.6 Point of view of the literature review VI

----The Excellent Books focusing on the relationships between the IPR law and antitrust law in U.S.

For the detailed discussion of the relationship between IP and Antitrust, and the development of the latest relevant cases in U.S., I think, the huge serial books, named *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law*, written by Hovenkamp, Herbert, Janis, Mark D., Lemley, Mark A., and published by the Aspen Law & Business from 2002 to 2009, are the exact and best ones. By way of these serial books, not only can we get better understanding what the latest cases concerning about the IPRS and antitrust law happen recently, but also we can get clearly pictures of the history of the evolution of the relationship between IP law and Antitrust law in U.S.

Another book for the relationship relationship between IP and Antitrust, and the development of the IP Misuse doctrine in U.S., is the book named *Intellectual Property Misuse: Licensing and Litigation*, sponsored by the ABA Section of Antitrust Law, published in 2000. I think this book is worth reading.⁴⁷

4.7 Point of view of the literature review VII

⁴⁷ I just have read some part of this book available at [http://books.google.com/books?hl=zh-CN&lr=&id=ux79s_IhpFYC&oi=fnd&pg=PA165&dq=Arrow,+Kenneth+J.++\(1962\):+%E2%80%9CEconomic+Welfare+and+the+Allocation+of+Resources+for+Invention.&ots=gU2C8mEFts&sig=T9jtGYHgW62M9VzGdLT4t3HYouc#v=onepage&q=Arrow+%20Kenneth%20J.+%20\(1962\)%3A%20%E2%80%9CEconomic%20Welfare%20and%20the%20Allocation%20of%20Resources%20for%20Invention%2C&f=false](http://books.google.com/books?hl=zh-CN&lr=&id=ux79s_IhpFYC&oi=fnd&pg=PA165&dq=Arrow,+Kenneth+J.++(1962):+%E2%80%9CEconomic+Welfare+and+the+Allocation+of+Resources+for+Invention.&ots=gU2C8mEFts&sig=T9jtGYHgW62M9VzGdLT4t3HYouc#v=onepage&q=Arrow+%20Kenneth%20J.+%20(1962)%3A%20%E2%80%9CEconomic%20Welfare%20and%20the%20Allocation%20of%20Resources%20for%20Invention%2C&f=false), for the whole book, I did not find this book.

----The Excellent Books focusing on EU Law and the relationships between the IPR law and antitrust law in EU

EU law is serial of laws, which are more powerful and vigorous laws which I ever met before. After the carefully search, I am astonished by the ambition of EU internal market and the EU internal law. I will devote my whole life to make thorough research on them.

For the general introduction to EU law, I have read a book named *EU law*. (10th ed.), written by Steiner, Josephine. & Woods, Loma., published by Oxford University press in 2009. It is very good book.

For the EU competition law, I have read the book named *EC competition law: text, cases and materials* (3th ed.), written by Jones, Alison. & Sufrin, Brenda, published by Oxford university press in 2008. And other books, such as, *EU competition law: an analytical guide to the leading cases*,(2th,ed.), written by Ezrachi, A., published by Hart publisher in 2010, and the book named *Intellectual Property Rights and the EC Competition Rules*, published by Hart publisher in 2006. And the book named *EU competition law handbook: 2011 edition*, written by Woude, Marc van der. & Jones, Christopher, published by Sweet & Maxwell in 2010. And the book named *The Use and Abuse of Intellectual Property Rights in EC Law*, written by Govaere, published by Sweet & Maxwell in 1996.

4. 8 Point of view of the literature review VIII

----The Excellent Books concerning the comparative research on the relationships between the IPRS law and antitrust law in U.S. and in EU.

For comparative research on the relationship between the IPR law and antitrust law in U.S. and in EU, within the books which I have read, I think there are two confernees papers collections, made by Prof. Francois Léveque and Prof. Howard Shelanski, are quite good, the names of these two books are *Antitrust, Patents and Copyright: EU and US Perspectives* (Cheltenham: Edward Elgar, in 2005), *Antitrust and regulation in the EU and US: legal and economic perspectives*. Celtenham: Elgar). Another good book is this book named *Innovation markets and competition analysis: EU competition law and US antitrust law*, written by Glader, M. published by E. Elgar published in 2006.

There are a lot of literatures concerning the comparative research focusing on the relationships between the IPRS law and antitrust law in U.S. and in EU. However, according to the literatures which I have read, I think Prof. Emanuela Arezzo's article named *Intellectual Property Rights at the Crossroad Between Monopolization and Abuse of Dominant Position: American and European*

*Approaches Compared.*⁴⁸ is quite good. I am quite agreed with the Prof. Emanuela Arezzo's opinion that "As I have pointed out, the risk is sensible that a convulsive combination of intellectual property rights and economic effects will vest the dominant undertakings with the power not just to monopolize the market but to shift such power from one market to another, to create strong barriers to enter and, in so doing, granting the perpetuation of such dominance for quite a long time"⁴⁹

4.9 Point of view of the literature review IX

----The Excellent Books focusing on the Chinese IPR Law and the relationships between the IPR law and antitrust law in Chinese Circumstance

For the books or articles focusing on the relationships between the IPRS law and antitrust law in Chinese Circumstance, within the books and articles which I have read, I think, the two reports of the EU-China Trade Projects conducted by Prof. Steven O. Anderman are good, named *Competition Policy and Intellectual Property Rights: EU Experience and Prospects for China*⁵⁰ (EU-China Trade Project, Project reference: A0138), this project conducted jointly by Chinese Prof. Huang Yong in 2008, and in the latest project report, named *The Relationship between competition Policy and Intellectual Property Rights—Study supplement, Recent EU Experience and IPR Policy Making of Relevance to China*⁵¹ (EU-China Trade Project, Project reference: A0285), Prof. Steven O. Anderman provides the latest cases concerning about the IPR law and EU competition law, such as, the Microsoft case, the Interl case about the patent pool., and provide feasible suggestion to Chinese legislature.

Till now, the book named *Intellectual Property Law in China*, written by Ganea, P. & Pattloch, T., published by Kluwer Law International in 2005 is the best book to introduce the Chinese IPR law. Just because, till now, there are great changes happened in Chinese IPR law system, and the latest book about the Chinese IPR law is the book named *Intellectual property in China*, written by Prof, Xue Hong, published by Kluwer law international in 2010.⁵²

⁴⁸ Arezzo, Emanuela, (2007). Intellectual Property Rights at the Crossroad Between Monopolization and Abuse of Dominant Position: American and European Approaches Compared. forthcoming in *John Marshall Journal of Computer & Information Law*, Vol. 24, No. 3. Available at SSRN: <http://ssrn.com/abstract=935047> the last visiting time: 06-02-2011

⁴⁹ Arezzo, Emanuela, (2007). Intellectual Property Rights at the Crossroad Between Monopolization and Abuse of Dominant Position: American and European Approaches Compared. forthcoming in *John Marshall Journal of Computer & Information Law*, Vol. 24, No. 3. P41 Available at SSRN: <http://ssrn.com/abstract=935047> . The last visiting time: 23-02-2011.

⁵⁰ Anderman, Steven D. & Huang Yong (2008). *Competition Policy and Intellectual Property Rights: EU Experience and Prospects for China*. EU-China Trade Project, Project reference: A0138 Available at: http://www.euchinawto.org/index.php?option=com_content&task=view&id=192&Itemid=54, the last visiting time: 06-02-2011.

⁵¹ Anderman, Steven D. (2009). *The Relationship between competition Policy and Intellectual Property Rights—Study supplement, Recent EU Experience and IPR Policy Making of Relevance to China*. EU-China Trade Project, Project reference: A0285 Available at:

http://www.euchinawto.org/index.php?option=com_content&task=view&id=346&Itemid=54, the last visiting time: 06-02-2011.

⁵² This book I do not read, the information of this book is for the CICU, Xue Hong.(2010).*Intellectual property in China*. Alphen aan den Rijn:Kluwer law international.

For books concerning about the research on the relationship between the IPR and competition law in Chinese, according to my reading, I think, the following books are worth reading:

Fei Anling, (2008). Study on legal mechanism of prevention of intellectual property abuse, Beijing: the Publisher of Chinese University of Political Science and Law;

Wang Xianlin, (2008). Study of abuse of intellectual property rights and its legal regulation. Beijing: China Legal Publishing House;

(2008) Study of the regulation of abuse of intellectual property----the IPR law and Competition Law.(revised), Beijing: Law Publisher.

For this subject, there are two PhD dissertations are worth reading:

Wu Changhai, *On the Regulation of Abuses of Intellectual Property: from the perspective of forbidding the abuse of civil right*, the University of Foreign Trade, 2007 PhD dissertation;

Cheng Jangping, *On the Regulating the Abuse of Intellectual Property and its Jurisprudence*, the University of Foreign Trade, 2007 PhD dissertation;

4. 10 Point of view of the literature review X

— — the books about the Microsoft cases in US and in EU.

In this new-economy age, the two cases of Microsoft, the US vs. Microsoft, and the EC vs. Microsoft. Exert great effect on the relationship between the IPR and competition law. There are the following books about these two cases I have read:

Rubini, Luca. (Ed.) (2010). *Microsoft on trial: legal and economic analysis of a transatlantic antitrust case*. Cheltenham; Northampton: Elgar.

Gordon, Richard L. (2002). *Antitrust abuse in the new economy: the Microsoft case*. Cheltenham: E. Elgar.

Liebowitz, Stan J. & Margolis, Stephen E. (2001). *Winners, Losers & Microsoft: competition and antitrust in high technology*.(Revised edition) (Foreword by Jack Hirshleifer). Oaland, California: the independent institution.⁵³

McKenzie, Richard B.(2001). *Trust on trial: how the Microsoft case is reframing the rules of competition*. Cambridge: Perseus Publishing.

Documento in corso di trattamento

此书 20110204 查到, 没有阅读, 从博大图书馆的信息显示, 此书正在处理中, 没有 collocazione

⁵³ See

http://www.amazon.com/Winners-Losers-Microsoft-Stan-Liebowitz/dp/0945999844/ref=sr_1_1?s=books&ie=UTF8&qid=1298455750&sr=1-1#reader_0945999844.

The last visiting time: 02-02-2011.

Chapter Two The concepts and behaviors of the abuse of Intellectual Property rights

THERE is nothing which so generally strikes the imagination, and engages the affections of mankind, as right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in universe.⁵⁴

Sir William Blackstone,⁵⁵

Volume II Of the Rights of Things (1766),
Commentaries on the Laws of England⁵⁶
(A facsimile of the First Edition of 1765-1769),
London: The University of Chicago Press.

“没有任何东西像财产使用权那样如此普遍地焕发起人类的想象力，并煽动起人类的激情。”

孙宪忠，*中国物权法*，北京：法律出版社，2004。

⁵⁴ Blackstone, William. (1766). *Of the rights of things*. (With an introduction by A. W. Brian Simpson). Chicago; London: University of Chicago Press, 1979. ((Ripr. facs. dell'ed.: Oxford: Clarendon Press, 1766.) p2.

⁵⁵ Sir William Blackstone, (b. July 10, 1723, London, England—d. February 14, 1780, Wallingford, Oxfordshire), English jurist, whose *Commentaries on the Laws of England*, 4 vol. (1765–69), is the best-known description of the doctrines of English law. The work became the basis of university legal education in England and North America. He was knighted in 1770. *See*, http://en.wikipedia.org/wiki/William_Blackstone, the last visiting time: 27-02-2011.

⁵⁶ *See* http://en.wikipedia.org/wiki/Commentaries_on_the_Laws_of_England, the last visiting time: 27-02-2011.

1 Property^{57 58}

1.1 The definition of Property

The concept of “property” or “private property” is one of essential concepts in the western economic political and legal world. As what Hayek claimed that “To admit the individual property right is the beginning of the civilization, and the rules of regulating the property is the key base of every morals.”⁵⁹

There are many scholars and statesman made very precise definition of the property, and to catch a glimpse of the definitions of property is just like to read a whole history of western history.

⁵⁷ The concept of the private property is one of essential concepts in the Western political and legal world. From the thinking and philosophy of the concept of property or the ownership (tangible property, such as, land, house, horse, capital, etc.), the concept of intellectual property is coming into being. In another words, the politician and the law-make just apply the concept of “private property” (tangible property) to coin the concept of the intellectual property. However, as this dissertation has been discussing in the process, we can clearly know that, though the philosophy foundation of this two kinds of property are the same, there are great different between them, such as, the ways of use and the ways of protection, and the rules they play in the different stages of world economy, etc.

And just because the politician, the law-make and the scholar apply their rooted concept of “private property” to thinking about the IP, that cause many problems in the attitude towards the relationship between the IPRS law and antitrust law (or competition law). And as what like Prof. Lemley has pointed that “Courts and scholars have increasingly assumed that intellectual property is a form of property, and have applied the economic insights of Harold Demsetz and other property theorists to condemn the use of intellectual property by others as “free riding.”, “..... (and) that this represents a fundamental misapplication of the economic theory of property. The economics of property is concerned with internalizing negative externalities – harms that one person’s use of land does to another’s interest to it, as in the familiar tragedy of the commons. But the externalities in intellectual property are positive, not negative, and property theory offers little or no justification for internalizing positive externalities. Indeed, doing so is at odds with the logic and functioning of the market. From this core insight, the Prof. Lemley proceeds to explain why free riding is desirable in intellectual property cases except in limited circumstances where curbing it is necessary to encourage creativity, and explains why economic theory demonstrates that too much protection is just as bad as not enough protection, and therefore why intellectual property law must search for balance, not free riders. Finally, the Prof. Lemley considers whether we would be better served by another metaphor than the misused notion of intellectual property as a form of tangible property.”

Lemley, Mark A. (2004). Property, intellectual property, and free riding. John M. Olin Program in Law and Economics, Working Paper No. 291, August 2004. Stanford Law School. Texas Law Review. Vol.86.1031. Available at SSRN: <http://ssrn.com/abstract=582602>. the last visiting time: 27-02-2011.

Therefore, at the beginning of this dissertation to make such general combing of the theories/philosophies concerning about the “private property” will help us get better understanding the intellectual property, and the relationship between the IPR law and antitrust law.

⁵⁸ For the discussions of the issue of “private Property”, The Prof. LIU LIANTAI, has made a very deeply discuss. “在财产权问题上，我们无论如何也清高不起来：反对财产权者不少，极力主张财产权者更多——只要论及人权、民主、自由等，学者就无法回避这一话题。将财产权问题称为“经济自由之源，民主宪政之基”者有之，将财产权视为“人类不平等的起源和基础者”有之；浅吟低唱者道出“财产是人摆脱纯粹主观性的存在”这一历史绝唱，慷慨激昂者发出“连治产的权利都没有，哪有权利治身”这一千古天问。形而上的理论思辨，形而下的制度关照，有关财产权的理论和制度资源足以把我们淹没。我们还能做什么？归纳、推演、深化、应用，这是我们目前可以作的工作，也是我们写本文的基本思路。”

刘连泰，*财产权基本问题考*，Available at <http://www.studa.net/jingjifa/080515/1738152.html>, the last visiting time: 27-02-2011.

⁵⁹ Come from the Note 14 of 刘连泰，*财产权基本问题考*，Available at <http://www.studa.net/jingjifa/080515/1738152.html>, the last visiting time: 27-02-2011.

他们认为：“分立的财产得到承认，标志着文明的开始，规范产权的规则是一切道德的关键之所在”。转引自，[14] [英]哈耶克：《致命的自负》，冯克利等译，中国社会科学出版社 2000 年版，第 34 页。Hayek, Friedrich A. (1988) *The fatal conceit: the errors of socialism*. (Edited by W. W. Bartley. London: Routledge.)

But, according to my understanding, I will try my best to provide the most important definitions of property.

Generally, there is no unified definition of the property. From the beginning history of human being to the present time, the philosophies, the legal scholar, the statesman, and the ordinary individual try their best to definite it, explain it.

1.1.1 The definition of property made by David Hume

In 1793, the great Scottish philosopher, David Hume (7 May 1711 – 25 August 1776)⁶⁰ clearly pointed out the definition of the property as following:

“property may be defined, such a relation betwixt a person and an. object as permits him, but forbids any other, the free use and possession of it, without violating the laws of justice and moral equity.”⁶¹

And then, he said *“This in the mean time is certain, that the mention of the property naturally carries our thought to the proprietor, and of the proprietor to the property; which being a proof of a perfect relation of ideas is all that is requisite to our present purpose.”⁶²*

1.1.2 The definition of property made by Immanuel Kant

In 1798, the great philosopher, Immanuel Kant,⁶³ with his inspiration and contemplation, pointed out that

“ANYTHING is “Mine” by Right, or is rightfully Mine, when I am so connected with it, that if any other Person should make use of it without my consent, he would do me a lesion or injury. The subjective of the use of anything, is Possession of it.

As external thing, however, as such only be mine, if I may assume it to be possible that I can be wrong by the use which another might make of it when it is not actually in my possession. Hence it would be a contradiction to have External as one’s own, were not the conception of Possession capable of two different meanings, as sensible possession that is perceivable by the senses, and rational Possession that is perceivable only by the Intellect. By the former is to be understood a physical Possession, and by the latter, a purely juridical Possession of the same object.

⁶⁰ David Hume (7 May 1711 – 25 August 1776) was a Scottish philosopher, historian, economist, and essayist, known especially for his philosophical empiricism and skepticism. He is regarded as one of the most important figures in the history of Western philosophy and the Scottish Enlightenment. Hume is often grouped with John Locke, George Berkeley, and a handful of others as a British Empiricist.

See http://en.wikipedia.org/wiki/David_Hume. The last visiting time: 08-03-2011.

⁶¹ BOOK II. OF THE PASSIONS, Part I OF PRIDE AND HUMILITY, SECT. X Of property and riches

第二卷 論情感 第一章 論驕傲与謙卑 第十节 論财产权与财富

See <http://www.class.uidaho.edu/mickelsen/texts/Hume%20Treatise/hume%20treatise3.htm#ADVERTISEMENT>. The last visiting time: 27-02-2011.

⁶² Ibid.

⁶³ See, http://en.wikipedia.org/wiki/Immanuel_Kant, the last visiting time: 27-02-2011.

*The description of an Object as 'external to me' may signify either that it is merely 'different and distinct from me as a Subject.' Or that it is also "a thing placed outside of me, and to be found elsewhere in space or time.' Take in the first sense, the term Possession signifies 'rational Possession;' and in the second sense, it must mean 'Empirical Possession.' A rational or intelligible Possession, if such be possible, it Possession reviewed apart from physical holding or detention(detention)."*⁶⁴

For the "Possession and Ownership", the great thinker, said, "Any one who would assert the Right to a thing as his, must be in possession of it as an object. Were he not its actual possessor owner, he could not be wronged or injured by the use which another might make of it without his consent. For, should anything external to him, and in no way connected with him by Right, affect this object, it could not affect himself as a Subject, nor do him any wrong, unless he stood in a relation of Ownership to it."⁶⁵

1.1.3 The definition of Property in Black Law Dictionary

According to the Black Law Dictionary, the definition of the Property is that,

*"The right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel); the right of ownership<the institution of private property is protected from undue governmental interference>....Also termed bundle of rights."*⁶⁶

From this definition made in the Black Law Dictionary, we can clearly know that the property is bundle of rights to possess, use, and enjoy a certain things, and the main function of the private property is to prevent the undue government interference.

1.2 The classification of the property

1.2.1 "De rerum divisione" in *Iustiniani institutiones*

In LIBER SECUNDUS of the *Iustiniani institutiones*, the first part is the classification of the good--

- I De rerum divisione

I De rerum divisione

I.2.1pr. Superiore libro de iure personarum exposuimus: modo videamus de rebus. Quae vel in nostro patrimonio vel extra nostrum patrimonium habentur quaedam. Enim naturali iure communia sunt omnium, quaedam publica, quaedam universitatis, quaedam nullius, pleraque singulorum,

⁶⁴ Kant, Immanuel.(1789). *The philosophy of law: an exposition of the fundamental principles of jurisprudence as the science of right.* Translated from German by W.Hatie, B.D. Published by T. & T. Clark, in 1887. P 61-62

⁶⁵ Ibid. p 64.

⁶⁶ Garner, Bryan A. (2004). *Blacks law dictionary.* (8th. ed.). St. Paul: West. P1252

*quae variis ex causis cuique adquiruntur, sicut ex subiectis apparebit.*⁶⁷

1.2.2 The general classification of the property

Generally, in the most civil law legal systems, there are two basic classification of the property: one is immovable property, such as, land, house etc., another is the movable property, which is the property beside the immovable property.

In common law, property is divided into: real property - interests in land and improvements thereto; personal property - interests in anything other than real property; personal property in turn is divided into tangible property (such as cars, clothing, animals) and intangible or abstract property (stocks, bonds, bank deposits, derivatives, options, futures, patents, copyrights, trademarks, etc.), which includes intellectual property (though some disagree with the use of the term intellectual property). Real property is a legal term encompassing real estate and ownership interests in real estate. It is a type of property differentiated from personal property.⁶⁸

Traditional principles of property rights include:⁶⁹

1. Control of the use of the property
2. The right to any benefit from the property (examples: mining rights and rent)
3. A right to transfer or sell the property
4. A right to exclude others from the property.

1.3 The Importance of Property----Philosophy perspective

1.3.1 Locke's philosophy —The right property is one of three inalienable rights of human being

Many philosophers and statesmen have listed what they believe to be natural rights. Almost all include the right to life and liberty, as these are considered to be the two highest priorities in human nature.

John Locke (August 1632 – 28 October 1704), widely known as the Father of Liberalism, was an English philosopher and physician regarded as one of the most influential of Enlightenment thinkers.⁷⁰ As a 17th-century philosopher concerned primarily with society and from the Natural Law, John Locke added the concept of man as a maker of things and natural owner of property.

⁶⁷ See <http://romanlaw.cn/sub3-1.htm>. The last visiting time: 28-03-2011.

⁶⁸ See <http://en.wikipedia.org/wiki/Property>. The last visiting time: 28-02-2011

⁶⁹ Ibid.

⁷⁰ See http://en.wikipedia.org/wiki/John_Locke. The last visiting time: 28-02-2011.

Locke referred to “life, liberty, and property” as inalienable rights. And based on his “Labour theory”, Locke believed that “ownership of property is created by the application of labour.”⁷¹

John Lock makes the notions of a "government with the consent of the governed" and one of the fundamental responsibilities of a government is to protect man's natural rights—life, liberty, and estate (property). All the John Lock' theory had an enormous influence on the development of political philosophy. His ideas formed the basis for the concepts used in American law and government, allowing the colonists to justify revolution.

In 1698, John Lock, delivered his famous pamphlet, named *Two Treatises on Government*⁷², and in the Sect.27/ 28/28/30/31 of Chapter V. Of Property, the great thinker fully illustrated the “Labour theory” of property, and made completely explanation of the justification of the private right.

CHAPTER. V. OF PROPERTY.⁷⁴

Sect. 27. Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.

Sect. 28. He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself. No body can deny but the nourishment is his. I ask then, when did they begin to be his? when he digested? or when he eat? or when he boiled? or when he brought them home? or when he picked them up? and it is

⁷¹ Ibid.

⁷² The Two Treatises of Government (or "Two Treatises of Government: In the Former, The False Principles and Foundation of Sir Robert Filmer, And His Followers, are Detected and Overthrown. The Latter is an Essay concerning The True Original, Extent, and End of Civil-Government") is a work of political philosophy published anonymously in 1689 by John Locke. The First Treatise attacks patriarchalism in the form of sentence-by-sentence refutation of Robert Filmer's Patriarcha and the Second Treatise outlines a theory of political or civil society based on natural rights and contract theory. See http://en.wikipedia.org/wiki/Two_Treatises_of_Government. The last visiting time: 02-03-2011.

⁷³ Lock, John, (1698). Second Treatise of Government. Posting Date: July 28, 2010 [EBook #7370],Release Date: January, 2005, Character set encoding: ISO-8859-1.START OF THIS PROJECT GUTENBERG EBOOK SECOND TREATISE OF GOVERNMENT.HTML version produced by Chuck Greif.

Available at <http://www.gutenberg.org/files/7370/7370-h/7370-h.htm>. The last visiting time: 02—03-2011.

⁷⁴ Ibid.

plain, if the first gathering made them not his, nothing else could. That labour put a distinction between them and common: that added something to them more than nature, the common mother of all, had done; and so they became his private right. And will any one say, he had no right to those acorns or apples, he thus appropriated, because he had not the consent of all mankind to make them his? Was it a robbery thus to assume to himself what belonged to all in common? If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him. We see in commons, which remain so by compact, that it is the taking any part of what is common, and removing it out of the state nature leaves it in, which begins the property; without which the common is of no use. And the taking of this or that part, does not depend on the express consent of all the commoners. Thus the grass my horse has bit; the turfs my servant has cut; and the ore I have digged in any place, where I have a right to them in common with others, become my property, without the assignation or consent of any body. The labour that was mine, removing them out of that common state they were in, hath fixed my property in them.

Sect. 29. By making an explicit consent of every commoner, necessary to any one's appropriating to himself any part of what is given in common, children or servants could not cut the meat, which their father or master had provided for them in common, without assigning to every one his peculiar part. Though the water running in the fountain be every one's, yet who can doubt, but that in the pitcher is his only who drew it out? His labour hath taken it out of the hands of nature, where it was common, and belonged equally to all her children, and hath thereby appropriated it to himself.

Sect. 30. Thus this law of reason makes the deer that Indian's who hath killed it; it is allowed to be his goods, who hath bestowed his labour upon it, though before it was the common right of every one. And amongst those who are counted the civilized part of mankind, who have made and multiplied positive laws to determine property, this original law of nature, for the beginning of property, in what was before common, still takes place; and by virtue thereof, what fish any one catches in the ocean, that great and still remaining common of mankind; or what ambergrise any one takes up here, is by the labour that removes it out of that common state nature left it in, made his property, who takes that pains about it. And even amongst us, the hare that any one is hunting, is thought his who pursues her during the chase: for being a beast that is still looked upon as common, and no man's private possession; whoever has employed so much labour about any of that kind, as to find and pursue her, has thereby removed her from the state of nature, wherein she was common, and hath begun a property.

Sect. 31. It will perhaps be objected to this, that if gathering the acorns, or other fruits of the earth, &c. makes a right to them, then any one may ingross as much as he will. To which I answer, Not so. The same law of nature, that does by this means give us property, does also bound that property too. God has given us all things richly, 1 Tim. vi. 12. is the voice of reason confirmed by inspiration. But how far has he given it us? To enjoy. As much as any one can make use of to any advantage of life before it spoils, so much he may by his Tabour fix a property in: whatever is beyond this, is more than his share, and belongs to others. Nothing was made by God for man to spoil or destroy. And thus, considering the plenty of natural provisions there was a long time in the world, and the few spenders; and to how small a part of that provision the industry of one man could extend itself, and ingross it to the prejudice of others; especially keeping within the bounds, set by reason, of what might serve for his use; there could be then little room for quarrels or contentions about property so established.

1.3.2 Montesquieu's *De l'esprit des loix (The Spirit of the Laws)*—The right of property is the natural right

Montesquieu (Charles-Louis de Secondat, baron de La Brède et de Montesquieu) (18 January 1689 – 10 February 1755), a French social commentator and political thinker who lived during the Enlightenment.⁷⁵

In his masterpiece, *The Spirit of the Laws, (De l'esprit des loix)*,⁷⁶ (1748) the great thinker, Montesquieu also illustrated the same thought as John Lock, that the private property is the kind of natural right. “As men have given up their natural independence to live under political laws, they have given up the natural community of goods to live under civil laws.”⁷⁷

⁷⁵ See <http://en.wikipedia.org/wiki/Montesquieu>. The last visiting time: 28-02-201

⁷⁶ See http://en.wikipedia.org/wiki/The_Spirit_of_the_Laws. The last visiting time: 28-02-2011.

⁷⁷ 孟德斯鸠同洛克一样在其鸿篇巨著《论法的精神》(1748)阐述所有权(财产权)是天赋的! (法)孟德斯鸠(1748),张雁深翻译,论法的精神,北京:商务印书馆,1961。

Book XXVI Of Laws in relation to the order of Things Which They Determine

15 That We should Not regulate by the principles of political law, those things which depend on the principles of civil law

As men have given up their natural independence to live under political laws, they have given up the natural community of goods to live under civil laws.

By the first, they acquired liberty; by the second property. We should not decide by the laws of liberty, which, as we have already said, is only the government of the community, what ought to be decided by the laws concerning property. It is a paralogism to say that the good of the individual should give way to that of the public, this can never take place, except when the government of the community, or, in other words, the liberty of the subject is concerned; this does not affect such cases as relate to private property, because the public good consists in every one's having his property, which was given him by the civil laws, invariably preserved.

Thus when the public has occasion for the estate of an individual, it ought never to act by rigour of political law; it is here that the civil laws ought to triumph, which, with the eyes of a mother, regards every individual as the whole community.

Montesquieu, Baron de. (1748). *The spirit of laws*. Translated by Thomas Nugent and revised by J. V. Prichard, in Adler, Mortimer J. (Editor in Chief) (1993). *Great Books of the Western World*, 35 Montesquieu, Rousseau. (2ed. ed.). Chicago: Encyclopaedia Britannica, 1990. p221.

孟德斯鸠在其鸿篇巨著《论法的精神》阐述所有权(财产权)是天赋的!

在第五卷第26章,第15节,孟德斯鸠论述了以民法原则为依据要做的事情,不能用政治法的原则来处理

1.3.3 Hume's property theory

David Hume, the great Scottish philosopher, regarded the right of property as the justice and the moral. David Hume, illustrated his property theory from the weak nature of human being, “*In man alone, this unnatural conjunction of infirmity, and of necessity, may be observ'd in its greatest perfection. Not only the food, which is requir'd for his sustenance, flies his search and approach, or at least requires his labour to be produc'd, but he must be possess'd of cloaths and lodging, to defend him against the injuries of the weather; tho' to consider him only in himself, he is provided neither with arms, nor force, nor other natural abilities, which are in any degree answerable to so many necessities.*”⁷⁸

In order to supply his defects, “he depends on the society”, and in order to maintain the order of the society, the member of society must definite the right of property. “*and when they have observ'd, that the principal disturbance in society arises from those goods, which we call external, and from their looseness and easy transition from one person to another; they must seek for a remedy by putting these goods, as far as possible, on the same footing with the fix'd and constant advantages of the mind and body. This can be done after no other manner, than by a convention enter'd into by all the members of the society to bestow stability on the possession of those external goods, and leave every one in the peaceable enjoyment of what he may acquire by his fortune and industry. By this means, every one knows what he may safely possess; and the passions ale restrain'd in their partial and contradictory motions.*”⁷⁹

“*After this convention, concerning abstinence from the possessions of others, is enter'd into, and*

第一句话——政治行的法律使人类获得了自由，而民事法律使人类获得了所有权。认为所有权（财产权）是天赋的！还有一句非常著名的话也同样出自此章节——“在民法那慈母般的眼里，每一个人都被认做是国家本身。”

此外，“绝对的权力必然导致绝对的腐败”出自此 **Book XI of the laws which establish political liberty, with regard to the constitution 4 The same subject continued.** 孟德斯鸠在十一章第四节中写道：“一切有权力的人都容易滥用权力，这是万古不易的一条经验。有权力的人们使用权力一直到遇到有界限的地方才休止。”

（法）孟德斯鸠（1748），张雁深翻译，*论法的精神*，北京：商务印书馆，1961。

Book XI of the laws which establish political liberty, with regard to the constitution

4 The same subject continued.

But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has need of limits?

To prevent this abuse, it is necessary from the very nature of things that power should be a check to power. A government may be so constituted, as no man shall be compelled to do things, to which the law does not oblige him, nor forced to abstain from things which the law permits. P69

Montesquieu, Baron de. (1748). *The spirit of laws*. Translated by Thomas Nugent and revised by J. V. Prichard, in Adler, Mortimer J. (Editor in Chief) (1993). *Great Books of the Western World*, 35 Montesquieu, Rousseau. (2ed. ed.). Chicago: Encyclopaedia Britannica, 1990. P69.

⁷⁸ Hume, David (1739-40). *A Treatise of Human Nature*

BOOK III: OF MORALS, Part II: OF JUSTICE AND INJUSTICE, SECT. II Of the origin of justice and property Available at <http://www.class.uidaho.edu/mickelsen/texts/Hume%20Treatise/hume%20treatise3.htm#ADVERTISEMENT>. The last visiting time: 27-02-2011.

休谟，*人性论（上下）* 关文运翻译，商务出版社，1980年版。

第三卷 道德学，第二章 论正义与非义，第二节 论正义与财产权的起源，P219

⁷⁹ Ibid.

*every one has acquir'd a stability in his possessions, there immediately arise the ideas of justice and injustice; as also those of property, right, and obligation. ”*⁸⁰

*“A man's property is some object related to him. This relation is not natural, but moral, and founded on justice. ”*⁸¹

And then, Hume declared that “assuring the stability of possession of those rights (property rights) is to be ‘absolutely necessary to human society’⁸²

1.3.4 Hegel, Property, and Personhood

Georg Wilhelm Friedrich Hegel (August 27, 1770 – November 14, 1831) was a German philosopher, one of the creators of German Idealism. His historicist and idealist account of reality as a whole revolutionized European philosophy and was an important precursor to Continental philosophy and Marxism.⁸³

In the book named *Elements of the Philosophy of Right (Grundlinien der Philosophie des Rechts)*.⁸⁴ Hegel concluded that “the person become a real self only by engaging in a property relationship with something external. Such a relationship is the goal of the person.”⁸⁵ In perhaps the best-known passage from this book, Hegel says:

*The person has for its substantive end the right of placing its will in any and every thing, which thing is the thereby mine;[and] because that thing has no such end in itself, its destiny and soul take on my will.[This constitutes] mankind's absolute right of appropriation over all thins.*⁸⁶

(111 Id. at 973 (alteration in original) (emphasis added) (quoting GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT (T. M. Knox trans. 1821)).

Hence, property is the first embodiment of freedom and so is in itself a substantive end.-----”

⁸⁷

In another words, the property is a kind of thing with the personality, and this lays the philosophical foundation of the moral right in the copyright.

In 1982, the Prof. Margaret Jane Radin, published her seminal work, *Property and Personhood*,

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Hume, David.(1740). *A treatise of human nature*, Volume III,edited by L.A. Selby-Bigge. Second edition, by P.H. Niddich, Oxford: Oxford University Press,1778. P501.

Adapted from Preface of Newman, Peter.(Ed.) (1998). *The new Palgrave dictionary of economics and the law.*(1:A-D;2:E-O; 3:P-Z).London: Macmillan; New York: Stockton.

⁸³ See http://en.wikipedia.org/wiki/Georg_Wilhelm_Friedrich_Hegel. The last visiting time: 01-03-2011.

⁸⁴ See http://en.wikipedia.org/wiki/Elements_of_the_Philosophy_of_Right The last visiting time: 01-03-2011.

⁸⁵ Merges, Robert P., Menell, Peter S. & Lemley, Mark A.(2006). *Intellectual Property in the New Technical Age* (4th. ed.), New York: Aspen Law & Business. P7.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

in Stanford Law Review.⁸⁸ “Since publication, the article has been cited over 700 times. The doyens of property law and theory, and leading scholars in other subject areas, readily have called upon Radin’s piece.”⁸⁹

“In the article Professor Radin makes a compelling case for two claims. First, proper self-development, or personhood, requires individuals to have secure control over some things in their external environment in the form of property rights. Professor Radin calls property in service of personhood “personal” property. Second, property for personhood is one justification for property rights in general, but also for some current schemes of property entitlement.”⁹⁰

1.3.5 Hayek: The private property is the guarantee of the individual’s liberty

Friedrich Hayek,⁹¹ the former Nobile Prize owner, the encyclopedia-styled scholar Hayek’s writing “To define the property is the first step to prevent us from domination. The private property is the basic element of freedom, is an unalienable natural right .To recognize the right of property is the prior and fundamental condition to prohibit and prevent the state and the government from coercion /totalitarianism and arbitration!----- If the right of property and material property are control by an agency or somebody, the freedom of individual will be totally died out! ”⁹²; also Hayek attributed the birth of civilization to private property.⁹³ All these great inspiring sayings have definitely shown the importance of private property!

1.3.6 Rousseau — — “The private property” is the *Origin and Basis of Inequality Among Men*

Jean-Jacques Rousseau (28 June 1712 – 2 July 1778) was a major Genevan philosopher, writer, and composer of 18th-century Romanticism.⁹⁴ In his book, name *Discourse on the Origin and Basis of Inequality Among Men (Discours sur l'origine et les fondements de l'inégalité parmi les hommes)*⁹⁵, Rousseau claimed that the poverty and serfhood of human being, that is, the inequality among the individual is companied by the system of private

⁸⁸ Radin, Margaret Jane,(1982). Property and Personhood *34 Stan. L. Rev.*95.

⁸⁹ From Note 2 Jones, Jeffrey D., (2010). Property and Personhood Revisited. Wake Forest Journal of Law & Public Policy, Forthcoming; Lewis & Clark Law School Legal Studies Research Paper No. 2010-23. Available at SSRN: <http://ssrn.com/abstract=1640189>, the last visiting time: 02-03-2011.

⁹⁰ *Ibid.* pp.105-106.

⁹¹ Friedrich August Hayek CH (8 May 1899 – 23 March 1992), born Friedrich August von Hayek, was an Austrian-born economist and philosopher best known for his defense of classical liberalism and free-market capitalism against socialist and collectivist thought. He is considered to be one of the most important economists and political philosophers of the twentieth century, winning the Nobel Memorial Prize in Economic Sciences in 1974. See http://en.wikipedia.org/wiki/Friedrich_Hayek . The last visiting time: 28-02-2011.

⁹² *Hayek: The Road to Serfdom (1944)*

⁹³ *Hayek(1988): The Fatal Conceit*

See http://en.wikipedia.org/wiki/Friedrich_Hayek. The last visiting time: 28-02-2011.

⁹⁴ See <http://en.wikipedia.org/wiki/Rousseau>. The last visiting time: 28-02-2011.

⁹⁵ See http://en.wikipedia.org/wiki/Discourse_on_the_Origin_of_Inequality. The last visiting time: 28-02-2011.

property, and it based on the private property.

“The first man who, having fenced in a piece of land, said "This is mine," and found people naïve enough to believe him, that man was the true founder of civil society. From how many crimes, wars, and murders, from how many horrors and misfortunes might not any one have saved mankind, by pulling up the stakes, or filling up the ditch, and crying to his fellows: Beware of listening to this impostor; you are undone if you once forget that the fruits of the earth belong to us all, and the earth itself to nobody.”⁹⁶

“But from the moment one man began to stand in need of the help of another; from the moment it appeared advantageous to any one man to have enough provisions for two, equality disappeared, property was introduced, work became indispensable, and vast forests became smiling fields, which man had to water with the sweat of his brow, and where slavery and misery were soon seen to germinate and grow up with the crops.”⁹⁷

“Metallurgy and agriculture were the two arts which produced this great revolution. The poets tell us it was gold and silver, but, for the philosophers, it was iron and corn, which first civilized men, and ruined humanity.”⁹⁸

“It follows from this survey that, as there is hardly any inequality in the state of nature, all the inequality which now prevails owes its strength and growth to the development of our faculties and the advance of the human mind, and becomes at last permanent and legitimate by the establishment of property and laws.”⁹⁹

1.3.7 Karl H. Marx¹⁰⁰ ----“Abolition of private property”¹⁰¹

Karl Heinrich Marx (May 5, 1818 – March 14, 1883) was a German philosopher, political economist, historian, political theorist, sociologist, communist revolutionary and, whose ideas played a significant role in the development of modern communism and socialism.¹⁰² In 1999, a BBC poll revealed that Marx had been voted the “thinker of the millennium” by people from around the world.¹⁰³

By ways of thorough research of the economic reality of Germany/French and Britain, and the analyses of the economic theories at his time, Marx believed in the private property system is the

⁹⁶ See http://www.constitution.org/jjr/ineq_04.htm. The last visiting time: 28002-2011

卢梭认为：“贫困和奴役，亦即人与人之间的不平等的产生是随着私有制而来的，是建立在私有制确立的唯一基础上的。”

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ See http://en.wikipedia.org/wiki/Karl_Marx. The last visiting time: 28-02-2011.

¹⁰¹ Karl Marx.(1948). *The Communist Manifesto* 卡尔.马克思 (1948) 共产党宣言, Seehttp://www.woyouxian.com/b06/b060401/communist_manifesto_en3.html. The last visiting time: 28-02-2011.

¹⁰² Ibid. 3

¹⁰³“Marx the millennium's ‘greatest thinker’”. BBC News World Online.1 October 1999. <http://news.bbc.co.uk/1/hi/461545.stm>. Retrieved 10-02-2011.

essential system for the bourgeois class to exist, “The essential condition for the existence, and for the sway of the bourgeois class, is the accumulation of the private property, is the formation and augmentation of capital; the condition for capital is wage-labour.(资产阶级生存和统治的根本条件, 是财富在私人手里的积累, 是资本的形成和增殖; 资本的条件是雇佣劳动.)”¹⁰⁴

And the institutional system of capitalism private property is the key reason of why the labor class is being exploited, “modern bourgeois private property is the final and most complete expression of the system of producing and appropriating products, that is based on class antagonisms, on the exploitation of the many by the few.”, therefore, “In this sense, the theory of the Communists may be summed up in the single sentence: Abolition of private property.” However, “The distinguishing feature of Communism is not the abolition of property generally, but the abolition of bourgeois property.” And also “not abolish the right of personally acquiring property as the fruit of a man's own labour, which property is alleged to be the groundwork of all personal freedom, activity and independence.”¹⁰⁵

1.4 The Importance of property ---Legal perspective

In the western history, there are many distinguished scholars and politicians have delivered a

¹⁰⁴ Ibid. 4

“The essential condition for the existence, and for the sway of the bourgeois class, is the accumulation of the private property, is the formation and augmentation of capital; the condition for capital is wage-labour. Wage-labour rests exclusively on competition between the laborers. The advance of industry, whose involuntary promoter is the bourgeoisie, replaces the isolation of the laborers, due to competition, by their revolutionary combination, due to association. The development of Modern Industry, therefore, cuts from under its feet the very foundation on which the bourgeoisie produces and appropriates products. What the bourgeoisie, therefore, produces, above all, is its own grave-diggers. Its fall and the victory of the proletariat are equally inevitable.”

See the English version at

http://www.woyouxian.com/b06/b060401/communist_manifesto_en3.html.

The last visiting time: 28-02-2011.

“资产阶级生存和统治的根本条件, 是财富在私人手里的积累, 是资本的形成和增殖; 资本的条件是雇佣劳动。雇佣劳动完全是建立在工人的自相竞争之上的。”资产阶级无意中造成而又无力抵抗的工业进步, 使工人通过结社而达到的革命联合代替了他们由于竞争而造成的分散状态。于是, 随着大工业的发展, 资产阶级赖以生产和占有产品的基础本身也就从它的脚下被挖掉了。它首先生产的是它自身的掘墓人。资产阶级的灭亡和无产阶级的胜利是同样不可避免的。See the Chinese version at

http://www.woyouxian.com/b06/b060401/communist_manifesto_cn2.html.

The last visiting time: 28-02-2011.

¹⁰⁵ Ibid.4 “The distinguishing feature of Communism is not the abolition of property generally, but the abolition of bourgeois property. But modern bourgeois private property is the final and most complete expression of the system of producing and appropriating products, that is based on class antagonisms, on the exploitation of the many by the few.

In this sense, the theory of the Communists may be summed up in the single sentence: Abolition of private property.

We Communists have been reproached with the desire of abolishing the right of personally acquiring property as the fruit of a man's own labour, which property is alleged to be the groundwork of all personal freedom, activity and independence.”

See the English version at http://www.woyouxian.com/b06/b060401/communist_manifesto_en3.html. The last visiting time: 28-02-2011.

“共产主义的特征并不是要废除一般的所有制, 而是要废除资产阶级的所有制。

但是, 现代的资产阶级私有制是建立在阶级对立上面、建立在一个人对另一些人的剥削上面的产品生产和占有的最后而又最完备的表现。

从这个意义上说, 共产党人可以把他们的理论概括为一句话: 消灭私有制。

有人责备我们共产党人, 说我们要消灭个人挣得的、自己劳动得来的财产, 要消灭构成个人的一切自由、活动和独立的基础的财产。”

See the Chinese version at http://www.woyouxian.com/b06/b060401/communist_manifesto_cn2.html. The last visiting time: 28-02-2011.

marvelous excellent master pieces concerning about the property.

The private property is one of the key essential issues in legal society: The ideal of the law is that the individual person can live independently and dignity, but, the personal dignity is closed with the property----only based on the property, can you “dignifiedly live”, and can you “freely thinking.”¹⁰⁶

1.4.1 The Legal Theories of Property

1.4.1.1 From the *Corpus Iuris Civilis*, to give one person's his due, especially, the property is a kind of justice!

In the *Corpus Iuris Civilis*,¹⁰⁷“a Roman Gift to the world”¹⁰⁸, the law has clearly provided the definition of law and justice, just like “ius est ars boni et aequi”(Cesus)¹⁰⁹“Law is the art of the good and the fair.” and the “I.1.1pr. Iustitia est constans et perpetua voluntas ius suum cuique tribuens. (Ulp.1.1 (Dig.1,1,10 pr. § 2))”¹¹⁰

“Justice is the set and constant purpose which gives to every man his due.”¹¹¹ The precepts (格

¹⁰⁶ 刘连泰, *财产权基本问题考辨(On the Basic Issues of private Property)*”财产权问题一直是法学领域里经久不衰的命题: 法律的理想是个体的人有尊严地活着, 而人的尊严与财产权密切联系——只有“体面地生活”, 才能“自由地思想”。

Available at <http://www.studa.net/jingjifa/080515/1738152.html>, the last visiting time: 09-02-2011

¹⁰⁷ *Corpus Iuris Civilis* (kô'r'pəs jô'r'is sîv'l'is), most comprehensive code of Roman law and the basic document of all modern civil law. Compiled by order of Byzantine Emperor Justinian I, the first three parts appeared between 529 and 535 and were the work of a commission of 17 jurists presided over by the eminent jurist Tribonian. The *Corpus Iuris* was an attempt to systematize Roman law, to reduce it to order after over 1,000 years of development. The resulting work was more comprehensive, systematic, and thorough than any previous work of that nature, including the Theodosian Code. The four parts of the *Corpus Iuris* are the Institutes, a general introduction to the work and a general survey of the whole field of Roman law; the Digest or Pandects, by far the most important part, intended for practitioners and judges and containing the law in concrete form plus selections from 39 noted classical jurists such as Gaius, Paulus, Ulpian, Modestinus, and Papinian; the Codex or Code, a collection of imperial legislation since the time of Hadrian; and the Novels or Novellae, compilations of later imperial legislation issued between 535 and 565 but never officially collected.

Because it was published in numerous editions, copies of this written body of Roman law survived the collapse of the Roman empire and avoided the fate of earlier legal texts—notably those of the great Roman jurist Gaius. With the revival of interest in Roman law (especially at Bologna) in the 11th cent., the *Corpus Iuris* was studied and commented on exhaustively by such scholars as Irenaeus. Jurists and scholars trained in this Roman law played a leading role in the creation of national legal systems throughout Europe, and the *Corpus Iuris Civilis* thus became the ultimate model and inspiration for the legal system of virtually every continental European nation. The name *Corpus Iuris Civilis* was first applied to the collection by the 16th-century jurist Denys Godefroi.

See H. F. Jolowicz, *Historical Introduction to the Study of Roman Law* (2d ed. 1952) and *Roman Foundations of Modern Law* (1957); A. T. Von Mehren, *The Civil Law System* (1957).

Available from: <http://www.answers.com/topic/corpus-juris-civilis>

¹⁰⁸ See <http://www.elopos.com/blog/?p=912>, the last visiting time: 07-02-2011.

¹⁰⁹ DOMINI NOSTRI IUSTINIANI PERPETUO AUGUSTI INSTITUTIONUM SIVE ELEMENTORUM, LIBER PRIMUS, I . DE IUSTITIA ET IURE. Iustitia est constans et perpetua voluntas ius suum cuique tribuens. Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniustiscentia

CORPUS IURIS CIVILIS EDITIO STEROTYPA TERTIA, VOLUMEN PRIMUM
INSTITUTIONES RECOGNOVIT PAULUS KRUEGER; DIGESTA, RECOGNOVIT THEODORUS MOMMSEN
BEROLINI APUD WEIDMANNOS MDCCCLXXXII p 1* 1882 年版

¹¹⁰ Ibid.

CORPUS IURIS CIVILIS EDITIO STEROTYPA TERTIA, VOLUMEN PRIMUM
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BEROLINI APUD WEIDMANNOS MDCCCLXXXII p 1* 1882 年版

¹¹¹ 应该是该句子的英文翻译出处

言) of the law are these: to live honestly, to injure no one, and to give every man his due.¹¹²

(I.1.1.3 Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere. § 3 ex Ulp. l. c. (Dig. 1,1,10,1)¹¹³法律的基本原则是: 为人诚实, 不损害别人。给予每个人他应得的部分。要加注, 出处)

Therefore, according to the definition of “justice” and the precepts of the law prescript in this masterpiece, *to give one person’s his due, especially, the property is a kind of justice!*

1.4.1.2 The importance of the property declared by Sir William Blackstone

In Sir William Blackstone’s great book, *Commentaries on the Laws of England*, (Volume II Of the Rights of Things (1766)), the great British jurist, claimed that,

*“THERE is nothing which so generally strikes the imagination, and engages the affections of mankind, as right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in universe.”*¹¹⁴

Iustiniani institutiones LIBER PRIMUS I De iustitia et iure

10 *Ulpianus librimo regularum* Iustitia est constans et perpetua voluntas ius suum cuique tribuendi. Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.

(Justice is the set and constant purpose which gives to every man his due. 正义是给予每个人他应得的部分的这种坚定而永恒的愿望。)

I.1.1.1 Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia.

I.1.1.2 His generaliter cognitibus et incipientibus nobis exponere iura populi Romani ita maxime videntur posse tradi commodissime, si primo levi ac simplici, post deinde diligentissima atque exactissima interpretatione singula tradantur. Alioquin si statim ab initio rudem adhuc et infirmum animum studiosi multitudine ac varietate rerum oneraverimus, duorum alterum aut desertorem studiorum efficiemus aut cum magno labore eius, saepe etiam cum diffidentia, quae plerumque iuvenes avertit, serius ad id perducamus, ad quod leniore via ductus sine magno labore et sine ulla diffidentia maturius perducere potuisset.

I.1.1.3 Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.

I.1.1.4 Huius studii duae sunt positiones, publicum et privatum. Publicum ius est, quod ad statum rei Romanae spectat, privatum, quod ad singulorum utilitatem pertinet. Dicendum est igitur de iure privato, quod est tripartitum: collectum est enim ex naturalibus praeceptis aut gentium aut civilibus.

I.1.1pr. Iustitia est constans et perpetua voluntas ius suum cuique tribuens.

(Justice is the set and constant purpose which gives to every man his due.

正义是给予每个人他应得的部分的这种坚定而永恒的愿望。)

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See <http://romanlaw.cn/sub3-1.htm>. The last visiting time: 01-03-2011.

¹¹² Ibid.

¹¹³ Ibid. p 1*

¹¹⁴ Blackstone, William. (1766). *Of the rights of things*. (With an introduction by A. W. Brian Simpson). Chicago; London: University of Chicago Press, 1979. ((Ripr. facs. dell'ed.: Oxford: Clarendon Press, 1766.) p2.

1.4.1.3 The Inviolability of Private Property is the prima principles of Three Principles of Western Civil law

During the struggle against the feudalism, the Three Principles is the distinguished prophets (Pamphlets) which uphold by the capitalist. Under the instruction of these three flags, the feudalism is overthrown, and the capitalism society is established. In order to secure the capitalist's revolutionary results, the capitalist legislature stipulated them in the constitution and civil code. Among them, the Inviolability (Sacredness) of the private property is the prima principle!¹¹⁵ It is the foundation of the capitalism society.

Therefore, the Sacredness of the private property is not only a capitalist political pamphlet, but also is the basic principle of civil law system. Based on this principle, the principle of Freely Express of willingness can be fulfilled, and then the civil liabilities can be occurred, according to the Principle of Faulty.

From the economics aspect, the clarified property is the fundamental of commodity society, the beginning and the destination of all commercial transaction.

1.4.1.4 Rudolf von Jhering¹¹⁶, *Der Kampf um das Recht (The Struggle for the Rights)*¹¹⁷

On 11 March 1872, Rudolf von Jhering, as a legal scholar, and as the founder of a modern sociological and historical school of law, delivered his famous pamphlet, *Der Kampf ums Recht (La lotta per diritto)*. In this world famous short article, Professor, Rudolf von Jhering, clearly declared the relationship between the property and the personal right.

英国法学家布莱克斯通在其名著《英国法释义》中精辟地指出：“没有任何东西像财产所有权那样如此普遍地唤起人类的想象力，并煽动起人类的激情；或者说财产所有权是一个人能够在完全排斥任何他人权利的情况下，对世间的外部事物享有独占的垄断性的支配权。这种财产上的支配权是完全排斥世上任何人的。”

¹¹⁵ From point of view of the modern civil law, there are three essential principals of modern civil law, these are (1) Inviolability of private property; (2) Freedom of willingness; (3) Faulty liability. And the inviolability of private property is the first, because it is the base of the free market, it the base of all commercial transaction.

从近代民法三原则上讲，私权神圣、意思自治、过错责任是近代资产阶级民法的三大原则。私权神圣是首要原则——整个商品社会的基础——交易的基础

The essence of civil law idea is justice, and its core incarnate inviolability of private right, equality of personality and autonomy of will.

民法理念的内涵丰富,其本质是正义,其核心表现为私权神圣、人格平等和私法自治。

¹¹⁶ Rudolf von Jhering (also Ihering) (22 August 1818 - 17 September 1892) was a German jurist. He is known for his 1872 book *Der Kampf ums Recht*, as a legal scholar, and as the founder of a modern sociological and historical school of law. See http://en.wikipedia.org/wiki/Rudolf_von_Jhering. The last visiting time: 28-02-2011.

¹¹⁷ Der Kampf um das Recht, Vortrag des Hofrates Professor Jhering. Gehalten in der Wiener Juristischen Gesellschaft am 11. März 1872 Meine hochverehrten Herren!

Available at <http://www.koeblergerhard.de/Fontes/JheringDerKampfumsRecht.htm>.

The last visiting time: 28-02-2011.

Jhering, Rudolf von. (1872). *Der Kampf ums Recht*. (5. Aufl.). Wien: Manz.

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Jhering, Rudolf von. (1872). *Der La lotta pel diritto*. (traduzione dal tedesco e La libertà di coscienza per Raffaele Mariano). Milano; Napoli: U. Hoepli. 1875.

“The private property is the basis of safeguarding the development of personality, therefore, to protect the ownership is the protection of human being.”¹¹⁸

“By means of my willingness, the subject is belonged to mine. Therefore, I ironed my personality on it. Thus, who conduct the infringement of my property, means that who infringe my personality! Who beats my property, means who beats my physical body---the ownership do is my personality which extending to the property!”^{119 120}

1.5 The Importance of Property---Economics perspective

(The economic analysis of property)

From the economics perspective, the market/ the goods (commodity) /the scarceness and the efficiency are four basic words of economics. To define the property clearly is one of the fundamental things of market economy, and the beginning and the destination of all commercial transaction in the market is pursuing the right of property. “A primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities.”¹²¹

1.5.1 Coase Theorem---To well delimitation of the property right is the most efficiency way to conduct the commercial activity¹²²

According to the Coase theorem, in market with the cost of transaction market, to define the private property well and initially is very important for the market mechanism to play efficiently.

In article of *The Problem of Social Cost* (1960), Coase Theorem is explicated expressed like that, “If there is no any market transaction cost, whatever the property right be defined, there is no any effect to the market efficiency. That is, by way of the part of the market, the market mechanism can itself obtain the efficiency — to efficiently allocate the resources.”¹²³ (Coase Theorem I).

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ 耶林:《为权利而斗争》个人财产是保障个人人格发展的基础,所以,对所有权的保护就是对人的保护。“我通过我的意志使之为我物,从而给它打上了我人格的烙印。因此,有人侵害之就是侵害我的人格,谁殴打之,就是殴打含于其中的我的自身——所有权无非是扩展到物之上的我的人格的外延而已!”

¹²¹ Demsetz, Harold. (1967). Toward a theory of property rights. *American Economic Review*. Vol. 57, No. 2, 347, 348 (1967) See <http://www.jstor.org/stable/pdfplus/1821637.pdf?acceptTC=true>. The last visiting time: 28-02-2011.

¹²² 从经济学上讲——科斯——明晰的财产权是市场交易最有效率的。科斯的理论要提炼! !

关于外部效应的内部化问题被庇古税理论所支配。《社会成本问题》该文重新研究了交易成本为零时合约行为的特征,批评了庇古关于“外部性”问题的补偿原则(政府干预),并论证了在产权明确的前提下,市场交易即使在出现社会成本(即外部性)的场合也同样有效。文中科斯论述到,一旦假定交易成本为零,而且对产权(指财产使用权,即运行和操作中的财产权利)界定是清晰的,那么法律规范并不影响合约行为的结果,即最优化结果保持不变。换言之,只要交易成本为零,那么无论产权归谁,都可以通过市场自由交易达到资源的最佳配置。

《社会成本问题》中最重要的思想就是:“如果没有交易成本的话,无论权利怎样界定都没有关系;但交易成本不可能为零,所以权利的界定就十分重要。”

¹²³ Coase, R.H. (1960). The problem of the social cost. *The Journal of Law and Economics*, Vol.3, Oct.1-44. Available at <http://www.sfu.ca/~allen/CoaseJLE1960.pdf>. The last visiting time: 02-03-2011.

IV. The Pricing System with No Liability for Damage

“---It is necessary to know whether the damaging -business is liable or not for damage caused since without the establishment of this initial delimitation of rights there can be no marked transactions to transfer and recombine them. But the ultimate result

However, “in reality, there are many transaction cost,¹²⁴ therefore, to the define property right well and initially is the key important for the market efficiency! “(Coase Theorem II)

1.5.2 Posner’s Economic Theory of Property Rights: Incentive Function from the Static and Dynamic Perspectives

In 2003, Judge R. A. Posner published his *Economic Analysis of Law* in sixth edition since this textbook-treatise first published in 1973. In Chapter 3 Property, Judge R. A. Posner clearly pointed out that “legal protection of property rights creates incentive to exploit resources efficiently.”¹²⁵

And then, in the following paragraph, Judge R. A. Posner gave fully illustration of the creation of individual (as distinct from collective) ownership rights and the rights of individual ownership are be transferable are both important conditions for the efficient use of resources.¹²⁶

The discussion to this point may seem to imply that if every valuable (meaning scarce as well as desired) resource were owner by someone (the criterion of universality), ownership connoted the unqualified power to exclude everybody else from using the resource (exclusivity) as well as to use it oneself, and ownership rights were freely transferable or as lawyers say alienable

(which maximizes the value of production) is independent of the legal position if the pricing system is assumed to work without cost.” P7

科斯在《社会成本问题》第四节中说：“如果定价制度的运行毫无成本，最终的结果（产值最大化）是不受法律状况影响的。”“不论养牛者是否对他的牛引起的谷物损失负责，情况都一样。”

科斯所说的“定价制度的运行成本”就是讨价还价等整个谈判和履约过程的交易成本，科斯所说的“法律状况”就是法院的判决。

科斯的假定被产权学家们归纳为“科斯第一定理”：“只要交易成本为零，无论立法者或法院对权利如何界定，都可以通过市场交易达到资源的最佳配置。”

¹²⁴ Ibid.

V. The Cost of Market Transactions Taken into Account

The argument has proceeded up to this point on the assumption that there were no costs involved in carrying out market transactions. This is, of course, a very unrealistic assumption. In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on. These operations are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost.

Once the costs of carrying out market transactions are taken into account it is clear that such a rearrangement of rights will only be under taken when the increase in the value of production consequent upon the rearrangement is greater than the costs which would be involved in bringing it about. When it is less, the granting of an injunction (or the knowledge that it would be granted) or the liability to pay damages may result in an activity being discontinued (or may prevent its being started) which would be undertaken if market transactions were costless. **In these conditions the initial delimitation of legal rights does have an effect on the efficiency with which the economic system operates. One arrangement of rights may bring about a greater value of production than any other.**

VI. The Legal Delimitation of Rights and the Economic Problem

Of course, if market transactions were costless, all that matters (questions of equity apart) is that the rights of the various parties should be well-defined and the results of legal actions easy to forecast. But as we have seen, the situation is quite different when market transactions are so costly as to make it difficult to change the arrangement of rights established by the law. In such cases, the courts directly influence economic activity. It would therefore seem desirable that the courts should understand the economic consequences of their decisions and should, insofar as this is possible without creating too much uncertainty about the legal position itself, take these consequences into account when making their decisions. Even when it is possible to change the legal delimitation of rights through market transactions, it is obviously desirable to reduce the need for such transactions and thus reduce the employment of resources in carrying them out.

科斯在《社会成本问题》第五节《对市场交易成本的考察》中又说：“一旦考虑到进行市场交易的成本，……合法权利的初始界定，会对经济制度运行的效率产生影响。”科斯的这段话，被产权学家们称为“科斯第二定理”。

¹²⁵ Posner, Richard A. (2003). *Economic Analysis of Law*. (6th ed). New York: Aspen. P32

¹²⁶ Ibid. P33

(transferability), value would be maximized.¹²⁷¹²⁸

1.5.3 North's Institutional theory---The systematical institutions of private property in the Western countries is the fundamental reason of *The Rise of the Western World*.¹²⁹

North said that "Institutions are a set of rules, compliance procedures, and moral and ethical behavioral norms designed to constrain the behavior of individuals in the interests of maximizing the wealth or utility of principles".¹³⁰ And "the institutional framework plays a major role in the performance of an economy."¹³¹ There are some the same sayings as that delivered by North in his serial books concerning about the economic institutions, such as, "Institutions determine the performance of economies"¹³², "Efficient economic organization is the key to (economy) growth."¹³³

In the Western legal and political history, the legal and political institutional systems of the private property played very important role for European economic development. Through the deeply research the Western economic history begin in the eighteen century, the famous institutional economist, Douglas C North, has pointed that a serial of legal and political institutions of private property are the key elements for the Western countries' economy development.¹³⁴

1.6 "The Private Property is the Life of Man"---Shylock in *The Merchant of Venice*¹³⁵

Shylock is a greedy money-lender, a character in William Shakespeare's¹³⁶ "The Merchant of Venice". When the Judge Portia, claim that, according to the law of Venice, all the property of Shylock should be forfeited, "For half thy wealth, it is Antonio's. The other half comes to the

¹²⁷ Ibid.p33.

¹²⁸ 以波斯纳为代表的经济分析学派认为, "对财产权的法律保护创造了有效率地使用资源的激励". [美]理查德·A·波斯纳:《法律的经济分析》, 蒋兆康译, 中国大百科全书出版社1997年版, 第40页。

今天的美国学界仍有学者讨论财产权和经济增长之间的关系, 他们认为财产权有利于社会经济的增长。只不过他们论述的方法与洛克有别, 更多地采用了实证分析和数学模型。参见[美]凯斯·R·孙斯坦:《自由市场与社会正义》, 金朝武等译, 中国政法大学出版社2002年版, 第273页以下。

¹²⁹ 从制度经济学的角度, 美国学者诺思——制定经济学派的创始人之一。诺思考察了资本主义初期的发展, 从经济史上得出的结论。《西方世界的兴起》一对西方经济发展的历史进行梳理、考察、研究之后认为, 正是明晰的所有权制度, 才使得西方社会经济力量有了源源不断的发展! Douglas C North: *Institutions, Institutional change and Economic Performance*.

¹³⁰ North, Douglass C. (1981). *Structure and Change in Economic History*. New York: W.W. Northon & Company. P201

¹³¹ North, Douglass C. (1981). *Structure and Change in Economic History*. New York: W.W. Northon & Company. P69.

¹³² Ibid. p 137.

¹³³ North, Douglass C. & Thomas, Robert Paul (1973). *The Rise of the Western World*. Cambridge: Cambridge University Press. P1

¹³⁴ North, D. C. & Thomas, R. P. (1973). *The Rise of the Western World*. Cambridge: Cambridge University Press.p157.

"In the eighteen century, by that time a structure of property rights had developed in the Netherland and England which provided the incentives necessary for sustained growth. These included the inducements required to encourage innovation and the consequent industrialization. The industrial revolution was not the source of modern economic growth. It was the outcome of raising the private rate of return on developing new techniques and applying them to the production process." P157

¹³⁵ See http://en.wikipedia.org/wiki/The_Merchant_of_Venice. The last visiting time: 28-02-2011.

¹³⁶ See http://en.wikipedia.org/wiki/William_Shakespeare. The last visiting time: 28-02-2011.

general state of Venice.”¹³⁷ As soon as Shylock heard this judgment, he was astonished and shouted angrily what he thought of his property to him.

“SHYLOCK

Nay, take my life and all; pardon not that: You take my house when you do take the prop, That doth sustain my house; you take my life, When you do take the means whereby I live.”¹³⁸

What the Shylock said in the court of Venice, is vividly illustrating the importance of the private property to everyone in the world.

1.7 The famous saying of Willian Pitt: “The wind can enter this house, the rain can enter this house, but without the permission of the owner of the house, the King do not enter it!”

In 18 century, in the lecture delivered by the president of British, William Pitt,¹³⁹ fully illustrated the nobility of the private property----Even the poorest person can confront with the power of King. The wind can blow it, the rain can beat it, the house is even trembling in such bad weather, but, without permission of the owner of this house, the King can not enter this house, and the army of the King can not take one step into this broken threshold of this house!”¹⁴⁰

2 IP

2.1 The definition of IP

IP means intellectual property, is a kind of intangible property. It is a kind of creation of the mind,¹⁴¹ or “the labors of the mind.”¹⁴²

¹³⁷ See <http://shakespeare.mit.edu/merchant/merchant.4.1.html>. The last visiting time: 28-02-2011.

¹³⁸ The merchant of Venice **SCENE I. Venice. A court of justice.**

SHYLOCK: Nay, take my life and all; pardon not that: You take my house when you do take the prop, That doth sustain my house; you take my life, When you do take the means whereby I live.

See <http://shakespeare.mit.edu/merchant/merchant.4.1.html>. The last visiting time: 28-02-2011.

莎士比亚《威尼斯商人》的名言 --夏洛克：不，把我的生命连着财产一起拿了去吧，我不要你们的宽恕。你们拿掉了支撑房子的柱子，就是拆了我的房子；你们夺去了我的养家活命的根本，就是活活要了我的命。

¹³⁹ See http://en.wikipedia.org/wiki/William_Pitt_the_Younger. The last visiting time 28-02-2011.

¹⁴⁰威廉·皮特首相的“风能进，雨能尽，国王不能进”的名言

政府对私有财产应当持有一种尊重乃至敬畏的态度。正如 18 世纪英国威廉·皮特首相如此诠释了私有财产的神圣不可侵犯性 “即使是最穷的人，在他的寒舍里也敢对抗国王的权威，风可以吹进这间房子，雨也可打进这间房子，房子在风雨中颤栗，但是国王不能随意踏进这间房子，国王的千军万马也不能踏进这间门槛早已磨损的破房子。”这是 18 世纪中叶的英国首相老威廉·皮特演讲中的内容。见刘军宁：《风能进 雨能进 国王不能进——政治理论视野中的财产权与人类文明》，载刘军宁等主编：《自由与社群》，北京三联书店出版社 1998 年版，第 152 页。文章转引自注 46 刘连泰,财产权基本问题考辨 *On the basic issues of property right*, See <http://www.studa.net/jingjifa/080515/1738152.html>. The last visiting time: 28-02-2011.

¹⁴¹ See, http://www.wto.org/english/tratop_e/trips_e/intell_e.htm, the last visiting time, 08-02-2011

¹⁴² Davoll v. Brown, 7 F. Cas. 197, 199 (C.C.D.Mass. 1845) “we protect intellectual property, the labors of the mind, productions and interests as much a man's own, and as much the fruit of his honest industry, as the wheat he cultivates, or the flocks he rears.”

In Chinese, the IP is “智慧成果” (ZHI HUI CHENG GUO, the result(s) of intellectual, or the result of brain. Being compared with the real property, such as, the real estate, the cattle, the money, the IP is very broad concept, that means, every products of the mind can be regarded as IP, and the inappropriationability¹⁴³ is one of significant characteristics of IP.

Strictly following the definition of IP, which we made above, we will find that the IP is a kind of information or a kind of knowledge, in other words, IP is analog to information and knowledge. Just because the IP is a kind of information, some legal professors, such as, Professor Lemly (2004) has pointed out that “Indeed, the term “intellectual property” itself may be part of the problem.”¹⁴⁴ And “only recently has the term “intellectual property “come into vogue”¹⁴⁵

The modern use of the term intellectual property as a common descriptor of the field probably traces to the foundation of the World Intellectual Property Organization (WIPO) by the United Nations.¹⁴⁶ Since that time, numerous groups such as the American Patent Law Association and the ABA Section on Patent, Trademark, and Copyright Law have changed their names (to the American Intellectual Property Law Association and the ABA Section on Intellectual Property Law, respectively).^{147 148}

2.2 The economic foundation of IP¹⁴⁹

IP’s economic foundation is the economic theory of property---in such a society, the resources are scarce, the market mechanism, such as, the price, the competition, play very essential function to

¹⁴³ “Appropriation, n.1. The exercise of control over property; a taking of possession. ”

Garner, Bryan A. (2009). *Black’s law dictionary*. (9th. ed.). St. Paul: West. p117

“Misappropriation n.1. The application of another’s property or money dishonestly to one’s own use. The element of misappropriation are: (the plaintiff must have invested time, money, or effort to extract the information.(2) the defend must have taken the information with no similar investment, and (3) the plaintiff must have suffered competitive injury because of the taking.3. The doctrine giving rise to such a tort claim.---misappropriate,vb “The doctrine of ‘misappropriation’, which is distinct branch of unfair competition,--has been applied to a variety of situation in which the courts have sensed that one party was dealing “unfairly” another, butt which were not covered by the three established statutory systems protecting intellectual property: copyright, patent, and trademark/deception as to orgin.”U.S.Golf Ass’n v.St.Andrews systems. Data-Max,Inc. 749 F.2d 1028,1034-35(3d Cir. 1984) (Becker,J).”

Garner, Bryan A. (2009). *Black’s law dictionary*. (9th. ed.). St. Paul: West. p1088.

¹⁴⁴ Lemley, Mark A.(2004). Property, intellectual property, and free riding. *Texas Law Review*.Vol.86.1031. Available at SSRN: <http://ssrn.com/abstract=582602>

¹⁴⁵ Ibid.

¹⁴⁶ See Convention Establishing the World Intellectual Property Organization art. 2(viii) (Stockholm, July 14 1967 to January 13 1968)

¹⁴⁷ Note 6 of Lemley, Mark A.(2004). Property, intellectual property, and free riding. *Texas Law Review*.Vol.86.1031. Available at SSRN: <http://ssrn.com/abstract=582602>

¹⁴⁸ In the literature concerning IP, there are three terms mainly used, depending on writer field of activity. The term of “intellectual capital” is used essentially by managers in creating a favorable imago of the company with the aim of attracting investment. Intellectual capital is broader than the more usual terms of “intellectual property”, which is used by legal experts, and “intangible assets”, which principally is used by accounting specialists. At the same time, the term “intellectual property” is more popular and is used in literature concerning company’s intangible assets.

¹⁴⁹ **知识产权的政治学和经济学基础**

知权是建立在西方政治和经济学的基础上的,其基本理论是:资源的稀缺性,市场在经济生活中其基础性配置资源——市场竞争(供求关心、价格杠杆)是可以使效率最优化!(经典的话——亚当史密的“看不见的手”)。而在这一个资源稀缺的环境中,赋予经济活动的主体以财产权——是最有效率的!

allocate the resources efficiently. And such resource scarce society, to propertize the resource to different individual is the most efficient way.^{150 151}

So does the IP.

2.3 The economic characteristics of IP

IP is a kind of information or a kind of knowledge. And according to the theory of economics of information, “Information is a fundamentally different commodity from normal goods, because information is costly to produce but cheap to reproduce, market in information are subject to severe market failures.”¹⁵²

The basic economic characteristics of IP are the following:

(1) The nature of IP—a typical public good

Generally speaking, the IP is a kind of information goods. Therefore, according to the economic theories, the IP is typical public good,¹⁵³ exerting the positive external effects to the other. That means being information, or a kind of knowledge, the IP spillover the information and the knowledge, and enhancing the social total resources of knowledge.¹⁵⁴

(2) Disappropriation ---you can make good use of it, but the other also can take advantage of it without decrease its value. Or in other words, the no-rival nature, that is, “a single person's use of information does not diminish its availability to other”. (Dina Kallay, 2004, p14).

(3) The cost to invent the IP is huge, but the cost of copying or duplicating the IP is very low; “Information is fundamentally different commodity from normal goods. Because information is

¹⁵⁰ Lea, Gary.& Hall, Peter. Standards and intellectual property rights: an economic and legal perspective. *Information Economics and Policy*. 16, 67-89. “property rights are required to provide incentives and legitimize resource owners’ claims on rewards from trade or production.”

¹⁵¹ Demsetz, Harold. (1967). Toward a theory of property rights. *American Economic Review*. Vol. 57, No. 2,347, 348 (“A primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities.”).

<http://www.jstor.org/stable/pdfplus/1821637.pdf?acceptTC=true>

¹⁵² Samuelson, Paul A. & Nordhaus, William D.(2005). *Microeconomics* (18th ed.), New York: The McGraw-Hill. (此句话引自 [美] 萨缪尔森, 诺德豪斯 著 经济学 (第 18 版) 萧琛 主译 /2008 年 01 月/人民邮电出版社, 第 194. (Paul A. Samuelson, Economics(16th ed. p179))

¹⁵³ Jasay, Anthony de (1990). *Social contract, free ride: a study of the public goods problem*. Oxford : Clarendon Press

¹⁵⁴ Barlow, John Perry. (1994). “The Economy of Ideas: A framework for patents and copyrights in the Digital Age,” tagged:

“(Everything you know about intellectual property is wrong.)”, Wired article, Issue 2.03, March 1994. available at: <http://groups.csail.mit.edu/mac/classes/6.805/articles/int-prop/barlow-economy-of-ideas.htm>. The last visiting time : 08-03-2011.

As I will soon discuss in detail, unbounded intellectual property is very different from physical property and can no longer be protected as though these differences did not exist. For example, if we continue to assume that value is based on scarcity, as it is with regard to physical objects, we will create laws that are precisely contrary to the nature of information, which may, in many cases, increase in value with distribution.

Of course, information is, by nature, intangible and hard to define. Like other such deep phenomena as light or matter, it is a natural host to paradox. It is most helpful to understand light as being both a particle and a wave, an understanding of information may emerge in the abstract congruence (一致 和谐) of its several different properties which might be described by the following three statements:

Information is an activity.

Information is a life form.

Information is a relationship.

The central economic distinction between information and physical property is that information can be transferred without leaving the possession of the original owner. If I sell you my horse, I can't ride him after that. If I sell you what I know, we both know it.

costly to produce but cheap to reproduce, markets in information are subject to severe market failures.”¹⁵⁵

(4) In the IP market, the free-riding phenomenon is extremely popular.

Free-riders are market participants who want to obtain the benefits of a good without paying its cost of production. “IP is kind of “public goods” and has the positive externalities. The feature of IPR can produce severe market failures---that means, the information inventors sometimes have great difficulty profiting from their inventions because other people can copy them. Then, in order to get off such market failures, the government increasingly pays more attention to IPRS, to provide adequate market rewards for creative activities.” Paul A. Samuelson, *Economics* (16th ed. P529)

Free-riding is an economy phenomenon of market failure. In the information market, or IP market, such phenomenon is much popular.

Just because of free-riding phenomenon is such popular in the information market and the public good nature of IP that the producer of IP can not able to collect revenues from few of consumers of their products. And then, the disaster consequence will be occurred, that is, the producer will not reinvest any more to produce the IP, and there will be no more information produced, the world will be dragged into the desert of information.

In order to solve such market failure in the IP market, from the institutional economics point of view, the IPR legal systems are introduced, that is, to grant the IP producers a group of exclusive rights to use their products in certain limited time, and thus allowing them to recoup the investment they made and make profits. The fundamental economics though of these IP legal institution is to propertize the information (knowledge) ---the public goods into private goods.

3 IPR

3.1 The definition of IPR

IPR is a bundle of rights, which endowed by law, such as, copyright, patent right, trademark right and trade secret, etc. All of these IPRs “comprise a special form of property, created by statute law.”¹⁵⁶

There are a lot definitions of IPR, according to TRIPS, intellectual property rights are the rights given to persons over the creations of their minds. They usually give the creator an exclusive right over the use of his/her creation for a certain period of time.¹⁵⁷

¹⁵⁵ Paul A. Samuelson, *Economics*(16th ed. p179)

¹⁵⁶ Plant, Arnold (1934): The Economic Theory Concerning Patents for Inventions, *Economica*, New Series, Vol. 1, No. 1 (Feb., 1934), pp. 30-51;

Available at <http://www.jstor.org/stable/2548573>.) “PATENTS for inventions comprise a special form of property, created by statute law.” The last visiting time: 28-02-2011.

3.2 The traditional classification of IPRs

Traditionally, the Intellectual property rights are divided into two main categories: one category is Copyright and rights related to copyright, in technical terms, is “neighboring right”; another is Industrial property. The essential purpose of the copyright law is to provide legal protection to any forms of expression of the literary and artistic works, and then to enrich the culture and human being’s spiritual life, to promote the social, economic and culture development.¹⁵⁸

For the Industrial property, we usually divided the Industrial Property into two main areas: one area is connected with the form of technological information such as, invention and technology; another area of Industrial Property is connected with the protection of the distinctive signs, in particular trademarks (which distinguish the goods or services of one undertaking from those of other undertakings) and geographical indications (which identify a good as originating in a place where a given characteristic of the good is essentially attributable to its geographical origin)¹⁵⁹. For the former, according to whether these technological or business information is public or not, we can divide these information into two categories: the one which is public, in the legal form is the patent, or patent right, which are designed to protect the form of innovation, industrial design and the one which is not public, in the legal form is trade secrets. The social purpose is to provide protection for the results of investment in the development of new technology, thus giving the incentive and means to finance research and development activities. For the latter, the protection of such distinctive signs aims to stimulate and ensure fair competition and to protect consumers, by enabling them to make informed choices between various goods and services. The protection may last indefinitely, provided the sign in question continues to be distinctive.¹⁶⁰

For the general classification of the IPRs, please the Picture

¹⁵⁷ See, http://www.wto.org/english/tratop_e/trips_e/intell_e.htm. The last visiting time: 28-02-2011.

¹⁵⁸ Copyright, for its part, constitutes an essential element in the development process. Experience has shown that the enrichment of the national cultural heritage depends directly on the level of protection afforded to literary and artistic works. The higher the level, the greater the encouragement for authors to create; the greater the number of a country’s intellectual creations, the higher its renown; the greater the number of productions in literature and the arts, the more numerous their auxiliaries in the book, record and entertainment industries; and indeed, in the final analysis, encouragement of intellectual creation is one of the basic prerequisites of all social, economic and cultural development.

-----ARPAD BOGSCH, Director General, World Intellectual Property Organization(WIPO)

“著作权构成了人类社会发展过程中的最基本的要素。经验表明，一国的民族文化遗产丰富与否直接取决于它提供给文学和艺术作品的保护水平。保护水平越高，就越能鼓励作者创作；一国的智力创作物越多，它的声望就越高；文学和艺术产品就越多；因而，它们在图书、唱片和娱乐业内的副产品也就越丰富。总之，鼓励智力创作的确是所有社会、经济和文化发展的前提之一。”。因此，随着社会的不断发展，《伯尔尼公约》将在文学和艺术作品的国际保护领域内起到越来越大的作用。——世界知识产权组织（WIPO）总干事阿帕德·鲍格胥。引自世界知识产权组织编著 刘波林译：《保护文学和艺术作品伯尔尼公约指南》，北京：中国人民大学出版社，2002年7月，第1版，第2页。

¹⁵⁹ See 1 Item of art.22 of TRIPS, http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm. The last visiting time: 28-02-2011.

¹⁶⁰ The materials come from: http://www.wto.org/english/tratop_e/trips_e/intell_e.htm. The last visiting time: 28-02-2011.



3.3 The nature IPR

As the Part I GENERAL PROVISIONS AND BASIC PRINCIPLES of TRIPs, the member of WTO declared that “*Recognizing that intellectual property rights are private rights.*”¹⁶¹

3.4 The characteristics of IPR

Compared with the right of tangible property, the IPR enjoys the following distinctive characteristics

- (1) The subject matter of IP is intangible,
- (2) The time limited
- (3) The geographical characteristic (territory)
- (4) The ways to obtain the IPRs ---are granted by the competent authorities of one’s government.
- (5) It is more easily to be infringed, and deserved more subtle legal protection.

¹⁶¹ See http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm. The last visiting time: 28-02-2011.

4 The differences between IP and IPR

According to my understanding, there are several reasons to make the legal professor or legal student to think that “the term "intellectual property" come into vogue”, such as,

(1) I think that the concept of IP is an economic concept, not a legal concept. However, the IPR is the typical legal concept;

(2) And when some scholars talk about the IP and IPR, they sometimes make them as the same meaning. That is completely wrong.

(3) IPR is a bundle of legal rights to the some creation of minds, that means, only the some of the information or knowledge that fulfill the requirements of the IP laws, can be granted these bundles of rights.

5 The economic analysis of IPR’s function

---the main function of IPR legal system is a kind of optimal institution in broader sense as a way of creating incentives to innovate and to produce more and more intellectual products.

5.1 “Added the fuel of interest to the fire of genius”---- Abraham Lincoln

When we talking about the function of the patent, Abraham Lincoln, the 16th American president, had made a very good illustration of the function of the patent in one of his speech in 1858 like that “Next came the Patent laws. These began in England in 1624; and, in this country, with the adoption of our constitution. Before then [these?], any man might instantly use what another had invented; so that the inventor had no special advantage from his own invention. The patent system changed this; secured to the inventor, for a limited time, the exclusive use of his invention; and thereby added the fuel of interest to the fire of genius, in the discovery and production of new and useful things.”¹⁶²

5.2 “Patents are a driving force for innovation, growth and competitiveness.”---- “The EU Patent Ten Years On: Time is running out”¹⁶³

In EU, there are great political/legal and economic ambitions to fulfill the EU single market. To establish a single EU patent legal system is one of most important step to “foster European

¹⁶² Lincoln, Abraham (1858): Lecture on Discoveries and Inventions.

<http://showcase.netins.net/web/creative/lincoln/speeches/discoveries.htm>. The last visiting time: 28-02-2011.

¹⁶³ Conference: Future Patent Policy in Europe (03.11.2010) “The EU Patent Ten Years On: Time is running out” http://ec.europa.eu/internal_market/indprop/patent/index_en.htm#proposal

innovation and competitiveness”¹⁶⁴. There will be a single EU Patent and a common EU patent protection system, such as, to establish a common EU patent court. “It will allow all the cases to be heard before judges with the highest level of legal and technical expertise.”¹⁶⁵ “It will also improve legal certainty by making litigation more accessible and predictable as well as provide for uniform patent protection at the EU’s external boards.”¹⁶⁶

5.3 The incentive mechanism—the mainly function of patent (Bowman, 1973)

In 1973, Prof. Bowman has clearly explained the economic function of the patent, which is the most important part of IP, concerning about the technological information, such as,

“Patent law, however, assumes that a time-limited patent, giving patentees the rights to exclude others from making, using, or vending that which is patented, is an important and necessary incentive for incurring the necessary costs of producing useful inventions. The reward depends upon providing competitive advantage to users. It is market oriented. Without patent protection, patent law assumes, rapid copying by others (who have not incurred the cost) would greatly diminish wealth-creating activity, to the detriment of the community. Invention would be under-rewarded.”¹⁶⁷

Another “economic standard rational of patent law is that it is an efficient method of enabling the benefits of research and development to be internalized, thus promoting innovation and technological progress.” (Ladas, p294)

The reason behind this is that “---for granting legal protection to inventions as to expressive works is the difficulty that a producer may encounter in trying to recover his fixed costs of research and development when the product or process that embodies a new inventions is readily copiable. A new product, for example, may require the developer to incur heavy costs before any commercial application can be implemented, so that a competitor able to copy the product without incurring those costs will have a cost advantage that may lead to a fall in the market price to a point at which the developer cannot recover his fixed costs.” (Landes,p294) And from the social point of view, “(if there is no any) legal protection for invention, the inventor will try to keep the invention secret, thus reducing the stock of knowledge available to society as a whole.” (Landes, p294)

¹⁶⁴ Break through on enhanced patent system for Europe,
http://ec.europa.eu/internal_market/smn/smn57/docs/patent_system_en.pdf.

The last visiting time: 28-02-2011.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Bowman, Ward S. Jr. (1973): Patent and Antitrust Law: A Legal and Economic Appraisal. Chicago: The University of Chicago Press. x.

5.4 “Intellectual property is one of the few ways that you can differentiate a product and enforce its uniqueness.”----- Ian Harvey, chief executive of the British Technology Group (BTG)

The importance of intellectual property was highlighted by a statement from Ian Harvey, chief executive of the British Technology Group (BTG):“Intellectual property is one of the few ways that you can differentiate a product and enforce its uniqueness. Competing on price or first-mover advantage is ephemeral in comparison.”¹⁶⁸

5.5 The importance of IPR declared by the Chinese government in the Outline of the National Intellectual Property Strategy (GUO FA [2008] No.18)¹⁶⁹

On June 5, 2008, the Chinese government declared her *Outline of the National Intellectual Property Strategy*. It is the milestone progress in the process of IPR protection in China. In the (2) of I. of Preface of *Outline of the National Intellectual Property Strategy*, the Chinese government definitely declared the importance of IPR,

“Intellectual property system is a basic system for developing and utilizing knowledge-based resources. By reasonably determining people's rights to certain knowledge and other information, the intellectual property system adjusts the interests among different groups of persons in the process of creating and utilizing knowledge and information, encourages innovation and promotes economic and social progress. In the world today, with the development of the knowledge-based economy and economic globalization, intellectual property is becoming increasingly a strategic resource in national development and a core element in international competitiveness, an important supporting force in building an innovative country and the key to hold the initiative in development. The international community attaches greater importance to intellectual property as well as innovation. Developed countries take innovation as the main impetus driving economic development, and make full use of the intellectual property system to maintain their competitive advantages. Developing countries actively adopt intellectual property policies and measures suitable for their respective national conditions to promote development.”¹⁷⁰

¹⁶⁸ Ian Harvey, BTG’s chief executive, believes that his company can be described quite simply in just two words: intellectual property. He says: “Intellectual property is one of the few ways that you can differentiate a product and enforce its uniqueness. Competing on price or first-mover advantage are ephemeral in comparison.” “Little-understood BTG aims to harness profit power of ideas”, *The Times*, 23 October 2000. From Note 1 of United Kingdom: The Patents Act 1977 (Amendment) Bill, Bill 9 of 2001-02, Working Reports (Papers) RESEARCH PAPER 01/84 31 OCTOBER 2001. See <http://www.parliament.uk/documents/commons/lib/research/rp2001/rp01-084.pdf>. The last visiting time: 02-03-2011.

¹⁶⁹ Outline of the National Intellectual Property Strategy GUO FA [2008] No.18
The State Council of the People’s Republic of China, June 5, 2008

See http://www.nipso.cn/rdwz/200806/t20080627_409087.html. The last visiting time: 28-02-2011.

¹⁷⁰ Ibid.

6 The Abuse

6.1 The definitions of “abuse” and “misuse”

---A comparative analysis from the linguistic perspective

In China, the English word “abuse” is correct English translation of the Chinese characters “濫用” (LAN YONG). But in English, there are two words—one is “abuse” and another is “misuse”. The word “abuse” (verb) means “to use or treat someone or something wrongly or badly, especially in a way that is to your own advantage.”¹⁷¹ The word “misuse” (verb) means “to use something in an unsuitable way or in a way that was not intended”.¹⁷²

In article 5A (2) of the Paris Convention as a ground of compulsory license (for example, failure to work), the Convention uses the word “abuse”, such as, Article 5 A. (2) Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.¹⁷³

In the 2 item of Article 40 of TRIPS, the TRIPS use the word “abuse”, such as, Article 40, “2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.”¹⁷⁴

However, in the IPR literatures and cases in the US, the writers use the word “misuse”, such as, “the misuse of patent”/ “the misuse of copyright” etc., and by way of the cases, the doctrine of “patent misuse” was established and developed. In the *LASERCOMB AMERICA, INC., v. JOB RENOLDS;HOLODAY STEEL RULE DIE CORPORATION*(No.89-3245), the judge SPROUSE delivered the court opinion, in his opinion, when the judge SPROUSE mentioned “the misuse of patent defense”, the judge SPROUSE wrote, “Although a patent misuse defense was recognized by the courts as early as 1917(*Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 052,61 L. Ed. 871,37S.Ct.416(1917), most commentators point to *Morton Salt Co. v. G.S.Suppiger*,314 U.S.488,86L.Ed.363,62 S.Ct.402(1942)”. The patent misuse defense also has been acknowledged by the US Congress in the 1988 Patent Misuse Reform Act, Pub.L.No.100-703,102 Stat.

¹⁷¹ See http://dictionary.cambridge.org/dictionary/british/abuse_1. The last visiting time: 03-03-2011.

¹⁷² See http://dictionary.cambridge.org/dictionary/british/misuse_1. The last visiting time: 03-03-2011.

¹⁷³ See http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html#P123_15283. The last visiting time: 03-03-2011.

¹⁷⁴ See http://www.wto.org/english/tratop_e/trips_e/t_agm3d_e.htm. The last visiting time: 03-03-2011.

4676(1988) (codified at 35 U.S.C. §271(d)(4)& (5), which limited but did not eliminate the defense.))

The misuse doctrine in American patent, copyright and trademark law is an extension of the unclean-hand doctrine rooted in Equity law. IP misuse is referred to the attempting to extend the term of intellectual property (for example, tying) and it can be a defense in IP infringement litigations. In European Law, intellectual property rights may be abused because of the right-holders' breach of the free movement policy or the competition policy in the EU treaty while they exercise their property rights, for example unilateral refusal to license (abuse of the dominant position), or restrict in licensing agreement.

Therefore, in my dissertation, the words “IPR abusing” and “IPR misusing” enjoy the same meanings, but I use the “IPR abusing” as the key words of my dissertation.

6.2 The definition of “IPR abusing”

Just like what I have discussed above that, the IPR is a kind of general concept. Therefore, the concept of “IPR abusing” is not a kind of scientific concept. In order to follow the custom, I will follow this habitual concept. However, in this dissertation, the IPRs abuse referrers to patent abuse/copyright abuse and trademark abuse.

There are a lot academic articles concerning about the IPR abusing. After comparison and analysis, I make a definition of IPR abusing, that is, “in order to obtain his unlawful benefit, the owner of IPR intentionally extend his exclusive right and bring about the prejudice to the public interests or the market competition order.”

7 The competition

7.1 The definition of competition

The concept of competition is “much too central concept in economics”¹⁷⁵. “*When the concept of competition entered economics at the hand of Adam Smith and his predecessors, it was not clearly define, but it generally meant entry by firms into profitable industries (or exit from unprofitable ones) and the raising or lowering of price by existing firms according to market conditions.*”¹⁷⁶

¹⁷⁵ Durlauf, Steven N. & Blume, Lawrence. (2008). *The new Palgrave dictionary of economics*. (2nd. ed.). Basingstoke; New York: Palgrave Macmillan. p55

¹⁷⁶ Ibid. p61.

And “the central elements of competition—the freedom of traders to use their resources where they will, and exchange them at any price they wish—will continue to play a major role in the economics of an enterprise economy.”¹⁷⁷

Generally, according to the economic theory, “Competition, causes commercial firms to develop new products, services and technologies, which would give consumers greater selection and better products. The greater selection typically causes lower prices for the products, compared to what the price would be if there was no competition (monopoly) or little competition (oligopoly).”¹⁷⁸

7.2 The economic analysis of competition

Competition is the core of market economy and the life of the market economy. The essential function of the competition is by way of market mechanism to allocate the resources efficiently.

In Laissez-faire economies, by way of competition, resources are efficiently allocated by the independent individuals (natural person and artificial person). For that, Adam Smith, “the father of modern economics”¹⁷⁹, in his milestone economics book *The National Wealth*,¹⁸⁰ Adam Smith described a perfect picture of the free market’s function.

In his milestone book, Adam Smith firstly described a picture of the key element of free market economy---the price mechanism (or the role of the price in the free economy).

Of the Natural and Market Price of Commodities:

“When the quantity of any commodity which is brought to market falls short of the effectual demand, all those who are willing to pay... cannot be supplied with the quantity which they want... Some of them will be willing to give more. A competition will begin among them, and the market price will rise... When the quantity brought to market exceeds the effectual demand, it cannot be all sold to those who are willing to pay the whole value of the rent, wages and profit, which must be paid in order to bring it thither... The market price will sink...”(Smith (1776) Book I, Chapter 7, para 9)¹⁸¹

And then he provided us a perfect picture of the free market’s function, that means that the function of “invisible hand” like that,

¹⁷⁷ Ibid.p56.

¹⁷⁸ See <http://en.wikipedia.org/wiki/Competition>. The last visiting time: 09-03-2011

¹⁷⁹ See http://en.wikipedia.org/wiki/Adam_Smith. The last visiting time: 03-03-2011.

¹⁸⁰ *The Wealth of Nations*

An Inquiry into the Nature and Causes of the Wealth of Nations, generally referred to by its shortened title The Wealth of Nations, is the magnum opus of the Scottish economist and moral philosopher Adam Smith. First published in 1776, it is a reflection on economics at the beginning of the Industrial Revolution and argues that free market economies are more productive and beneficial to their societies. The book is considered to be the foundation of modern economic theory.

See http://en.wikipedia.org/wiki/The_Wealth_of_Nations. The last visiting time: 08-03-2011.

¹⁸¹ Ibid.

"As every individual, therefore, endeavors as much as he can both to employ his capital in the support of domestic industry, and so to direct that industry that its produce may be of the greatest value; every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it." (Book 4, Chapter 2)¹⁸²

In this technology-based economy, the competition still plays very important role in the national economy and in the international economy.

In the website of USFTC, the FTC definitely declared her mission, and clearly points the importance of the completion, "Free and open markets are the foundation of a vibrant economy. Aggressive competition among sellers in an open marketplace gives consumers — both individuals and businesses — the benefits of lower prices, higher quality products and services, more choices, and greater innovation."¹⁸³ Yes, only by way of competition can the market be survived and can the consumer be benefited!

7.3 The political and economic analysis of competition

Competition is the core of the market economy. By way of competition, all the market mechanism can fully exert their functions, and then, the resources can be allocated in more efficient way. However, there are market failures, such as, the monopoly, etc. and how to deal with this monopoly, it is necessary the government to intervention, because the market itself does not get rid of such market failures. From the institutional point of view, the competition law a one kinds of governmental intervention. And the main purposes of the competition law are such as, to keep the order of market, to vitalize the competition, and to benefit the customer. And from this point of view, it help us get better understanding of why we call the "Antitrust law" as "the economical constitution" in the market economy. From the political economy, this is the symbol of market democracy or economic democracy.

And behind the economical democracy is the political democracy. From this point, for China, there is a long way to go!

¹⁸² Ibid.

¹⁸³ See <http://www.ftc.gov/bc/antitrust/index.shtm>. The last visiting time: 03-03-2011.

Chapter Three To regulate the abuse of IPRs —Law and Economic theories

1 Legal theories on which we depend to restrict IPR Misuses

1.1 Every private right can be misused---the basic principle of private law

1.1.1 From the nature of human being perspective

What is the nature of human being? This is typical philosophy question. Generally speaking, there are two classification of this basic philosophy question in the East and Western. One answer is that the nature of human being is goodness; another answer is that the nature of human being is evil. For the former, the great thinker in ancient China is MENG ZI (372 BC—289 BC)¹⁸⁴ (孟子 “性善论”),¹⁸⁵ who believe in that all the human being is goodness when they come into this world, and then, just because the later development environment change their natures. For the latter, the great thinker in ancient China is XUN ZI (313 BC-238 BC)¹⁸⁶ (荀子 “性恶论”),¹⁸⁷ who believed in that the nature of human being was evil. Therefore, in order to minimize the evil side of human being, we need the law and social rules to regulate the human being activity.

¹⁸⁴ 孟子（前 372 年—前 289 年），名轲，字子舆（待考，一说字子车或子居）。战国时期鲁国人，鲁国庆父后裔。中国古代著名思想家、教育家，战国时期儒家代表人物。著有《孟子》一书。孟子继承并发扬了孔子的思想，成为仅次于孔子的一代儒家宗师，有“亚圣”之称，与孔子合称为“孔孟”。

See <http://baike.baidu.com/view/2655.htm>. The last visiting time:12-03-2011.

¹⁸⁵ 《孟子·告子上》：

“恻隐之心，人皆有之；羞恶之心，人皆有之；恭敬之心，人皆有之；是非之心，人皆有之。恻隐之心，仁也；羞恶之心，义也；恭敬之心，礼也；是非之心，智也。仁义礼智非由外铄我也，我固有之也。”

See <http://baike.baidu.com/view/762951.htm>. The last visiting time: 13-03-2011.

¹⁸⁶ 荀子（约公元前 313—前 238）名况，字卿，因避西汉宣帝刘询讳，因“荀”与“孙”二字古音相通，故又称孙卿。汉族，周朝战国末期赵国猗氏（今山西安泽）人。著名思想家、文学家、政治家，儒家代表人物之一，时人尊称“荀卿”。曾三次出齐国稷下学宫的祭酒，后为楚兰陵（今山东兰陵）令。荀子对儒家思想有所发展，提倡性恶论，常被与孟子的性善论比较。对重整儒家典籍也有相当的贡献。

See <http://baike.baidu.com/view/2776.htm>. The last visiting time: 12=03=2011.

¹⁸⁷ 《荀子·性恶》

“今人之性，生而有好利焉，顺是，故争生而辞让亡焉。生而有疾恶焉，顺是，故残贼生而忠信亡焉。生而有耳目之欲，有好声色焉，顺是，故淫乱生而礼义文理亡焉。然则从人之性，顺人之情，必出乎争夺，合于犯分乱理而归于暴。”

See <http://baike.baidu.com/view/546999.htm>. The last visiting time: 13-03-2011.

In the Western philosophy, Hume believes that “Among the former, we may justly esteem our selfishness to be the most considerable”. (“在自然性情方面，我们应该认为自私是最重大的。”)¹⁸⁸. In the eye of Thomas Hobbes,¹⁸⁹ in the prehistoric time (in the state of nature), just because the nature of human being is the evil, therefore, they were involving in the state war among each other. “Hobbes contends that man is naturally intrepid (勇猛), and is intent only upon attacking and fighting.”¹⁹⁰

“Above all, let us not conclude, with Hobbes, that because man has no idea of goodness, he must be naturally wicked; that he is vicious because he does not know virtue; that he always refuses to do his fellow-creatures services which he does not think they have a right to demand; or that by virtue of the right he truly claims to everything he needs, he foolishly imagines himself the sole proprietor of the whole universe.”¹⁹¹

In *On the origin of inequality* (1753), Jean Jacques Rousseau claimed that,

“Insatiable ambition, the thirst of raising their respective fortunes, not so much from real want as from the desire to surpass others, inspired all men with a vile propensity to injure one another, and with a secret jealousy, which is the more dangerous, as it puts on the mask of benevolence, to carry its point with greater security. In a word, there arose rivalry and competition on the one hand, and conflicting interests on the other, together with a secret desire on both of profiting at the expense of others. All these evils were the first effects of property, and the inseparable attendants of growing inequality.”¹⁹²

1.1.2 From the perspective of capital

¹⁸⁸ Hume, David (1739-40). A Treatise of Human Nature

BOOK III: OF MORALS, Part II: OF JUSTICE AND INJUSTICE, SECT. II Of the origin of justice and property Available at <http://www.class.uidaho.edu/mickelsen/texts/Hume%20Treatise/hume%20treatise3.htm#ADVERTISEMENT>. The last visiting time: 27-02-2011.

“在自然性情方面，我们应该认为自私是最重大的。” 休谟，*人性论*（上下）关文运翻译，商务出版社，1980年版。第三卷 道德学，第二章 论正义与非义，第二节 论正义与财产权的起源，P219

¹⁸⁹ See http://en.wikipedia.org/wiki/Thomas_Hobbes. The last visiting time: 09-03-2011.

¹⁹⁰ [法] 卢梭著（1753），李常山译，东林校，*论人类不平等的起源和基础*，北京：商务印书馆，1962。P76

Rousseau, Jean Jacques.(1753).ON THE ORIGIN AND FOUNDATION OF THE INEQUALITY OF MANKIND

See http://www.constitution.org/jjr/ineq_03.htm. The last visiting time: 01-02-2011.

¹⁹¹ Ibid. p98

¹⁹² See http://www.constitution.org/jjr/ineq_03.htm. The last visiting time: 28002-2011

Insatiable ambition, the thirst of raising their respective fortunes, —, inspired all men with a vile propensity to injure one another.” 卢梭认为：“对聚集财富的狂热，使所有人都产生一种损害他人的阴险意图”

The right of property and the right of IPR are very important capital in the free market, therefore, according to Marx's theories, "Capital comes dripping from head to foot, from every pore with blood and dirty."¹⁹³

And then, Marx quoted T.J. Dunning's famous saying to describe the nature of capital, "*Capital is said by a Quarterly Reviewer to fly turbulence (汹涌) and strife (竞争、冲突、吵架), and to be timid, which is very true; but this is very incompletely stating the question. Capital eschews (避免、避开) no profit, or very small profit, just as Nature was formerly said to abhor a vacuum. With adequate profit, capital is very bold. A certain 10 per cent will ensure its employment anywhere; 20 per cent certain will produce eagerness; 50 per cent., positive audacity; 100 per cent will make it ready to trample on all human laws; 300 per cent, and there is not a crime at which it will scruple, nor a risk it will not run, even to the chance of its owner being hanged. If turbulence and strife will bring a profit, it will freely encourage both. Smuggling and the slave-trade have amply proved all that is here stated.*" (T. J. Dunning, l. c., pp. 35, 36.)¹⁹⁴

And then, from the capital perspective, we can say that the owner of property and IP can easily abuse their right.

1.1.3 "Absolutely private right leads to absolutely corruption"

Montesquieu (Charles-Louis de Secondat, baron de La Brède et de Montesquieu) (18 January 1689 – 10 February 1755), a French social commentator and political thinker who lived during the Enlightenment.¹⁹⁵

In his famous treaty on political theory, named *The Spirit of the Laws (De l'esprit des loix)*(1748),¹⁹⁶ Montesquieu clearly pointed that "the absolutely power leads to absolutely corruption" And the famous saying like that "*But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go.*"¹⁹⁷

¹⁹³ Karl Marx. Capital Volume One, Chapter Thirty-One: Genesis of the Industrial Capitalist.(Transcribed by Zodiac, Html Markup by Stephen Baird (1999))

See <http://www.marxists.org/archive/marx/works/1867-c1/ch31.htm>. The last visiting time: 03-03-2011.

¹⁹⁴ Ibid. Note 15.

¹⁹⁵ See <http://en.wikipedia.org/wiki/Montesquieu>. The last visiting time: 02-03-2011.

¹⁹⁶ See http://en.wikipedia.org/wiki/The_Spirit_of_the_Laws, The last visiting time: 02-03-2011.

¹⁹⁷ Montesquieu, Baron de.(1748). *The spirit of laws*. Translated by Thomas Nugent and revised by J. V. Prichard, in Adler, Mortimer J. (Editor in Chief) (1993). *Great Books of the Western World*, 35 Montesquieu, Rousseau. (2ed. ed.). Chicago: Encyclopaedia Britannica, 1990. P69.

孟德斯鸠在十一章第四节中写道：“一切有权力的人都容易滥用权力，这是万古不易的一条经验。有权力的人们使用权力一直到遇到有界限的地方才休止。”

(法) 孟德斯鸠 (1748)，张雁深 翻译，*论法的精神*，北京：商务印书馆，1961。

Book XI of the laws which establish political liberty, with regard to the constitution
4 *The same subject continued.*

What the great philosophy said in the political aspect is correct, so does it in the civil aspect. That means "Absolutely private right leads to absolutely corruption"

And in 1887, the same *most famous pronouncement* also delivered by the great politician the Lord Acton,¹⁹⁸ "the great individualist social philosopher of nineteenth century".¹⁹⁹

*"I cannot accept your canon that we are to judge Pope and King unlike other men with a favourable presumption that they did no wrong. If there is any presumption, it is the other way, against the holders of power, increasing as the power increases. Historic responsibility has to make up for the want of legal responsibility. **All power tends to corrupt and absolute power corrupts absolutely.** Great men are almost always bad men, even when they exercise influence and not authority: still more when you supereadd the tendency or certainty of corruption by full authority. There is no worse heresy than that the office sanctifies the holder of it."*^{200 201}

1.2 The owner of IPR can abuse its IPR

Why the owner of IPR can abuse its IPR?

1.2.1 From the physical nature of IPR---- IPR is a kind of information, and such information enjoy dual natures, which functions both as a valuable commodity and as the foundation of knowledge in the information economy. Therefore, in contrast to physical property, there is great space for the owner of IPR to abuse these intangible information.

1.2.2 From the legal nature of IPR---IPR is kind of private right (TRIPS), and according to the civil law theory, there is probability that each civil right will tend to be abused.

1.2.3 The owner of IPR enjoy a kind of legal monopoly ---the exclusive right granted by the state, which is kind of incentive measures to encourage the innovation.

But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has need of limits?

To prevent this abuse, it is necessary from the very nature of things that power should be a check to power. A government may be so constituted, as no man shall be compelled to do things, to which the law does not oblige him, nor forced to abstain from things which the law permits. P69

¹⁹⁸ John Emerich Edward Dalberg-Acton, 1st Baron Acton, KCVO, DL (10 January 1834 – 19 June 1902), known as Sir John Dalberg-Acton, 8th Bt from 1837 to 1869 and usually referred to simply as Lord Acton, was an English Catholic historian, politician, and writer.

See http://en.wikipedia.org/wiki/John_Dalberg-Acton,_1st_Baron_Acton. The last visiting time: 09-03-2011.

¹⁹⁹ Hayek, F. A. (1940-1944). *The road to serfdom*. London: G. Routledge & Sons, (First Published in March 1944). P107.

²⁰⁰ Supra 25. Note 7, Dalberg-Acton, John Emerich Edward (1949), *Essays on Freedom and Power*, Boston: Beacon Press, p. 364

²⁰¹ Also see "Power tends to corrupt, and absolute power corrupts absolutely.---Lord Acton"

Hayek, F. A. (1940-1944). *The road to serfdom*. London: G. Routledge & Sons, (First Published in March 1944). P100

In order to maximize its benefits, there is great tendency for the owner of IPR to abuse its legal monopoly position.

1.2.4 In this technology-based market, in order to obtain the competitive advantages in both domestic and international market, it is one of the very important strategies for a company to make good use of its intellectual capital. Therefore, there is probability for a company to misuse its IPR.

1.2.5 From the statistics, the number of IPR abusing case is steadily increasing, such as, U.S vs. Microsoft²⁰² ²⁰³, EU vs. Microsoft, ²⁰⁴FTC vs. Intel, EU vs. Intel, etc.

2 Marx's economic theories about the technology innovation and competition

2.1 Marx's economic theories about the technology innovation

2.1.1 The technology advance is the key element to make the society become two opposite class.

According to my understanding of Marx's theories, the key element of the Marx's theories is the social class division. That is, according to Marx's theories, the society can be divided into two kinds of social class, the proletarians and the "capitalist" or "bourgeois". The proletarians are those people who can and only can sell their labor-power for the money, which allows them to survive. Those who buys the labor power, generally someone who does own the land and technology to produce, is a "capitalist" or "bourgeois". The proletarians inevitably outnumber the capitalists.²⁰⁵ And "The history of all hitherto existing society is the history of class struggles." — (The Communist Manifesto, Chapter 1)

²⁰² See http://en.wikipedia.org/wiki/United_States_v._Microsoft. The last visiting time: 15-03-2011.

²⁰³ See <http://www.microsoft.com/presspass/download/legal/RemediesTrial/PubIntDeterm11-1.pdf>. The last visiting time: 15-03-2011.

²⁰⁴ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:166:0016:0019:EN:PDF>. The last visiting time: 15-03-2011.

²⁰⁵ According to Marx, a capitalist mode of production developed in Europe when labor itself became a commodity—when peasants became free to sell their own labor-power, and needed to do so because they no longer possessed their own land. People sell their labor-power when they accept compensation in return for whatever work they do in a given period of time (in other words, they do not sell the product of their labor, but their capacity to work). In return for selling their labor-power they receive money, which allows them to survive. Those who must sell their labor-power are "proletarians". The person who buys the labor power, generally someone who does own the land and technology to produce, is a "capitalist" or "bourgeois". The proletarians inevitably outnumber the capitalists. http://en.wikipedia.org/wiki/Karl_Marx

Marx claims that through the history of human being, the productive force play very important rule in the human being's development. And the technology is one of vital element of productive force. Just because the progress of technology improve the productive force, and then, there are a lot of surplus of commodity, therefore, thus makes the human being to enjoy the possibility of classifying the labor occupation and the intellectual occupation. And thus, such classification of labor, on one aspect, it impetus to the development of the productivity and the progress of social civilization, and make the human being to step out from the cruelty primitive society to the civilization society; on another aspect, this classification of labor is the basis of the preliminary class division. Just because there accure the labor classification and the private property, therefore, the exploitists who monopoly the spiritual products and the labourists who take upon the whole labour work are in confront with each other for theirs essential interests, and thus, from that point, the human beings enter into the class society.²⁰⁶

2.1.2 The technology innovation is one of main ways for the capitalism to get rid of the economic crisis

Marx considered the capitalist class to be one of the most revolutionary class in the history,^{207 208} because it constantly improved the means of production, that means, it has an incentive to reinvest profits in new technologies and capital equipment.²⁰⁹ However, just because there exist the fundamental conflict between the social industrial production and the private property, the capitalism was prone to periodic crises. This is the economic growth cycle---growth-crisis-collapse

²⁰⁶ **Karl Marx's historical materialism.**

Marx claims that through the history of human being, the progress of technology improve the labor productivity, and then, there are a lot of surplus of commodity, therefore, thus makes the human being to enjoy the possibility of classifying the labor occupation and the intellectual occupation. And thus, such classification of labor, on one aspect, it impetus to the development of the productivity and the progress of social civilization, and make the human being to step out from the cruelty primitive society to the civilization society; on another aspect, this classification of labor is the basis of the preliminary class deviation. Just because there accure the labor classification and the private property, therefore, the exploitists who monopoly the spiritual products and the labourists who take upon the whole labour work are in confront with each other for theirs essential interests, and thus, from that point, the human beings enter into the class society.

馬克思認為，在人類歷史上，科技的進步提高了勞動生產率，從而剩餘生產物增多，使得人類有可能在自身中實行腦體分工。這種分工一方面大大促進了生產力的發展和文明的進步，使人類從原始社會的野蠻階段走了出來，進入文明時期；另一方面，腦體分工本身就是最初階級劃分的基礎，由於分工和私有制的出現，使壟斷精神生產的剝削階級分子與承擔全部體力勞動的勞動階級處在根本利益相互對抗的關係之中，人類自此進入階級社會。

See <http://zh.wikipedia.org/zh/%E5%8D%A1%E5%B0%94%C2%B7%E9%A9%AC%E5%85%8B%E6%80%9D>. The last visiting time: 14-03-2011.

²⁰⁷ Marx, K.(1848) *The Communist Manifesto*. "The bourgeoisie, historically, has played a most revolutionary part." See http://www.woyouxian.com/b06/b060401/communist_manifesto_en1.html. The last visiting time: 14-03-2011.

²⁰⁸ Ibid. "The bourgeoisie, during its rule of scarce one hundred years, has created more massive and more colossal productive forces than have all preceding generations together. Subjection of Nature's forces to man, machinery, application of chemistry to industry and agriculture, steam-navigation, railways, electric telegraphs, clearing of whole continents for cultivation, canalisation of rivers, whole populations conjured out of the ground -- what earlier century had even a presentiment that such productive forces slumbered in the lap of social labour?"

资产阶级在它的不到一百年的阶级统治中所创造的生产力，比过去一切时代创造的全部生产力还要多，还要大。自然力的征服，机器的采用，化学在工业和农业中的应用，轮船的行驶，铁路的通行，电报的使用，整个大陆的开垦，河川的通航，仿佛用魔术从地下呼唤出来的大量人口，---过去哪一个世纪料想到在社会劳动里蕴藏有这样的生产力呢？

See http://www.woyouxian.com/b06/b060401/communist_manifesto_en3.html. The last visiting time: 09-03-2011.

²⁰⁹ Ibid. "The bourgeoisie cannot exist without constantly revolutionizing the instruments of production,"

and then more growth. When the capitalism in the economic crisis, in order to get of the economic collapse, the most important way they can do is to invest more money to stir the technology improvement and open the new sectors of the economy.²¹⁰

2.2 Marx's economic theories about the competition

According to Marx's theories, to pursue the maximum surplus is the nature of each capitalist. In order to sell their commodities at the average cost of producing, there are severe completions among them, for the new markets, new products. The competition drives capitalists to centralization (many companies under one control) and concentration of capitals (increasing dimension of companies) in order to bring down the prices of commodities. And the competition is a main driving force that leads to technological innovation. Because only by way of technological innovation and concentration, can the capitalist efficiently get the benefits of the scale of capital and change the composition of the capitals.

Profits (and prices) in the market are a medium (average) of all the values of the single firms and the single branches of manufacturing. The capitalist who can sell at less than this average (because of his technological advances) can take possession of a larger share of profits. At this point, everyone is compelled to change to be competitive. This never-ending trend that is innate(天生的、固有的) in the nature of capitalism can also have negative consequences.

3 The Austrian Economic School and Schumpeter's "Destructive Innovation"

3.1 What is the Austrian Economic School

The Austrian school of economics from its beginnings in Vienna in the 1870s to the present, which has drawn increasing attention in recent year, takes its name from a group of Austrian scholars who established it.²¹¹ Such as Carl Menger,²¹² 213 214 Ludwig von Mises, Joseph Alio Schumpeter,²¹⁵

²¹⁰ Capitalism can stimulate considerable growth because the capitalist can, and has an incentive to reinvest profits in new technologies and capital equipment. Marx considered the capitalist class to be one of the most revolutionary in history, because it constantly improved the means of production. But Marx argued that capitalism was prone to periodic crises. He suggested that over time, capitalists would invest more and more in new technologies, and less and less in labor. Since Marx believed that surplus value appropriated from labor is the source of profits, he concluded that the rate of profit would fall even as the economy grew. When the rate of profit falls below a certain point, the result would be a recession or depression in which certain sectors of the economy would collapse. Marx thought that during such an economic crisis the price of labour would also fall, and eventually make possible the investment in new technologies and the growth of new sectors of the economy.

Marx believed that increasingly severe crises would punctuate this cycle of growth, collapse, and more growth. Moreover, he believed that in the long-term this process would necessarily enrich and empower the capitalist class and impoverish the proletariat. He believed that if the proletariat were to seize the means of production, they would encourage social relations that would benefit everyone equally, and a system of production less vulnerable to periodic crises. http://en.wikipedia.org/wiki/Karl_Marx

²¹¹ Kallay, D. (2004). *The Law and Economics of Antitrust and Intellectual Property: An Austrian Approach*. Cheltenham: Edward Elgar. P19.

Friedrich August von Hayek²¹⁶, Ludwig Lachmann, Israel Kirzner and other. As the Austrian school development has been evolving for nearly 130 years there are different perspectives among “Austrian” economics.²¹⁷

For Austrian economic school, I will apply the Schumpeter’s “Creative destruction” theory as main way to analysis the basic research questions in my dissertation. There are four key words in Schumpeter’s theory, these are Entrepreneurship, Innovation, Competition and Monopoly, and through the diligent learning about Schumpeter’s theory, I believe that the Schumpeter’s theory can best illustrate the relation among these Entrepreneurship, Innovation and Competition, and these are the key points for me to get understanding.

3.2 What are the main characteristics of Austrian School

According to my understandings of Austrian Economic School, I try my best to sum up the main characteristics of Austrian School are followings:

3.2.1 Upholding the Inviolability of the private property

The private property is the basic concept of the Western Economy. That means, the private property, the free market and the freedom of the transfer of the private property are the three essential elements in the Western Economic world.

For the importance of the private property, Hayek claimed that “**The private property is the guarantee of the individual’s liberty**” Friedrich Hayek,²¹⁸ the former Nobile Prize owner, the encyclopedia-styled scholar Hayek’s writing “To define the property is the first step to prevent us from domination. The private property is the basic element of freedom, is an unalienable natural

²¹² Carl Menger (February 28, 1840 – February 26, 1921) was the founder of the Austrian School of economics, famous for contributing to the development of the theory of marginal utility, which contested the cost-of-production theories of value. See http://en.wikipedia.org/wiki/Carl_Menger. The last visiting time: 09-03-2011.

²¹³ Menger, Carl. (1871). *Principals of Economics*

This online version of Carl Menger’s Principles of Economics contains corrections to the 1976 New York University edition; the manuscript is otherwise the same. First printing in German, 1871. The first English translation was copyright 1950 by the The Free Press, with an introduction by Frank H. Knight; 1976 and 1981 by the Institute for Human Studies, published by New York University Press with an introduction by F.A. Hayek; 1994 by Libertarian Press (reprint of the 1976 edition). Online version is copyright 2004 by the Ludwig von Mises Institute. <http://mises.org/etexts/menger/principles.asp>

²¹⁴ Bloch, Henni-Simon (1940). Carl Menger: The Founder of the Austrian School. *The Journal of Political Economy*, Vol. 48, No. 3 (Jun., 1940), 428-433. Stable URL: <http://www.jstor.org/stable/1825598> .Accessed: 25/01/2011 08:05. <http://www.jstor.org/stable/pdfplus/1825598.pdf?acceptTC=true>

²¹⁵ Joseph Alois Schumpeter (8 February 1883 – 8 January 1950) was an Austrian-American economist and political scientist. He popularized the term "creative destruction" in economics.

See http://en.wikipedia.org/wiki/Joseph_Schumpeter. The last visiting time: 09-03-2011.

²¹⁶ See http://en.wikipedia.org/wiki/Friedrich_Hayek. The last visiting time: 09-03-2011.

²¹⁷ Kallay, D. (2004). *The Law and Economics of Antitrust and Intellectual Property: An Austrian Approach*. Cheltenham: Edward Elgar. p19

²¹⁸ Friedrich August Hayek CH (8 May 1899 – 23 March 1992), born Friedrich August von Hayek, was an Austrian-born economist and philosopher best known for his defense of classical liberalism and free-market capitalism against socialist and collectivist thought. He is considered to be one of the most important economists and political philosophers of the twentieth century, winning the Nobel Memorial Prize in Economic Sciences in 1974. See http://en.wikipedia.org/wiki/Friedrich_Hayek . The last visiting time: 28-02-2011.

right .To recognize the right of property is the prior and fundamental condition to prohibit and prevent the state and the government from coercion /totalitarianism and arbitration!----- If the right of property and material property are control by an agency or somebody, the freedom of individual will be totally died out! ”²¹⁹; also Hayek attributed the birth of civilization to private property.²²⁰ “Where There Is No Property There Is No Justice”²²¹

All these great inspiring sayings have definitely shown the importance of private property!

3.2.2 The knowledge of human being is limited, they are ignorance to the process of economy.

There is no any omniscient and omnipotent person to know everything. The individual himself is the best judge to decide what is the best to his interest. The economic activities are the process of “spontaneous process”.

For Hayek, the concept of *spontaneous order* is the key important concept in Hayek’s works. *Spontaneous orders* most usefully regarded as an ethically neutral tool for analyzing large modern societies in which knowledge is very widely dispersed, so that ‘out of the totality of what is known in the economy at large, any single person knows essentially nothing’²²²

3.2.3 Paying more attention to the importance of individual

Quite different from the Neoclassical economic school, the Austrian Economic School pay more attention to the human being’s role in the process of economic process. More specifically, in the eyes of economist of AES, there are two group of individual play the key role in the economic process, one is the customer, another is the Entrepreneur. For the customer, this is the key concept in Carl Menger’s theory, the founder of AEC; for the Entrepreneur, this is the key concept in Schumpeter’s theory.

“Menger ([1871]1981:191) insisted that the force that drives all economic process is that individual ‘strive to better their economic position as much as possible.’”²²³

“Schumpeter’s theory was centered around the entrepreneur: he argued that change in economic

²¹⁹ Hayek: *The Road to Serfdom* (1944) 具体的出处

²²⁰ Hayek(1988): *The Fatal Conceit: the errors of socialism*.

See http://en.wikipedia.org/wiki/Friedrich_Hayek. The last visiting time: 28-02-2011.

²²¹ “没有财产的地方亦无公正” 哈耶克《致命的自负》第2章：自由、财产和公正的起源
<http://www.jingjixue.info/2009/10/313701.html>

“Where There Is No Property There Is No Justice”

Hayek, Friedrich A. (1988) *The fatal conceit: the errors of socialism*. (Edited by W. W. Bartley. London: Routledge. P33.

²²² Rosen, S. (1997). *Austrian and neoclassical economics: any gains from trade?* *Journal of Economic perspectives* 11(4):139-52. Adapted from Preface of Newman, Peter.(Ed.) (1998). *The new Palgrave dictionary of economics and the law. (1:A-D;2:E-O; 3:P-Z)*.London: Macmillan; New York: Stockton.

²²³ Newman, Peter.(Ed.) (1998). *The new Palgrave dictionary of economics and the law.(1:A-D;2:E-O; 3:P-Z)*.London: Macmillan; New York: Stockton. P638

life always starts with the actions of a forceful individual and then spreads to the rest of the economy.”²²⁴ “The entrepreneur, a neglected figure in classical and neoclassical economics, is the central figure in the Schumpeterian analytical framework.”²²⁵

3.2.4 Paying more attention to the importance of Entrepreneurship

In the Schumpeter economic theories, the Entrepreneur is the key important concept, and even more important the concept of Entrepreneurship.

In order to full understand the Schumpeter’s theories, you must fully understand the meanings of Entrepreneur and the concept of Entrepreneurship. By way of thorough reading of Schumpeter’s works, I understand these two important concepts in the following way:

(1) The Entrepreneur is general concept, it is not a particular group of individual, in different economic process, they play very important role to push the progress of the human being, they are the momentum of social progress.

(2) The Entrepreneurship is more abstract concept, in other words, it is the symbol of spirits or some kinds of values which stand by the Entrepreneur. Generally, these spirits or values are the followings, but not limited as these:

Pursue the freedom, pursue the self- realization, and never self-contented, and always to pursue the self-perfection, self-promotion.

They pursue the success in their careers, the economic success is the basic aspects of the success which they pursue. In other words, they pay more attention to the spiritual success, not the only material success.

3.2.5 Paying more attention to the innovation

Schumpeterian growth is a particular type of economic growth which is based on the process of creative destruction. The process of creative destruction was described in the writings of Joseph Schumpeter (1928, 1942) and refers to the endogenous introduction of new products and/or processes. For instance, in *Capitalism, Socialism and Democracy*, chapter 8, Schumpeter states:

The essential point to grasp is that in dealing with capitalism we are dealing with an evolutionary process...The fundamental impulse that sets and keeps the capitalist engine in motion

²²⁴ Schumpeter, Joseph Alois. (1942). *Capitalism, Socialism and Democracy*. Geogr Allen & Unwin.1976.

Available at

http://books.google.com.hk/books?id=6eM6YrMj46sC&printsec=frontcover&dq=Capitalism,+Socialism+and+Democracy&hl=zh-CN&ei=5ut5TI-XHoSlcYfBqOoF&saX&oi=book_result&ct=result&resnum=1&ved=0CCQO6AEwAA#v=onepage&q&f=false.

The last visiting time: 02-03-2011. Introduction p x i

²²⁵ Durlauf, Steven N. & Blume, Lawrence. (2008). *The new Palgrave dictionary of economics*. (2nd. ed.). Basingstoke; New York: Palgrave Macmillan. p62

*comes from the new consumer goods, the new methods of production, or transportation, the new forms of industrial organization that capitalist enterprise creates...In the case of retail trade the competition that matters arises not from additional shops of the same type, but from the department store, the chain store, the mail-order house and the super market, which are bound to destroy those pyramids sooner or later. Now a theoretical construction which neglects this essential elements of the case neglects all that is most typically capitalist about it; even if correct in logic as well as in fact, it is like Hamlet without the Danish prince.*²²⁶

3.2.6 Paying more attention to the dynamic competition.

The competition is key important concept in the Austrian Economic School. In the viewpoint of AEC, the competition is not only the price completion, it is the technological innovation competition, it is the institutional competition.

In Schumpeter's perspective, competition is broad concept. Unlike the some economic school, which focus attention mainly on the price competition, there are many of additional elements involve in the Schumpeter's competitive process, along with price-guided output determination. "In particular, costly efforts to appropriate the gains from innovation are added to the firm's competitive repertoire."²²⁷ Besides that, competition is a realistic and dynamic market process, NOT an equilibrium situation.

Competition is "an actual market activities and dynamic process",²²⁸ not an equilibrium situation. Therefore, as soon as we make analysis of competition, we should not focus our attention on the "perfect competition situation"---the results of completion,^{229 230 231} we should pay more attention on the process of "actual market activities and process"²³²

3.2.7 From the dynamic/realistic and historical perspective to conduct the further researches of economic phenomena

²²⁶ Elias Dinopoulos and Fuat Şener, *New Directions in Schumpeterian Growth*, Available at <http://bear.warrington.ufl.edu/dinopoulos/pdf/schumpeteriangrowth.pdf>. The last visiting time: 15-03-2011.

²²⁷ Durlauf, Steven N. & Blume, Lawrence. (2008). *The new Palgrave dictionary of economics*. (2nd. ed.). Basingstoke; New York: Palgrave Macmillan.p59.

²²⁸ Ibid.p61

²²⁹ Ibid. p61

"Indeed, one of the central challenges by Austrians to the neoclassical model, and a common denominator of virtually all Austrian economics, is the rejection of the concept of perfect competition."p61

²³⁰ Ibid. p62

"What is objectionable to Austrian economists is the neoclassical concept of perfect competition, developed during the 19th and early 20th centuries. The development began with Cournot (1838), whose concern it was to specify as rigorously as possible the effects of competition, after the process of competition had reached its limits. His conceptualization of this situation was a market structure in which the output of any one firm could be subtracted from total industry output with no discernible effect on price. Later, contributions by Jevons, edgeworth, J. B.Clark and Frank Knight led to the model of perfect competition as we know it today (Stigler, 1957; McNulty,1967)" p62.

²³¹ Ibid. p62. "Schumpeter insisted on the irrelevance of the concept of perfect competition to an understanding of the capitalist process."p62

²³² Ibid.p61

From the dynamic perspective to conduct the further research of economic phenomena

“The essence of Austrian economics is its emphasis on the ongoing economic process as opposed to the equilibrium analysis of neoclassical theory.”²³³ Therefore, when we conduct the research of the economic phenomena, we should keep this research method in our mind, to regard the economic phenomena as a constantly change process.

From the realistic perspective to conduct the further researches of economic phenomena

The realistic aspect of the Austrian approach is well explained by Friedrich Hayek (1947, *Individualism and economic order*), who wrote like that “The economic problem is a problem of making the best use of what resources we have, and not one of what we should do if the situation were different from what it actually is.”²³⁴

They pay more attention to apply the realistic statistics to analysis the practical things which happened in the market. Therefore, to apply the practical research method and to use the realistic statistics to analysis the economic phenomena is the basic research for us to analysis the economic phenomena.

From the historical perspective to conduct the further research of economic phenomena, innovation is a constantly process, the economic change is a kind of creative destruction. Therefore, all these economic phenomena are should be analysis from the historical point of view.

3.2.8 Apply the institutional method to analysis and observe the economic phenomena

That means when they observe and analysis the economic phenomena, they take the historical and institutional perspectives to conduct the analysis. We should analysis the economic development, the creative destruction process not only from the micro-institutional perspective, but also from the macro-institutional aspect.

3.3 Schumpeter’s “Destructive Innovation”

As one of the key economists of the twentieth century, Schumpeter’s theory is viewed in relation to areas a diverse as the history of economic analysis, economic methodology and economic sociology, as well as the theories of entrepreneurship, competition, innovation, business cycles, money, banking and finance.²³⁵

3.3.1 Innovation----From Schumpeter’s perspective

²³³ Durlauf, Steven N. & Blume, Lawrence. (2008). *The new Palgrave dictionary of economics*. (2nd. ed.). Basingstoke; New York: Palgrave Macmillan. P61.

²³⁴ Hayek, Friedrich A. (1949). *Individualism and economic order*. London: Routledge & Kegan Paul Ltd. 104.

²³⁵ Arena, Richard. & Dangel-Hagnauer, Cécile. (Eds.) (2002). *The contribution of Joseph A. Schumpeter to economics: economic development and institutional change*. New York: Routledge.

3.3.1.1 What is Innovation? ----From Schumpeter's perspective

The concept of Innovation in Schumpeter's books is very general concept or much broad concept, and the key words of Schumpeter's theory.

(1) From the contents perspective, the Innovation is very general concept, not only refers to the technological progress, but also, to the new products, new process of production, new market. Generally speaking, it refers to the all the improvement and progress in every aspect of market, in every aspect of society.

It is the institutional innovation.

(2) From the dynamic perspective, the innovation is a kind of constantly social process, never end, and pushing the society continuously development! It is "the competition process, not an equilibrium situation"²³⁶

(3) From the institutional perspective, from the micro-aspect—the enterprise perspective, it is new product, new productive line, and new market, new operation structure of company, etc.

From the macro-aspect—it is the technological improvement and innovation of whole industrial, such as, the innovation in financial market, the technological market, etc.

From political and economic institutional aspect—the innovation of legal system, political system

3.3.1.2 The function of Innovation—creative destruction

Just because there is dynamic impetus from the Entrepreneurship to innovation, therefore, this leads to the severe completion among the each entrepreneur, and by way of this dynamic completion, lead to not only the company's structure change, the financial market change, but also to the social institutional changes. Finally, there is creative destruction not only to the company, but to the society.

From historical aspect----the innovation is an impetus to keeping the capitalism living forever.

3.3.1.3 The source of innovation –Entrepreneurship

The sources of innovation are coming from the individuals, or every entrepreneur. It is inner force of a company to try to be the best.

3.3.2 Competition ---From Schumpeter's perspective

²³⁶ "The trouble with the concept from the Austrian point of view, as Hayek has emphasized, is that it describes an equilibrium situation but says nothing about the competition process which led to that equilibrium."

Durlauf, Steven N. & Blume, Lawrence. (2008). *The new Palgrave dictionary of economics*. (2nd. ed.). Basingstoke; New York: Palgrave Macmillan.p62

3.3.2.1 In Schumpeter's perspective, competition is broad concept

Unlike the some economic school, which focus attention mainly on the price competition, there are many of additional elements involve in the Schumpeter's competitive process, along with price-guided output determination. "In particular, costly efforts to appropriate the gains from innovation are added to the firm's competitive repertoire."²³⁷

3.3.2.2 Competition is a realistic and dynamic market process, NOT an equilibrium situation

Competition is "an actual market activities and dynamic process",²³⁸ not an equilibrium situation. Therefore, as soon as we make analysis of competition, we should not focus our attention on the "perfect competition situation"---the results of competitions,^{239 240 241} we should pay more attention on the process of "actual market activities and process"²⁴²

3.3.2.3 The purpose of competition

In Schumpeter's theory, the purpose of competition of entrepreneur, or individual in the market, is not only for the price of good, or the maximizing the profit, or the market share of company, but also mostly for pursuing a kind of high level competition. In another words, the individual with entrepreneurship pay more attention to the spiritual aspects, to the social aspect, not only to the economic aspect.

3.3.2.4 The result of the dynamic competition — — creative destruction

The result of this dynamic competition is not only the company get better competitive advantages, but also to change the whole market institution, and lead to the creative destruction.

²³⁷ Durlauf, Steven N. & Blume, Lawrence. (2008). *The new Palgrave dictionary of economics*. (2nd. ed.). Basingstoke; New York: Palgrave Macmillan.p59.

²³⁸ Ibid.p61

²³⁹ Ibid. p61

"Indeed, one of the central challenges by Austrians to the neoclassical model, and a common denominator of virtually all Austrian economics, is the rejection of the concept of perfect competition."p61

²⁴⁰ Ibid. p62

"What is objectionable to Austrian economists is the neoclassical concept of perfect competition, developed during the 19th and early 20th centuries. The development began with Cournot (1838), whose concern it was to specify as rigorously as possible the effects of competition, after the process of competition had reached its limits. His conceptualization of this situation was a market structure in which the output of any one firm could be subtracted from total industry output with no discernible effect on price. Later, contributions by Jevons, edgeworth, J. B.Clark and Frank Knight led to the model of perfect competition as we know it today (Stigler, 1957; McNulty,1967)" p62.

²⁴¹ Ibid. p62. "Schumpeter insisted on the irrelevance of the concept of perfect competition to an understanding of the capitalist process."p62

²⁴² Ibid.p61

3.3.2.5 The forms of the dynamic competition— — Innovation

The forms of the dynamic competition, firstly, they include the new product, new line of production, new group of customers, etc.; secondly and most importantly, the completion is kind of technology innovation.

Therefore, we can say that “A fundamental constituent of any dynamic model of Schumpeterian competition is a model of technological opportunity.”²⁴³

3.3.2.6 The sources of the dynamic competition--- Entrepreneurship

Just like the sources of innovation, the sources of dynamic competition are coming from the individuals' Entrepreneurship. The endogenous efforts of a company are key elements for the entrepreneurs to conduct every competition activity.

3.3.2.7 The result of dynamic competition—creative destruction

The result of dynamic competition is also creative destruction. That means firstly by way of this dynamic competition, the company with the advanced technology innovation will become the winner, the other will be out of the market. However, just because there are other individual with strong Entrepreneurship, they imitate the advanced technology, and then the total level of the whole industry and the level of market will be improved, and the, the whole ole market and social institution will be collapsed, and the more advanced market structures and social orders will be set up.

3.3.3 Monopoly---From Schumpeter's perspective

There is popular saying like that, “in the first stage of Schumpeter academic research stage, Schumpeter upholds the competition, and later, in the second phrase of Schumpeter adhere the competition.” That is true! But we should not think that there is contradiction among his theories. Indeed, what the competition which Schumpeter uphold in the first stage of his academic career, and later, he show great tolerance for large-scale business organizations, even for those enjoying some degree of monopoly, there is no any contradiction. Because the essences of competition and monopoly are the same, these are the innovation and entrepreneurship.

3.3.3.1 The reason of Schumpeter's monopoly

The reason of Schumpeter's monopoly is the result of technological innovation, it the endogenous

²⁴³ Durlauf, Steven N. & Blume, Lawrence. (2008). *The new Palgrave dictionary of economics*. (2nd. ed.). Basingstoke; New York: Palgrave Macmillan. P60

effects and basically, it is the result of entrepreneurship. Therefore, there is no any evil side of the monopoly. In other words, just because the individual with entrepreneurship's hard working, he obtains this monopoly position.

However, if the individual abuses his monopoly position, the anti-competition law should be involved in it. Actually, what the individual has done is totally violate the entrepreneurship

3.3.3.2 The Schumpeter's monopoly is the symbol of Entrepreneurship

Schumpeterian monopoly is not a monopoly from the standpoint of model of perfect completion. The symbol of Schumpeter's monopoly is the symbol of Entrepreneurship

3.3.3.3 The purpose of Schumpeter's monopoly is for the entrepreneur to invest more money to R& D and to extend more aspects for him to develop, not only to the monopoly benefits.

3.3.3.4 The Schumpeter's monopoly is temporarily, because "The ground under even large-scale enterprise is constantly shaking as a result of the competitive threat from the new firm, the new management, or the new ideas."²⁴⁴

3.3.3.5 The Schumpeter's monopoly is more efficient for innovation and for dynamic competition.

Schumpeter believes that the company with the entrepreneurship and with the monopoly position is "the dynamic efficiency of monopolistic structure"²⁴⁵

3.3.3.6 Schumpeter insisted that the quality of a firm's entrepreneurship was of far great significance that its mere size.

3.4 The relationship among Innovation/ Competition/ Monopoly and Entrepreneurship

From the above analyses, we can clearly know that the essences of the Schumpeter's innovation and completion are the same. Because, in Schumpeter's theory, the competition is "dynamic", is "competition as a discovery process"²⁴⁶, and that discovery process is the process of innovation.

²⁴⁴ Ibid.p 62

²⁴⁵ Arena, Richard. & Dangel-Hagnauer, Cécile (Eds.) (2002). *The contribution of Joseph A. Schumpeter to economics: economic development and institutional change*. New York: Routledge. x vi Preface

²⁴⁶ Krizner, Israel M., 'Price, the communication of knowledge, and the discovery process' in *The Political Economy of Freedom: Essays in Honour of F.A.Hayek 193*, Edited by Kurt R. Leube and Albert H. Zlabinger, Munich: Pjilosophia Verlag 1958.

The result of these competitions is the company with the monopoly position in the market. And what is the kind of force or impetus for the individual to absorb in innovation and competition and monopoly, the answer is the Entrepreneurship.

And for these relationships among them, Schumpeter has illustrated them clearly, like the following:

*“Without innovations, no entrepreneurs; without entrepreneurial achievement, no capitalist returns and no capitalist propulsion. The atmosphere of industrial revolution—of “progress”—is the only one in which capitalism can survive.”*²⁴⁷

4 The purposes we want to obtain by way of regulating the IPR abuse

4.1 The basic economic purpose—“Maximization of economic (market) efficiency”²⁴⁸

In the free market economy, the main purposes of the competition law are such as, to keep the order of market, to vitalize the fair competition, and to benefit the customer, and the main purposes of the IPR law are to protect the creative productivity and provide the incentives to creativity.²⁴⁹ The fundamental aims of these two institutions are to secure the fundamental function of the market mechanism in allocating the resource effectively and maximizingly--- To keep the order of market, to vitalize the competition, and to benefit the customer.

4.2 The basic political economic purpose—to pursue the economy democracy

From the political economical perspective, the basic purpose by way of regulating IPR abuse is to pursue the freedom of the individual in the market and equality among them and then to purpose the economy democracy, such as, protecting small independent business,²⁵⁰ eliminating bigness on the grounds that it is intrinsically evil,²⁵¹ protection the democratic state and process from enormous economic power,²⁵² protecting individual of freedom and opportunity for entrepreneurs from ‘great aggregations of capital’;²⁵³ neutral treatment of minorities;²⁵⁴ and the promotion of certain market morals, such as, *laissez faire* capitalism²⁵⁵ and ‘fair competition’.²⁵⁶

Adapted from Note 15 of Kallay, D. (2004). *The Law and Economics of Antitrust and Intellectual Property: An Austrian Approach*. Cheltenham: Edward Elgar. P41.

²⁴⁷ JOSEPH SCHEMPETER, *Business Cycles*, 1939. Adapted from McCra, Thoms K.(2007). *Prophet of innovation: Joseph Schumpeter and creative destruction*. Cambridge (MA). London: Belknap Press of Harvard University.

²⁴⁸ See Note 36.of Kallay, D. (2004). *The Law and Economics of Antitrust and Intellectual Property: An Austrian Approach*. Cheltenham: Edward Elgar. P11

²⁴⁹ The main function of IPR legal system is a kind of optimal institution in broader sense as a way of creating incentives to innovate and to produce more and more intellectual products.

²⁵⁰ Supra 1, see Note 38 p11

²⁵¹ Supra 1, see Note 39 p11

²⁵² Supra 1, see Note 40 p11

²⁵³ Supra 1, see Note 41 p11

4.3 For EU, the basic political economic purposes---to construct the internal European single market

For EU, to establish the internal market²⁵⁷, to safeguard the free movement of goods,²⁵⁸ to promote the market competition and to stimulate the progress of technology advance and to benefit the customer are the fundamental political economic purposes.

4.4 The basic political purpose—to pursue individual freedom and the political democracy

From the above rule of the new growth theory, we can clearly observe that the freedom of the individual in the market, and especially in the political life, is the fundamental cornerstone of the whole economy development---that is, by way of creativity/technology progress and competition. Therefore, there is “nothing can prevent creativity to perform abundance except a backward step of freedom.”²⁵⁹ And according to the new growth theory, objective limits (of the economy growth) do not exist, and psychological limits (of the economy growth) are not linked to economics. The only threat (of the economy growth) comes from political limits.²⁶⁰

And for EU, to fulfill “the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law.” is one of the fundamental political purposes.²⁶¹

²⁵⁴ Supra 1, see Note 42 p11

²⁵⁵ Supra 1, see Note 43 p11

²⁵⁶ Supra 1, see Note 44 p11

²⁵⁷ Treaty establishing the European Community (2002/C 325/01)

Preamble

DETERMINED to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields,

Article 2

The Union shall set itself the following objectives:

— to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty,

See <http://ec.europa.eu/competition/information/treaty.html>. The last visiting time: 08-03-2011.

²⁵⁸ Ibid. The chapter 2 Prohibition of quantitative restrictions between member states, of Title I Free movement of goods of Part three Community policy of Treaty establishing the European Community (2002/C 325/01).

²⁵⁹ NEW GROWTH THEORY — — CREATIVITY — — 7-THE LIMITS OF GROWTH

According to the new growth theory, objective limits do not exist, and psychological limits are not linked to economics. The only threat comes from political limits.

Nothing can prevent creativity to perform abundance except a backward step of freedom.

See <http://www.freeworldacademy.com/globalleader/ecodev.htm#7>. The last visiting time: 08-03-2011.

²⁶⁰ Ibid.

²⁶¹ Supra 10. The Preamble and art.6 of Treaty establishing the European Community (2002/C 325/01)

Preamble

CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law,

Article 6

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

Chapter Four The Legal Systems of Regulating the Abuse of IPR

1 The IPR abusing in the new economy

1.1 What it the new economy?

On 30rd May 1983, there was a cover article, named “The New Economy” in *Time* magazine, written by Charles P. Alexander; Adam Zagorin; Gisela Bolt.²⁶² In this article, the writers put forwards the “The New Economy” concept to describe the transition from heavy industry to a new technology based economy.

In the book named *Building the wealthy*, written by Prof. L.C. Thurow. Prof Thurow describe the six more important industries as the symbol of new economy for us---“At the end of the twentieth and beginning of the twenty-first century, six new technologies—microelectronics, computers, telecommunications, new man-made materials, robotics, and biotechnology—are interacting to create a new and very different economic world. (Thurow, Prologue/xiii)

1.2 What are the characteristics of the new economy?

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

3. The Union shall respect the national identities of its Member States.

4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

²⁶² Alexander, Charles P, Zagorin Adem, and Bolt Gisela, (1983), The New Economy, *Time* . May. 30, 1983.
<http://www.time.com/time/magazine/article/0,9171,926013-1,00.html>.

Prof. W. M. Landes has clearly illustrated the differences between the traditional industries and the new-economy industries.

*The traditional industries were characterized by multi-plant and multi-firm production(including that economies of scale are limited at both the plant level and firm level, or in other words that average total costs are, beyond relatively modest output levels, rising), stable markets, heavy capital investment, modest rates of innovation, and slow and infrequent entry and exit. The new-economies tend to be characterized instead by falling average costs(on a product, not firm, basis) over a broad range of output, modest capital requirements relative to what at least until recently was available for new enterprises in the global capital market, very high rates of innovation, quick and frequently entry and exit, “instant scalability”(the ability of a firm to multiply the output of a product very rapidly with no increase in marginal cost), and economies of scale in consumption (“network externalities,” as they are more commonly called), the realization of which may require either monopoly or inter-firm cooperation in standing setting.*²⁶³

Generally, there are the followings characteristics of the new economy:

(1) The IPRs are the most important capitals for a company

In the new economy, the key important capitals are the IPRs, and only by way of constantly innovation can enable the company to obtain the IPRs and to keep the competition advantages, “Every industrialized country is looking to high technology for its salvation. But competitiveness, high productivity, innovation — or their lack — will be even more decisive in the New Economy than in the old;”²⁶⁴

(2) The “instant scalability” is strong

In the new economy, the products are with the high technology, the cost of inventing such product is high, but the cost of reproducing it is much lower. In another words, the “instant scalability” of the product is strong, that is the ability of a firm to multiply the output of a product very rapidly with no increase in marginal cost.²⁶⁵

(3) The network effects and lock-in effects are strong

In the new economy, the network effects and lock-in effects are very significant. In 2001, Prof. Jack Hirshleifer has clearly described the significant characteristics of the network effects and lock-in effects in new economy.

²⁶³ Landes, W. M. & Posner, R. A. (2003). *The economic structure of intellectual property Law*. London: Harward University Press. 390.

²⁶⁴ Alexander, Charles P, Zagorin Adem, and Bolt Gisela, (1983), The New Economy, *Time* . May. 30, 1983. <http://www.time.com/time/magazine/article/0,9171,926013-1,00.html>.

²⁶⁵ Landes, W. M. & Posner, R. A. (2003). *The economic structure of intellectual property Law*. London: Harward University Press. 390.

“Network effects constitute a possible source of natural monopoly and lock-in that operates on the demand side. (In contrast with the traditional explanation of natural monopoly as due to decreasing average cost, increasing returns on the supply side.) These demand-side increasing returns stem from the advantages of synchronization. The value of a good to a consumer may depend not only on the characteristics of the commodity itself but also on how many other users have adopted the same products. This is evidently true of literal networks such as the telephone system.”²⁶⁶

(4) Just because of huge capacity of innovation and the network externalities and lock-in effects in the new economy, the company which enjoy the dominant position in the market is the hallmark of its success. (Liebowitz, Stan J. & Margolis, Stephen E. (2001))

(5) In the new economy, there is server competition, but the competition mainly for innovation.

In an increasingly high-tech world, there are severe competitions among companies. But “the competition does not take the textbook form of many suppliers offering a single fixed product to passive consumers. Instead it becomes a struggle to win, by entrepreneurial innovation and sensitivity to consumer needs, the big prize of dominant market share.”²⁶⁷

1.3 The consequences of IPR abuse in the new economy

The new economy, or in another name, the knowledge-based economy or high-technology industry, the key important capital is innovation, “Every industrialized country is looking to high technology for its salvation.”²⁶⁸ However, just because of the nature of human being and the nature of capital, there are probabilities for the owners of IPR to abuse their IPR. And based on the characteristics of the new economy, the consequences of such IPR abuse are even more serious than before.

2 Why to apply the competition law to regulate the IPR abuse?

According to the U.S and EU experience, it is the common way to apply the Antitrust/Completion to regulate the IPR abuse. The reasons are followings:

²⁶⁶ Liebowitz, Stan J. & Margolis, Stephen E. (2001). *Winners, Losers & Microsoft: competition and antitrust in high technology*. (Revised edition) (Foreword by Jack Hirshleifer). Oaland, California: the independent institution. http://www.amazon.com/Winners-Losers-Microsoft-Stan-Liebowitz/dp/0945999844/ref=sr_1_1?s=books&ie=UTF8&qid=1298455750&sr=1-1#reader_0945999844.

²⁶⁷ Liebowitz, Stan J. & Margolis, Stephen E. (2001). *Winners, Losers & Microsoft: competition and antitrust in high technology*. (Revised edition) (Foreword by Jack Hirshleifer). Oaland, California: the independent institution. http://www.amazon.com/Winners-Losers-Microsoft-Stan-Liebowitz/dp/0945999844/ref=sr_1_1?s=books&ie=UTF8&qid=1298455750&sr=1-1#reader_0945999844.

²⁶⁸ Alexander, Charles P, Zagorin Adem, and Bolt Gisela, (1983), The New Economy, *Time* . May. 30, 1983. <http://www.time.com/time/magazine/article/0,9171,926013-1,00.html>.

2.1 From the purposes which the Anti-trust law (competition law) and IPR laws pursue

The purposes of the IPR law are to protect the innovation and creative products, to secure the IPR owners have a competitive advantage over their commercial activities, and then to recoup their R&D investment. The purposes of competition law is to secure the market order and maintain the momentum of the market economy, and then to benefit the consumer. All these purposes pursuing by the IPR law and competition law are closed connected with the one country's current policies, in other words, according to the different economic situation, and the different periods of the country's development, to apply the competition law to regulate the IPR abuse is the main ways by the government.

2.2 From the natures of the Anti-trust law (competition law) and IPR laws

From the point of nature, the IPR law is private law, and the competition law is the public law. Therefore, the interests protected by the IPR law is mainly the individual's (the natural person and the artificial person), but, the interests protected by the competition law are mainly the general public's interests, such as, the consumer's interests and the market order, etc. And then, in order to well protect the market order or the general consumers' interests, it is the government to should their responsibilities, to secure the market order and protect the consumers' interests. In the economic words, just because there are some market failure, and then, the government should intervene the economic relationship. Therefore, in order to protect the general public's interests, in order to maintain the market order, it is the responsibility of the competition law to regulate the IPR abuse.

2.3 From the legislation aspects and judicial practices of the Anti-trust law (competition law) and IPR laws

From the U.S. and the EU's legislation point of view, in the U.S., there are Sherman Act and Clinton act to mainly regulate the anti-trust activities in the U.S. territory, so does it in the EU, such as, the EU competition law. Besides these, in order to well deal with the relation between the IPR and competition, the relevant department of U.S. and EU have constantly published their reports, guideline directs etc.^{269 270}

²⁶⁹ In U.S. (1) 20 世纪 70 年代初期对知权授权行为的审查提出了著名的 9 不原则, 后来被正式纳入 1977 年的《国际经营活动中的反托拉斯指南》。

(2) US DOJ & FTC. (1995) Antitrust Guidelines for the Licensing of Intellectual Property <http://www.justice.gov/atr/public/guidelines/0558.htm>. The last visiting time: 01-03-2011.

(3) U.S.DJ& FTC. Report (2007). Antitrust enforcement and intellectual property rights: promoting innovation and competition. <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf>

3 IPR vs. competition, confront or interact? The history point of view

3.1 The relationship between IPR and competition

There are a lot literatures discussing the relationship between IPR and competition law. “One reason is that the intersection of intellectual property law and competition policy, a question that has attracted debate and scholarly attention for a long time, has become even more salient (突出) as the global economy has become increasingly affected by industries in which technological innovation is central dimension of performance.”²⁷¹ (François Lévêque and Howard Shelanski, 2005)

For the relation between the IPRs and competition, there are a lot of books and literatures concerning about it. Generally speaking, there are three opinions towards it, some scholars clearly point out that the IPRs are bundle of exclusive rights, granted by the governmental authorities, in legal sense, with these rights, the owner of IPRs enjoy a kind of monopoly position in the market, and therefore, they are severely clashing with completion law, which its main purpose is to pursue the completion and keep the market order.

On the contrary, some scholars uphold that there is no any conflict between IPR and antitrust law.²⁷² In the seminal book, is named *Patent and Antitrust Law: A Legal and Economic Appraisal*. Written by Prof. Bowman, and published by the University of Chicago Press in 1973.

Prof. Bowman has delivered the outstanding statement about the relationship between the IPR and antitrust law, as following,

“Antitrust law and patent law are frequently viewed as standing in diametric opposition. How can there be compatibility between anti-trust law, which promotes competition, and patent law, which promotes monopoly? In terms of the economic goals sought, the supposed opposition

(4) UNCTAD Report (2008). *Competition policy and the exercise of intellectual property rights*. Trade and Development Board-Commission on Investment, Technology and Related Financial Issues--Intergovernmental Group of Experts on Competition Law and Policy, Ninth session, Geneva, 15–18 July 2008, No. TD/B/COM.2/CLP/68

Available at http://www.unctad.org/en/docs/c2clpd68_en.pdf

(5) U.S. Department of Commerce’s white paper (2010): *Patent Reform: Unleashing Innovation, Promoting Economic Growth & Producing High-Paying Jobs*, A White Paper from the U.S. Department of Commerce, April 13, 2010. http://www.commerce.gov/sites/default/files/documents/migrated/Patent_Reform-paper.pdf

²⁷⁰ In EU, such as, (1)1996年1月13日颁布《240/96号规章》

(2) TTBE 2004.

(3) European Commission Report (2007). *Competition policy and the exercise of intellectual property rights*. Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 17-19 July 2007

Available at http://www.unctad.org/sections/wcmu/docs/c2clp_ige8p08EC_en.pdf

²⁷¹ Lévêque, F & Shelanski, H.(Eds.) (2005). *Antitrust, Patents and Copyright: EU and US Perspectives*, Cheltenham: Edward Elgar. P1

²⁷² Bowman, Ward S.Jr. have pointed out that “A principal conclusion is that the antitrust/patent conflict, as (U.S.)courts have assessed it, is to a large extend illusory. It is based on a long-accepted but mistaken notion that a legal monopoly, a patent, may be used as lever to monopolize the unpatented. In addition, courts seem oblivious, whether or not patents are involved, to the consumer-benefiting efficiencies derivable from agreements sellers make with buyers concerning how, when, where, and under what conditions a licensee may use information.” Bowman, Ward S.Jr. (1973): *Patent and Antitrust Law: A Legal and Economic Appraisal*. Chicago: The University of Chicago Press. ix.

between these laws is lacking. Both antitrust law and patent law have a common central economic goal: to maximize wealth by producing what consumers want at the lowest cost. In serving this common goal, reconciliation between patent and antitrust law involves serious problems of assessing effects, but not conflicting purposes. Antitrust law does not demand competition under all circumstances. Quite properly, it permits monopoly when monopoly make greater output than would alternative of an artificially fragmented (inefficient) industry. The patent monopoly fits directly into this scheme insofar as its central aim is achieved. It is designed to provide something, which consumers value and which they could not have at all or have as abundantly were no patent protection afforded.”²⁷³

3.2 The relationship between the IPR and antitrust/competition law described in the legal documents

There are two important guidelines which are the best for illustrate the relationship between the IPR and antitrust law.

3.2.1 In US, *Antitrust Guidelines for the Licensing of Intellectual Property* (US DOJ & FTC. (1995)) has clearly declared the relationship between the IPR and antitrust law.

In the *Antitrust Guidelines for the Licensing of Intellectual Property*, published by US DOJ & FTC in 1995²⁷⁴. The US DOJ & FTC has clearly claimed that “The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare.”²⁷⁵ Besides that, the US DOJ FTC established the following principles to deal with the relationship between the IPR and antitrust law, such as, “ These Guidelines embody three general principles: A For the purpose of antitrust analysis, the Agencies regard intellectual property as being essentially comparable to any other form of property; B The Agencies do not presume that intellectual property creates market power in the antitrust context; and C The Agencies recognize

²⁷³ Bowman, Ward S.Jr. (1973): Patent and Antitrust Law: A Legal and Economic Appraisal. Chicago: The University of Chicago Press. 1.

²⁷⁴ US DOJ & FTC. (1995) Antitrust Guidelines for the Licensing of Intellectual Property

<http://www.justice.gov/atr/public/guidelines/0558.htm>

²⁷⁵ “[T]he aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds. However, the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition.” Atari Games Corp. v. Nintendo of America, Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990). 此句话已成为经典名言，具体出处来自该判例)，，转引自美国司法部2005 反垄断法与知权指南，注 8

that intellectual property licensing allows firms to combine complementary factors of production and is generally pro-competitive.”²⁷⁶

3.2.2 In EU, the article 7 of Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements (2004/C 101/02) has clearly declared the relationship between the IPR and antitrust law.²⁷⁷

The fact that intellectual property laws grant exclusive rights of exploitation does not imply that intellectual property rights are immune from competition law intervention. Articles 81 and 82 are in particular applicable to agreements whereby the holder licenses another undertaking to exploit his intellectual property rights (9). Nor does it imply that there is an inherent conflict between intellectual property rights and the Community competition rules. Indeed, both bodies of law share the same basic objective of promoting consumer welfare and an efficient allocation of resources. Innovation constitutes an essential and dynamic component of an open and competitive market economy. Intellectual property rights promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. So does competition by putting pressure on undertakings to innovate. Therefore, both intellectual property rights and competition are necessary to promote innovation and ensure a competitive exploitation thereof.

3.2.3 In the European Commission Report (2007). *Competition policy and the exercise of intellectual property rights*, the European Commission also has clearly declared the relationship between the IPR and antitrust law.

“However, this is only an apparent source of conflict. At the highest level of analysis IP and competition law are complementary because they both aim at promoting consumer welfare. Competition policy aims at promoting consumer welfare by protecting competition as the driving force of efficient and dynamic markets, providing at all times the best quality products at the lowest prices. The objective of IP laws is to promote technical progress to the ultimate benefit of consumers. This is done by striking a balance between over- and under-protection of innovators’ efforts. The aim is not to promote the individual innovator’s welfare. The property right provided by

²⁷⁶ US DOJ & FTC. (1995) Antitrust Guidelines for the Licensing of Intellectual Property, <http://www.justice.gov/atr/public/guidelines/0558.htm>

²⁷⁷ COMMISSION NOTICE Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements. (2004/C 101/02) (Text with EEA relevance) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0002:0042:EN:PDF>

IP laws is awarded to try to ensure a sufficient reward for the innovator to elicit its creative or inventive effort while not delaying follow-on innovation or leading to unnecessary long periods of high prices for consumers. A delay in follow-on innovation may result when the innovation consists of an improvement on earlier ideas that have been granted patent protection already. Unnecessary long periods of high prices will result when the innovation allows the IPR holder to achieve market power in the market(s) where the IPR is exploited and where the IPR protects this monopoly position longer than is required to elicit the innovative effort.”²⁷⁸

3.3 The summary of the relationship between the IPR and competition law

There are some things we should emphasize as follows:

(1) Generally, there is no any conflict between the IPR and fair competition.

The main institutional function IP law is to grant the bundle of exclusive right to certain inventors or creators for their great efforts and investment to the technological invention and artistic works for certain limited time. And inside the systems of IP law , there are certain mechanisms to define the scope of IPRs and to make balance between the private interests and public interests, such as, in Copyright law, there are the articles about the “fair use”(“fair use” in the U. S. law is “public use”, it means that for the purpose of the public, such as, for the use of the education, for the achieve of the library, without the permission of the holder of copyright, and without destroy the right of copyright obtained by the owner, the relevant organizations and institutions can make good use of them. The art.22 of Chinese Copyright Law); in the Patent Law, there are articles of “compulsory license”. (According to the TRIPS, ----- the main purposes of the “compulsory license” is to put the public interests first, when such emergency circumstances occurs, such as, the public emergencies, the terrible natural disaster and wide-spread epidemic illness. The art.48/49/50/51 of Chinese Patent Law). Therefore, just simply say that the IPR is anti-competition is not correct.

Certainly, in the 1930-60, there were some thoughts of that the IPR were anti-competition, and there were clash between the IPR and competition. But now, all these thought are out of day, there are many scholars and governmental legislation uphold that “there is no any conflict between the IPR and competition, on the contrary, they interact each other, and both play an importance roles to enhance the technology advance and consumer interests.”

(2) Only under some circumstance, especially, in this knowledge-based economy, what I have

²⁷⁸ European Commission Report (2007). *Competition policy and the exercise of intellectual property rights*. Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 17-19 July 2007 Available at http://www.unctad.org/sections/wcmu/docs/c2clp_ige8p08EC_en.pdf.

The last visiting time: 02-03-2011.

constantly pointed out is that, when the IPR-based company combined with their economic effects, such as the dominant position in the market, the network effect, the lock-in effects and switching costs, essential facility, do they can exert the monopoly effect and anti-competition effect, and then damage the consumer interests and social welfare!

Prof. Emanuela Arezzo, has pointe that

“As I have pointed out, the risk is sensible that a convulsive combination of intellectual property rights and economic effects will vest the dominant undertakings with the power not just to monopolize the market but to shift such power from one market to another, to create strong barriers to enter and, in so doing, granting the perpetuation of such dominance for quite a long time”²⁷⁹

²⁷⁹ Arezzo, Emanuela, (2007). Intellectual Property Rights at the Crossroad Between Monopolization and Abuse of Dominant Position: American and European Approaches Compared. forthcoming in *John Marshall Journal of Computer & Information Law*, Vol. 24, No. 3. P41
Available at SSRN: <http://ssrn.com/abstract=935047>

Chapter Five The Abuse of IPR in China and its restrictions

1 The IPR protection situation in Chinese history

1.1 To respect the knowledge and to protect the creative works and innovation is the essence of the Chinese traditional culture

Being a country with 5000 years history, there are a lot principles of respecting the knowledge in Chinese traditional culture. To respect the knowledge and to respect other intellectual creations are main moral ethics of Chinese traditional culture from the history beginning till now.

In ancient China, to respect the teacher is more important things in Chinese culture. They regard their teacher or knowledgeable person as their father. There is old saying, like that, “if some person be your teacher or you have learn something from him, he will be your father forever!”(一日为师，终生为父)²⁸⁰

In ancient, the Chinese regard the teacher or the knowledgeable person as a symbol of knowledge. Therefore, to respect the teacher or knowledgeable person is to respect the knowledge, is to respect the intellectual property. There are many ancient Chinese philosophers, the great thinker, and the famous poet talked about this subject, the followings are just some of them:

²⁸⁰ See <http://gwj777.blog.163.com/blog/static/101694858201011984548795/>. The last visiting time: 12-03-2011.

In the very old chronicle history book named 《LV SHI CHUN QIU, QUAN XUE》(《吕氏春秋·劝学》²⁸¹), there is say like that, “When you want to learn something fast and efficiently, you should be respect the teacher.”(“疾学在于尊师”)^{282 283}

The Chinese ancient great think XUN ZHI (荀子)²⁸⁴ claimed that “If one country want to be prosperity, this country must respect the teacher and knowledgeable person”(“国将兴，必贵师而重傅”)²⁸⁵. The great poet in Tang Dynasty, HAN YU (韩愈)²⁸⁶, has written a famous article named “On the teacher”(《师说》²⁸⁷) to express his respect to teacher. In Tang dynasty, also there was great writer, named LIU XHONGYUAN, 柳宗元,²⁸⁸ claimed that “If a country do not respect the knowledgeable person and teacher, and then, this country or this society will be a country or society without good moral.”(“举世不师，故道益离”)²⁸⁹. Also, the great poet in Song dynasty, SU SHI (苏轼)²⁹⁰ claimed that “The knowledgeable person or the teacher plays very important roles to develop the social culture, and to educate the children.”(“斯文有传，学者有师”)²⁹¹

²⁸¹ 《吕氏春秋》是秦国丞相吕不韦主编的一部古代类百科全书似的传世巨著，有八览、六论、十二纪，共二十多万言。

《吕氏春秋》是战国末年（公元前“239”年前后）秦国丞相吕不韦组织属下门客们集体编撰的杂家（儒、法、道等等）著作，又名《吕览》。此书共分为十二纪、八览、六论，共十二卷，一百六十篇，二十余万字。吕不韦自己认为其中包括了天地万物古往今来的事理，所以号称《吕氏春秋》。

See <http://baike.baidu.com/view/1269.html?wtp=tt>. The last visiting time: 12-03-2011.

²⁸² Ibid. 《吕氏春秋·劝学》中有一句话叫做“疾学在于尊师”意思是：要很快学得知识才干，首先在于尊敬老师。

²⁸³ See <http://www.eeloves.com/culture/4833>. The last visiting time: 12-03-2011.

²⁸⁴ 荀子（约公元前313—前238）名况，字卿，因避西汉宣帝刘询讳，因“荀”与“孙”二字古音相通，故又称孙卿。汉族，周朝战国末期赵国猗氏（今山西安泽）人。著名思想家、文学家、政治家，儒家代表人物之一，时人尊称“荀卿”。曾三次出齐国稷下学宫的祭酒，后为楚兰陵（今山东兰陵）令。荀子对儒家思想有所发展，提倡性恶论，常被与孟子的性善论比较。对重整儒家典籍也有相当的贡献。

See <http://baike.baidu.com/view/2776.htm>. The last visiting time: 12-03-2011.

²⁸⁵ “国将兴，必贵师而重傅；贵师而重傅，则法度存。国将衰，必贱师而轻傅；贱师而轻傅，则人有快；人有快而法度坏。”<<荀子·大略>>

²⁸⁶ 韩愈（768~824），字退之，汉族，唐河内河阳（今河南孟县）人。自谓郡望昌黎，世称韩昌黎。唐代古文运动的倡导者，宋代苏轼称他“文起八代之衰”，明人推他为唐宋八大家之首，与柳宗元并称“韩柳”，有“文章巨公”和“百代文宗”之名，著有《韩昌黎集》四十卷，《外集》十卷，《师说》等等。

See <http://baike.baidu.com/view/2518.htm>. The last visiting time: 12-03-2011.

²⁸⁷ 《师说》作于唐贞元十八年（公元802年）韩愈任四门博士时，是说明教师的重要作用，从师学习的必要性以及择师的原则。抨击当时士大夫之族耻于从师的错误观念，倡导从师而学的风气，同时，也是对那些诽谤者的一个公开答复和严正的驳斥。

See <http://baike.baidu.com/view/106386.htm>. The last visiting time: 12-03-2011.

²⁸⁸ 柳宗元是我国唐朝著名的文学家，字子厚，世称“柳河东”，与唐代的韩愈、宋代的欧阳修、苏洵、苏轼、苏辙、王安石和曾巩，并称“唐宋八大家”。一生留诗文学作品达600余篇，其文的成就大于诗。

See <http://baike.baidu.com/view/2521.htm>. The last visiting time: 12-03-2011.

²⁸⁹ Ibid.

²⁹⁰ 苏轼（1037年1月8日—1101年8月24日），字子瞻，又字和仲，号“东坡居士”，世人称其为“苏东坡”。汉族，眉州（今四川眉山，北宋时为眉山城）人，祖籍栾城。北宋著名文学家、书画家、词人、诗人，美食家，唐宋八大家之一，豪放派词人代表。其诗，词，赋，散文，均成就极高，且善书法和绘画，是中国文学艺术史上罕见的全才，也是中国数千年历史上被公认文学艺术造诣最杰出的大家之一。其散文与欧阳修并称欧苏；诗与黄庭坚并称苏黄；词与辛弃疾并称苏辛；书法名列“苏、黄、米、蔡”北宋四大书法家之一；其画则开创了湖州画派。

See <http://baike.baidu.com/view/2517.htm>. The last visiting time: 12-03-2011.

²⁹¹ 苏轼《祭欧阳文忠公文》

See <http://zhidao.baidu.com/question/4700105.html>. The last visiting time: 12-03-2011.

1.2 From the comparative perspective, the Chinese government did take effectively administrative measures to protect intellectual creations and respect the knowledge

Although, from the comparative perspective, there are not so much IPR legal systems like them in the Western countries, the Chinese people do protect and respect the intellectual creations and respect the knowledge in their mind and in their daily activities, and the Chinese government do take effective administrative measures, which are the administrative laws, to protect the intellectual creations and respect the knowledge.

1.3 “To steal the book is not an ‘offense’, is an activities of scholars, can not be regarded as a kind of offense.” is totally wrongly understood and explained by Western school, and it is not Chinese culture or Chinese tradition.

“窃书不能算偷……窃书！……读书人的事，能算偷么？”

—鲁迅²⁹²（1919），《孔乙己》^{293 294}

*“Western commentators tend to explain China’s disregard of rights for intellectual achievements with its particular cultural heritage, which holds the perfect imitation of ancient arts and styles in high regard and attaches little importance to individual originality.”*²⁹⁵

The most popular book was written by W.P. Alford, named *To steal a book is an elegant offense: intellectual property law in Chinese civilization*, published by Stanford university press in 1995. What the understanding of Prof. Alford to the Kong Yiji’s said “To steal the book is not an “offense”, is an activities of scholars, can not be regarded as a kind of steal.” is totally wrongly and explained by Western school, and it is not Chinese culture or Chinese tradition. (“窃书不能算偷……窃书！……读书人的事，能算偷么？” —鲁迅²⁹⁶（1919），《孔乙己》²⁹⁷)

²⁹² 鲁迅 (1881 年—1936 年)。原名周樟壽 (1898 年改為周樹人)，筆名魯迅，字豫山、豫亭，後改名為豫才。20 世紀中國重要作家，新文化運動的領導人、左翼文化運動的支持者。中華人民共和國的評價為現代文學家、思想家、革命家。魯迅的作品包括雜文、短篇小說、評論、散文、翻譯作品，對於五四運動以後的中國文學產生了深刻的影響。

See <http://zh.wikisource.org/wiki/%E4%BD%9C%E8%80%85:%E9%AD%AF%E8%BF%85>. The last visiting time: 12-03-2011.

²⁹³ 孔乙己是魯迅的代表作之一，也是該作品中的主人公。文章發表於 1919 年 4 月《新青年》第六卷第四號，後編入《吶喊》，是魯迅在“五四”前夕繼《狂人日記》之後第 2 篇白話小說。同時有沈正鈞 1998 年新編自該作品的越劇，共 4 幕 7 場。選自《吶喊》（《魯迅全集》第一卷，人民文學出版社 1981 年版）。據魯迅 1919 年 3 月 26 日所作的《附記》，本文作於 1918 年冬天。

See <http://baike.baidu.com/view/125374.htm>. The last visiting time: 12-03-2011.

²⁹⁴ “窃书不能算偷……窃书！……读书人的事，能算偷么？” ---孔乙己

See <http://zh.wikisource.org/zh/%E5%AD%94%E4%B9%99%E5%B7%B1>. The last visiting time: 12-03-2011.

²⁹⁵ Ganea, Peter, & Pattloch, Thomas (2005). *Intellectual Property Law in China*, Kluwer Law International.p205.

²⁹⁶ 魯迅 (1881 年—1936 年)。原名周樟壽 (1898 年改為周樹人)，筆名魯迅，字豫山、豫亭，後改名為豫才。20 世紀中國重要作家，新文化運動的領導人、左翼文化運動的支持者。中華人民共和國的評價為現代文學家、思想家、革命家。魯迅的作品包括雜文、短篇小說、評論、散文、翻譯作品，對於五四運動以後的中國文學產生了深刻的影響。

See <http://zh.wikisource.org/wiki/%E4%BD%9C%E8%80%85:%E9%AD%AF%E8%BF%85>. The last visiting time: 12-03-2011.

²⁹⁷ “窃书不能算偷……窃书！……读书人的事，能算偷么？” ---孔乙己

So did some opinions of what the CEO of UK IPO, Mr. John Alty²⁹⁸ said in his article, named *UK Sets Stage for Closer IP Cooperation with China*, “-- where imitation, for example copying another calligrapher’s style, was seen as a form of respect.”²⁹⁹

The main reasons for Prof. W. P. Alford, and some Western scholar, such as, Mr. John Alty, to make such wrong understand are following:

(1) They did not fully get thorough research on Chinese traditional culture!

Because to get better understanding the profound traditional of any country, it is not totally to read several books or many books. It is a whole life studying and learning. If you do not full understand one country with 5000 years history with your whole life, not only 200 histories, and make some conclusion, I think, this is not serious scientific research method.

(2) They applied the total Western concepts and legal theories to cut the reality of China

(3) They did not fully understanding the total background or context of why the Kong Yiji said these words.

Kong Yiji was a famous character in LUXUN’s short novel, name *Kong Yiji(1919)*. The purpose of LUXUN to write this short novel is to criticize the government intellectual policies----for the government do not look upon the intellectuals, and some intellectual really have some shortcoming, such as, they look upon themselves, and do not want to do any labour. Kong Yiji just a short novel character, what Kong Yijijust said and did, like what Shylock said and did in *The Merchant of Venice*,³⁰⁰ written by W. Shakespeare.³⁰¹

That is the key problem of Prof. W. P. Alford to understand what Kong Yiji said in Lu Xuan’s short novel. And if we follow the way of Prof. Alford thinking, when we are talking the nature of businessman, we can use what Shylock said and did in *The Merchant of Venice*---“in order to fulfill my contract, I will cut a pound of this poor merchant's flesh from his chest!”

That is really true in Western country???

See <http://zh.wikisource.org/zh/%E5%AD%94%E4%B9%99%E5%B7%B1>. The last visiting time: 12-03-2011.

²⁹⁸ John Alty Chief Executive and Comptroller General of UK IPO

John took up post as Chief Executive Officer and Comptroller General of the IPO on 15 February 2010.

See <http://www.ipo.gov.uk/about/director/director-ceo.htm>. The last visiting time: 12-03-2011.

²⁹⁹ However, as has been demonstrated through global concerns about music file-sharing over the internet, enforcement measures are often impractical against large numbers of consumers, which is why education and awareness-raising are important. This is particularly relevant to China, as China’s approach to IP has been required to change very quickly in the last three decades. **Thirty years ago it was a country without intellectual property laws and where imitation, for example copying another calligrapher’s style, was seen as a form of respect. In order for IP rights holders in the country to have confidence, the cultural shift on IP in China needs to continue.**

尤其是中国，在过去30年中，中国对待知识产权的方式一直在被要求迅速改变。30年前，这是一个没有知识产权立法的国家，仿造就像模仿其他书法家的风格一样，被看作是一种尊崇的形式。为了让国内外的知识产权所有者拥有信心，中国在知识产权上的文化和意识转变仍需继续进行。

作者John Alty为英国知识产权局CEO <http://www.chinaiprlaw.cn/file/2011030118695.html>

English version, Alty, John. (2011). *UK Sets Stage for Closer IP Cooperation with China*

See http://ipr.chinadaily.com.cn/2011-02/25/content_12079991.htm. The last visiting time: 12-03-2011.

³⁰⁰ Shakespeare, W. *The Merchant of Venice*, SCENE I. Venice. A court of justice.

See <http://shakespeare.mit.edu/merchant/merchant.4.1.html>. The last visiting time: 12-03-2011.

³⁰¹ See http://en.wikipedia.org/wiki/William_Shakespeare. The last visiting time: 12-03-2011.

(4) There is an old English proverb, “a little learning is a dangerous thing”³⁰², but, I think, if this little learning is widely cited and used by other scholars in the world, this is not a dangerous thing. That is disaster to the academic circle! Just like the nuclear radiations of Chernoby’s nuclear reactor explosion and the Japanese Three mile island’s nuclear reactors explosions.

Being a scholar like me, and Prof. W. P. Alford should be paying more attention to this forever!!

2 The Present situation of IPR in China

2.1 At present, China has established well-organized IPR legal system

2.1.1 From the IPR legislature perspective

In 1978, the Chinese government adopted the Open-up and reform policy. Since that year, the Chinese legislature authorities have paid more and more attention to the legislation of intellectual property. At present, China has established a well-organized IPRs legal protection system, and from the legal practice point of view, the owner of IPRs can enjoy very good protection, such as, the

2.1.2 From the IPR enforcement perspective

Generally speaking, there are dual-track intellectual protection enforcements, one is the administrative IPR enforcement from the central government state departments to the local administrative governments. Another is the judicial protection system, from the Supreme People’s Court (SPC) to the intermediate people’s court and some local people’s court.

2.2 To protect the IPR and encourage the innovation are the main notes in Chinese government and society

On June 5, 2008, the State Council officially promulgated the Compendium of China National IP Strategy (2008-2020) (hereinafter referred to as the "Compendium"). The issuance of the Compendium serves as a milestone in the history of intellectual property development in China.

³⁰² “A little knowledge is a dangerous thing”--Meaning

“A small amount of knowledge can mislead people into thinking that they are more expert than they really are.

Origin

'A little knowledge is a dangerous thing' and 'a little learning is a dangerous thing' have been used synonymously since the 18th century.

The 'a little learning' version is widely attributed to Alexander Pope (1688 - 1744). It is found in An Essay on Criticism, 1709, and I can find no earlier example of the expression in print:

A little learning is a dangerous thing;

drink deep, or taste not the Pierian spring:

there shallow draughts intoxicate the brain,

and drinking largely sobers us again.

See <http://www.phrases.org.uk/meanings/a-little-knowledge-is-a-dangerous-thing.html>. The last visiting time: 24-03-2011.

In the (2) of I. of Preface of *Outline of the National Intellectual Property Strategy*, the Chinese government definitely declared the importance of IPR,

*“Intellectual property system is a basic system for developing and utilizing knowledge-based resources. By reasonably determining people's rights to certain knowledge and other information, the intellectual property system adjusts the interests among different groups of persons in the process of creating and utilizing knowledge and information, encourages innovation and promotes economic and social progress. In the world today, with the development of the knowledge-based economy and economic globalization, intellectual property is becoming increasingly a strategic resource in national development and a core element in international competitiveness, an important supporting force in building an innovative country and the key to hold the initiative in development. The international community attaches greater importance to intellectual property as well as innovation. Developed countries take innovation as the main impetus driving economic development, and make full use of the intellectual property system to maintain their competitive advantages. Developing countries actively adopt intellectual property policies and measures suitable for their respective national conditions to promote development.”*³⁰³

Therefore, the national IP strategy is a kind of institutional system to safeguard the individual, company and the state's creativity. This will provide the support and protection for the transferring of the model of economy development, raising the quality of economy development and enlarging its space of development.³⁰⁴

3 At present, China is still a developing country, the capacity of innovation of average company is low, the quality of IP is not so good, and the consciousness or awareness of protection IPR should be further strengthened

3.1 China is still a developing country

Although the number of GDP of China in 2010, has exceeded the Japan, “China still largest developing country in the world.”³⁰⁵

Because, first, taking China's population as the base, the amount of space for the development is inadequate. Second, China's average human development index (HDI) is in the middle and lower status in the world and, thirdly, China's domestic regional differences are relatively big, and the

³⁰³ Ibid.

³⁰⁴ 国家知识产权局副局长鲍红强调，国家知识产权战略是从制度上保障个人、企业和整个国家的创新动力，这将为我国经济领域转变发展方式、提高发展质量、拓展发展空间提供重要支撑和保障。

See <http://www.chinaipr.law.cn/file/2011020118498.html>. The last visiting time: 05-02-2011

³⁰⁵ Hu Jintao, “China still largest developing country in the world.”

Source: Xinhua.

See http://www.gov.cn/english/2011-01/17/content_1786432.htm. The last visiting time: 17-01-2011.

dislocation between the economic society and the humanity environmental protection is more protruding. Hence, to reduce its disparity with the developed nations, China has to take arduous efforts to bridge the "digital gap".³⁰⁶

3.2 The capacity of innovation of average company is low, and the quality of IP is not so good

3.2.1 Some conclusions about Chinese patent quality

Generally speaking, the capacity of innovation of average company is low and the consciousness or awareness of protection of IPR should be raised.

There is article named *Patented in China: The Present and Future State of Innovation in China From*, written by Zhou, Eve Y. and Stembridge Bob in 2010.³⁰⁷ In this article, after analyzing a lot statistics of Chinese IP, the authors of this article concluded that "China Poised to become global innovation leader."³⁰⁸ This is very good new, but what they said and what the conclusion they drew in this article, I do not quite agreed with them.

The followings are some Figures, from the information provides by the statistics, I want to draw the following conclusions:

(1) The total number of patent application number put forward by the Chinese company is steady increasing, so does the patent granted by SIPO to Chinese company,

(2) There are three kinds of patent, invention patent, utility model patent and industrial design patent, for the high advanced patent ---the invention patent, the total number of invention patent application made by the Chinese is the lowest among the total number of utility model patent and industrial design application made by the Chinese. This shows that for although the number of patent application made by Chinese parties, the quality of Chinese patent application is not so good. So does the number of invention patent granted by the SIPO to Chinese company,

(3) The foreign patent applications pay more attention to the invention patent, and general quality of their patent application focus on the invention patent.

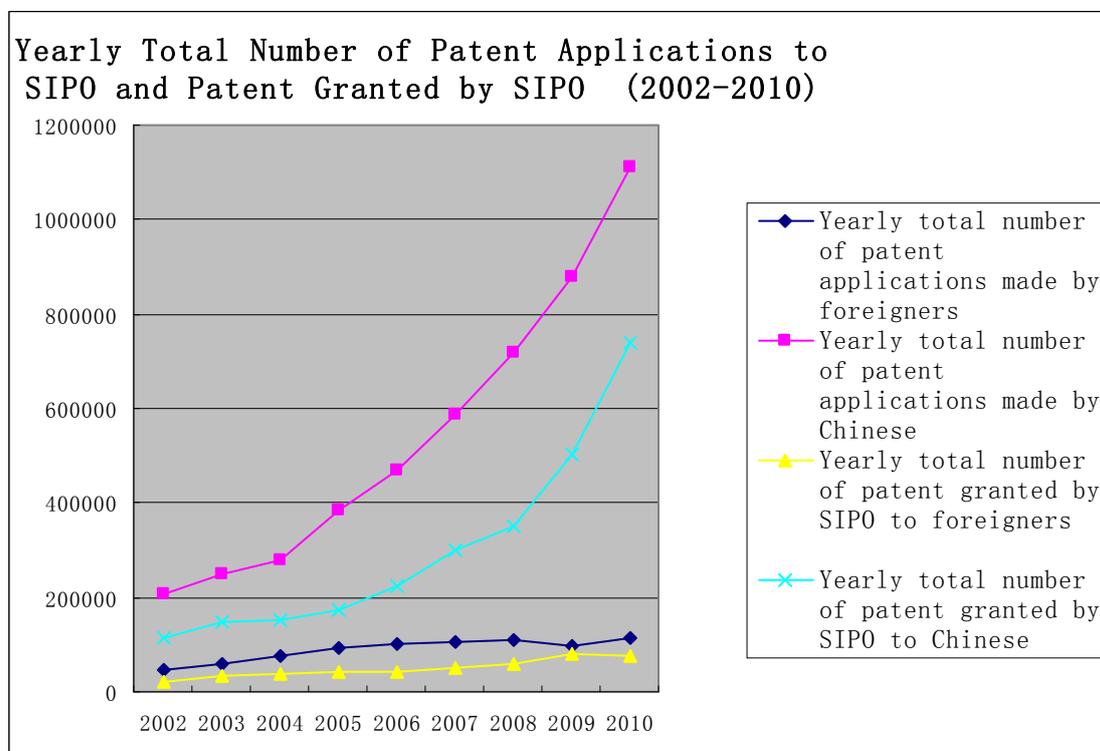
³⁰⁶ See <http://english.peopledaily.com.cn/90001/90780/91344/7283464.html>. The last visiting time: 02-03-2011.

³⁰⁷ Zhou, Eve Y. & Stembridge Bob (2010). *Patented in China: The Present and Future State of Innovation in China---China's Economy has Shift Focus, Moving away from traditional Agriculture and manufacturing toward Innovation-orientated Activities* See http://ip.thomsonreuters.com/chinapatents2010/China_Report_0810.pdf. The last visiting time: 15-03-2011.

³⁰⁸ Ibid. "China Poised To Become Global Innovation Leader"

3.2.2 The statistics/ the figures and some conclusions of Chinese patent

Figure 1: Yearly Total Number of Patent Applications to SIPO and Patent Granted by SIPO (2002-2010)



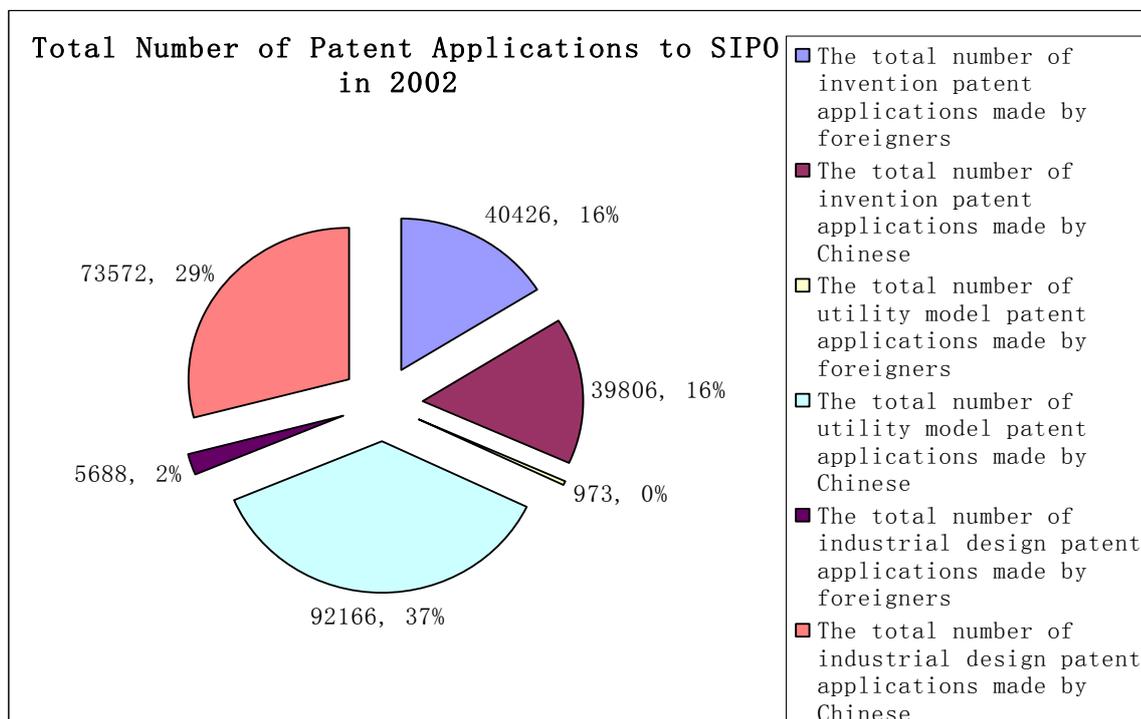
Source: The statics come from the SIPO website (Sate Intellectual Property Office) (2002-2010) <http://www.sipo.gov.cn/sipo2008/tjxx/>. Visiting time: 16-01-2011.

From the information of this figure, we can draw the following conclusions:

1 From the year of 2002 to 2010, we can clearly see that there are rapidly increasing number of patent applications conducted by Chinese, and therefore, the total number of patents granted by SIPO to Chinese is also increased rapidly;

2 From the year of 2002 to 2010, we can clearly see that the number of foreign patent application to SIPO is quite steady, and so does the total number of patents granted by SIPO to foreigners' applications.

Figure 2: Total Number of Patent Applications to SIPO in 2002



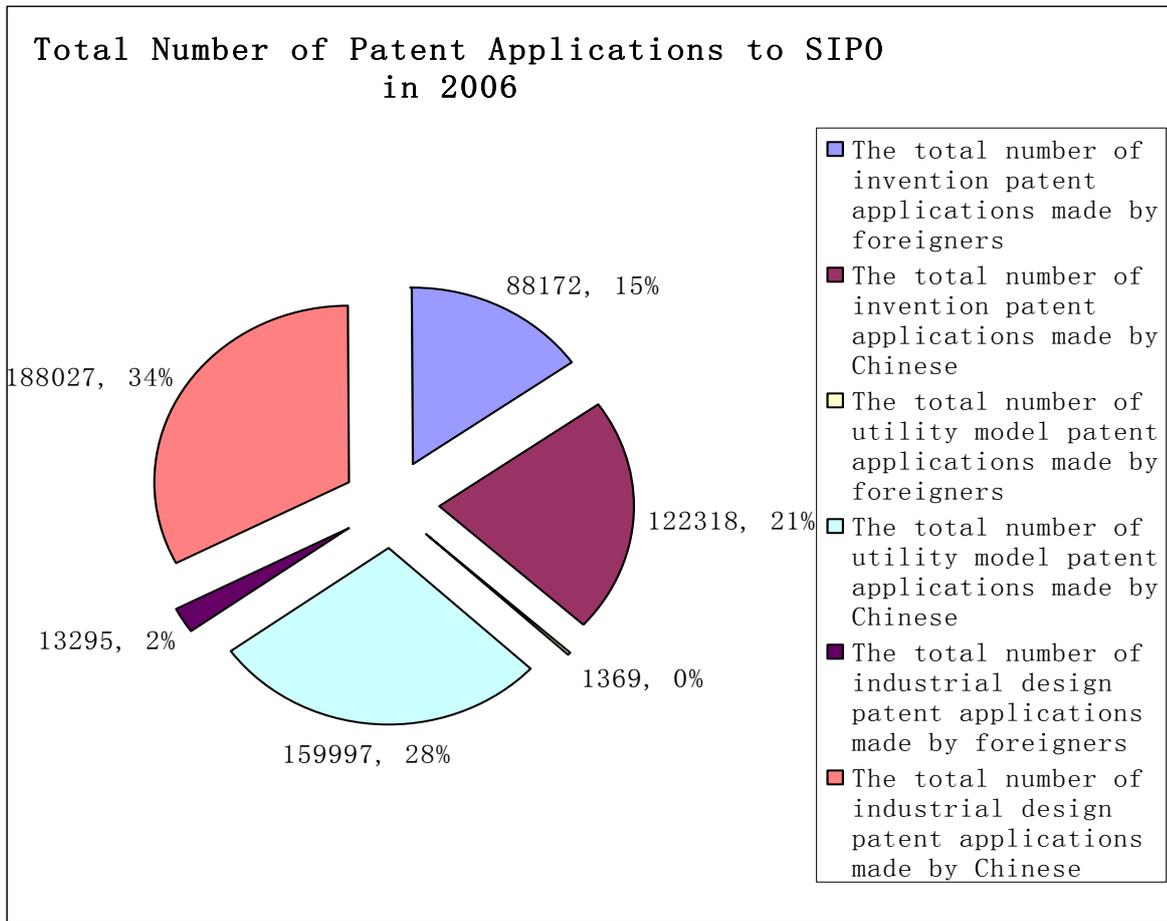
Source: The statics come from the SIPO website (Sate Intellectual Property Office) (2002-2010) <http://www.sipo.gov.cn/sipo2008/tjxx/> . Visiting time: 16-01-2011.

From the information of this figure, we can draw the following conclusions:

1 In 2002, among the total patent application number (invention patent, utility model patent and industrial design patent), for the high advanced patent ---the invention patent, the total number of invention patent application made by the Chinese is the lowest among the total number of utility model patent and industrial design application made by the Chinese. This shows that for although the number of patent application made by Chinese parties, the quality of Chinese patent application is not so good.

2 Comparing with the total number of invention patent application made by the Foreigner, we can clearly see that the quality of Foreigner patent application is so good.

Figure 3: Total Number of Patent Applications to SIPO in 2006

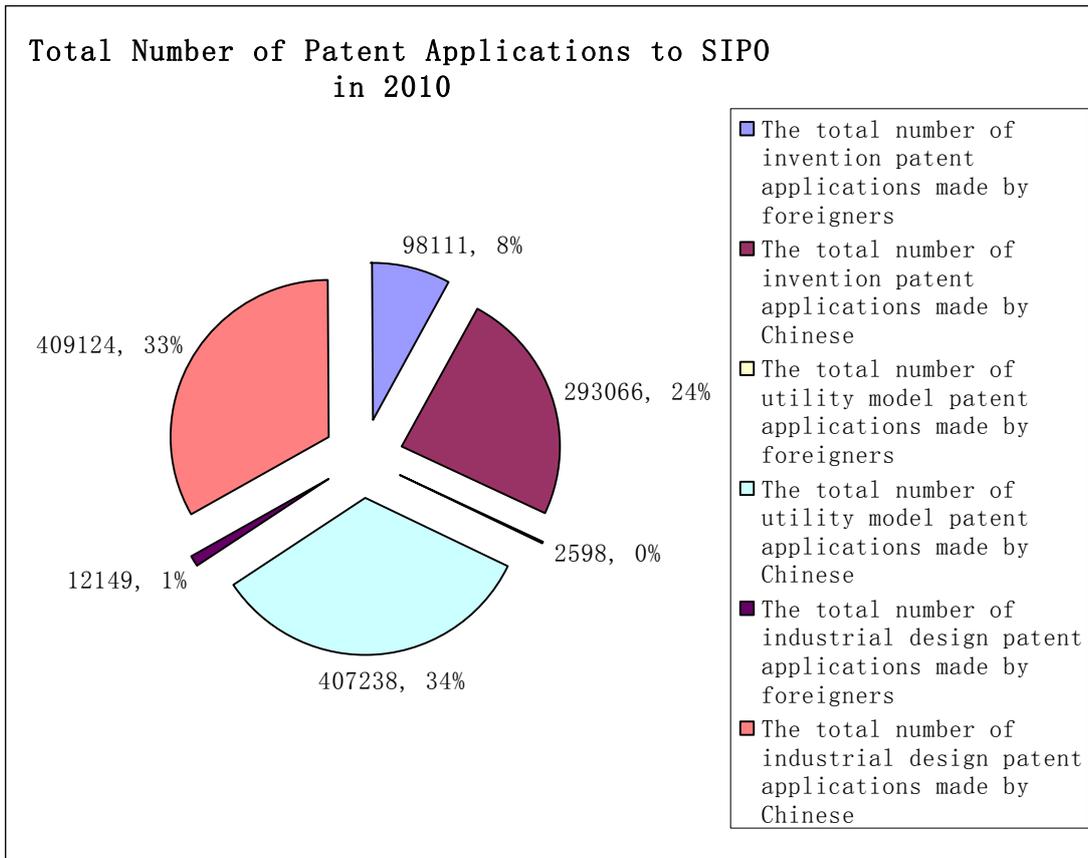


Source: The statics come from the SIPO website (Sate Intellectual Property Office) (2002-2010)

<http://www.sipo.gov.cn/sipo2008/tjxx/> . Visiting time: 16-01-2011.

The conclusion is the same with the Figure 2 in 2002.

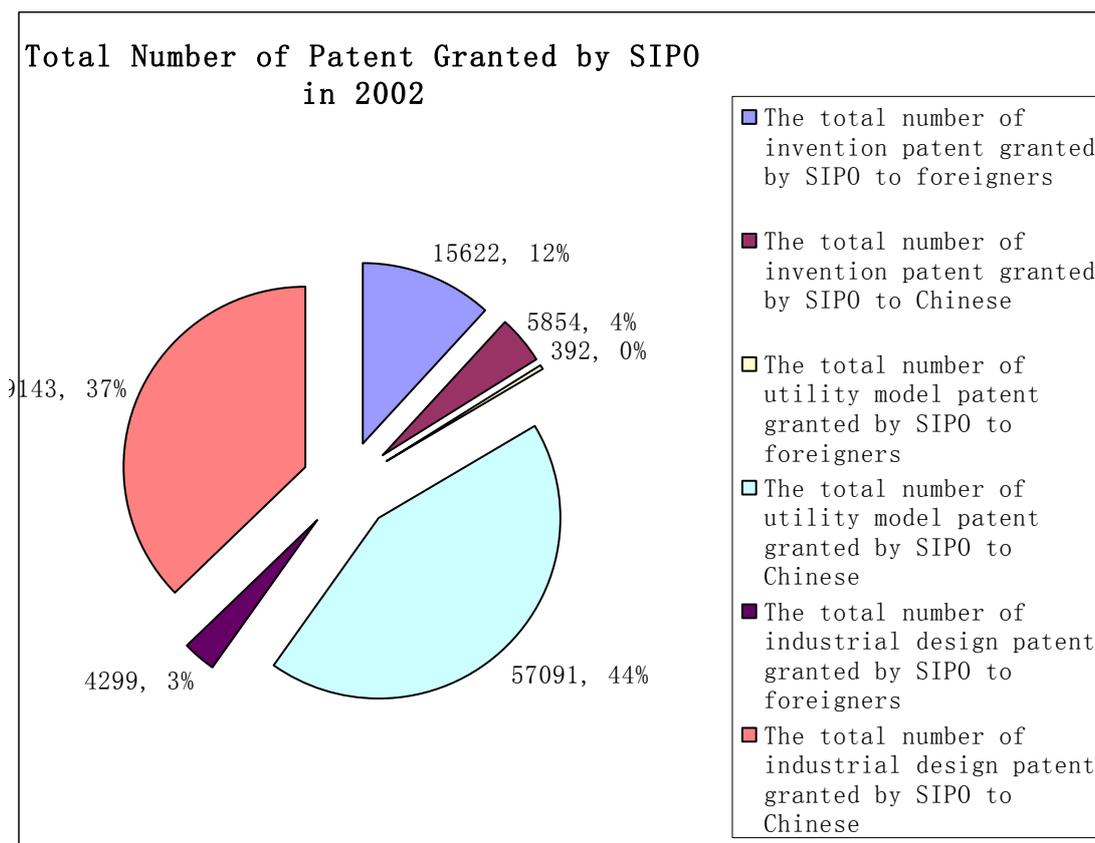
Figure 4: Total Number of Patent Applications to SIPO in 2010



Source: The statics come from the SIPO website (State Intellectual Property Office) (2002-2010) <http://www.sipo.gov.cn/sipo2008/tjxx/>. Visiting time: 16-01-2011.

The conclusion is the same with the Figure 2 in 2002.

Figure 5: The Total Number of Patent Granted by SIPO in 2002



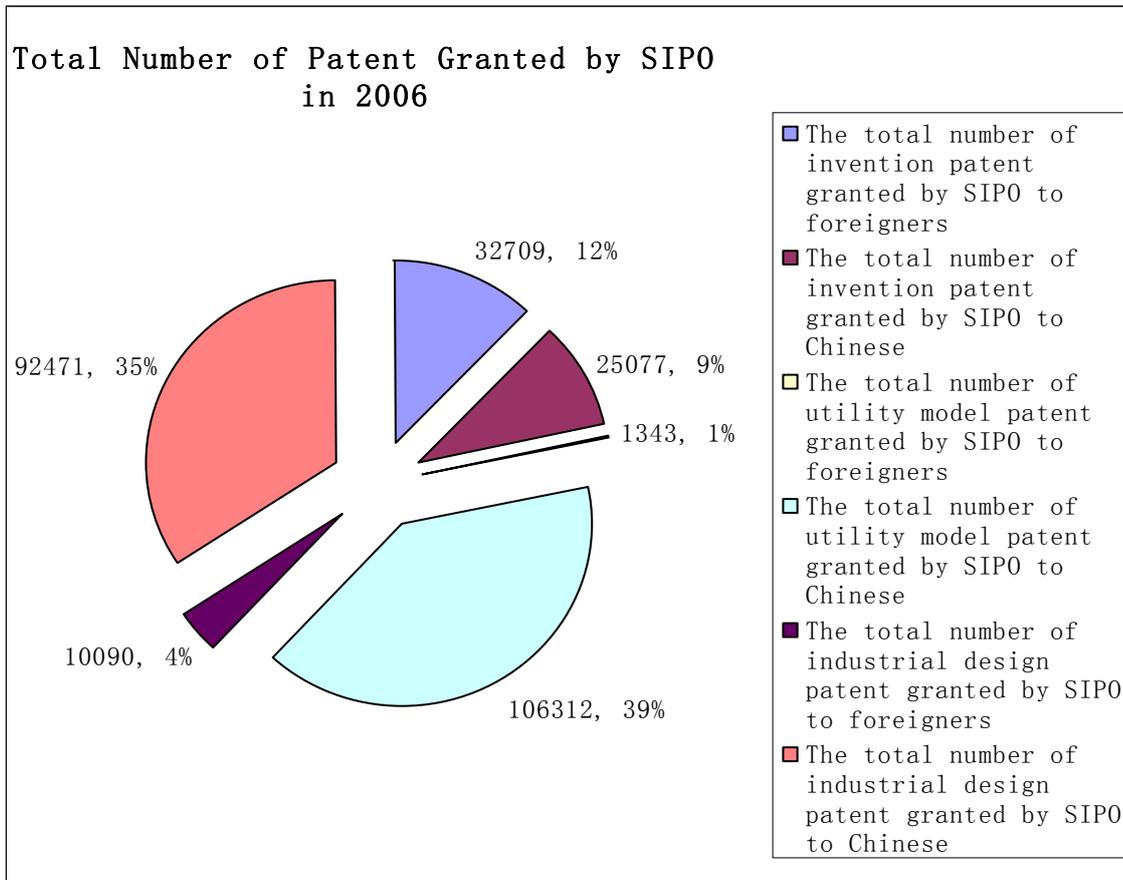
Source: The statistics come from the SIPO website (State Intellectual Property Office) (2002-2010) <http://www.sipo.gov.cn/sipo2008/tjxx/>. Visiting time: 16-01-2011.

From the information of this figure, we can draw the following conclusions:

1 In 2002, among the total number patent granted (invention patent, utility model patent and industrial design patent), for the high advanced patent ---the invention patent, the total number of invention patent granted by SIPO to the Chinese is the lowest among the total number of utility model patent and industrial design patent granted by SIPO to Chinese. This shows that for although the number of patent application made by Chinese parties, the quality of Chinese patent application is not so good.

2 Comparing with the total number of invention patent granted by SIPO to the Foreigner, we can clearly see that the quality of Foreigner patent application is so good.

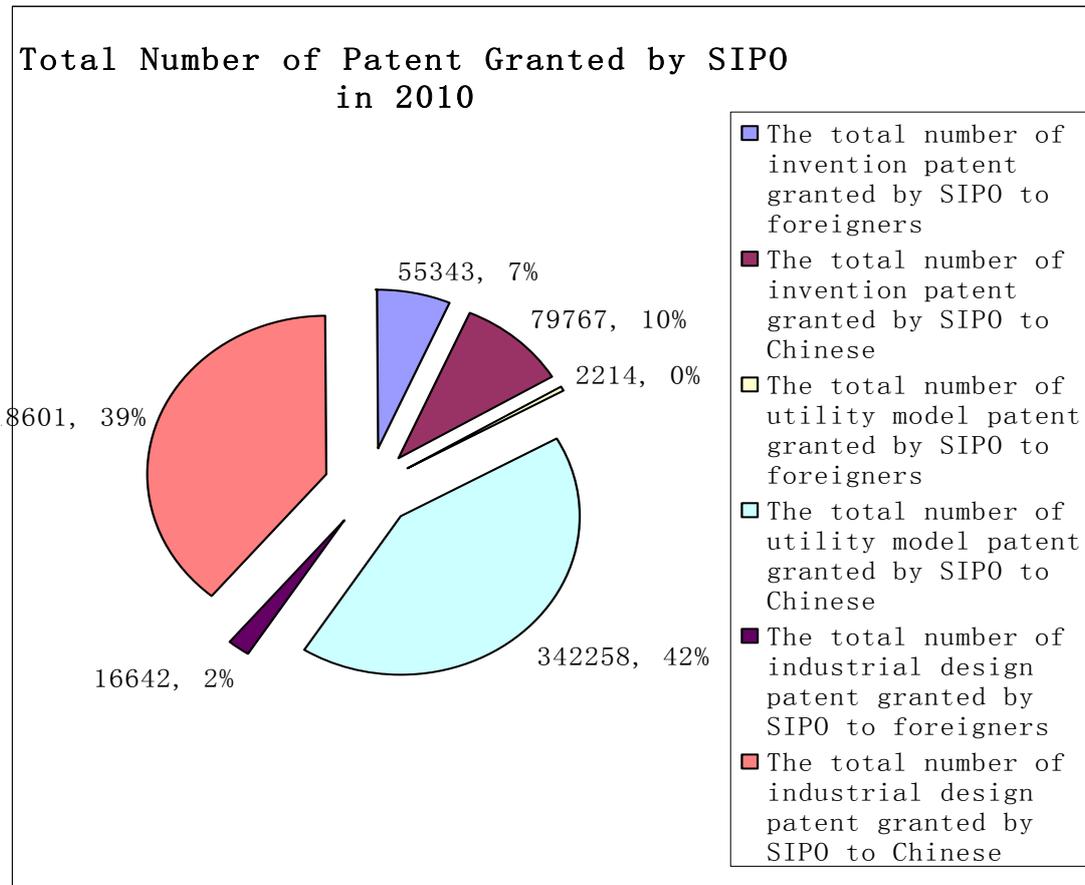
Figure 6: The Total Number of Patent Granted by SIPO in 2006



Source: The statics come from the SIPO website (Sate Intellectual Property Office) (2002-2010) <http://www.sipo.gov.cn/sipo2008/tjxx/> . Visiting time: 16-01-2011.

The conclusion is the same with the Figure 5 in 2002.

Figure 7: The Total Number of Patent Granted by SIPO in 2010

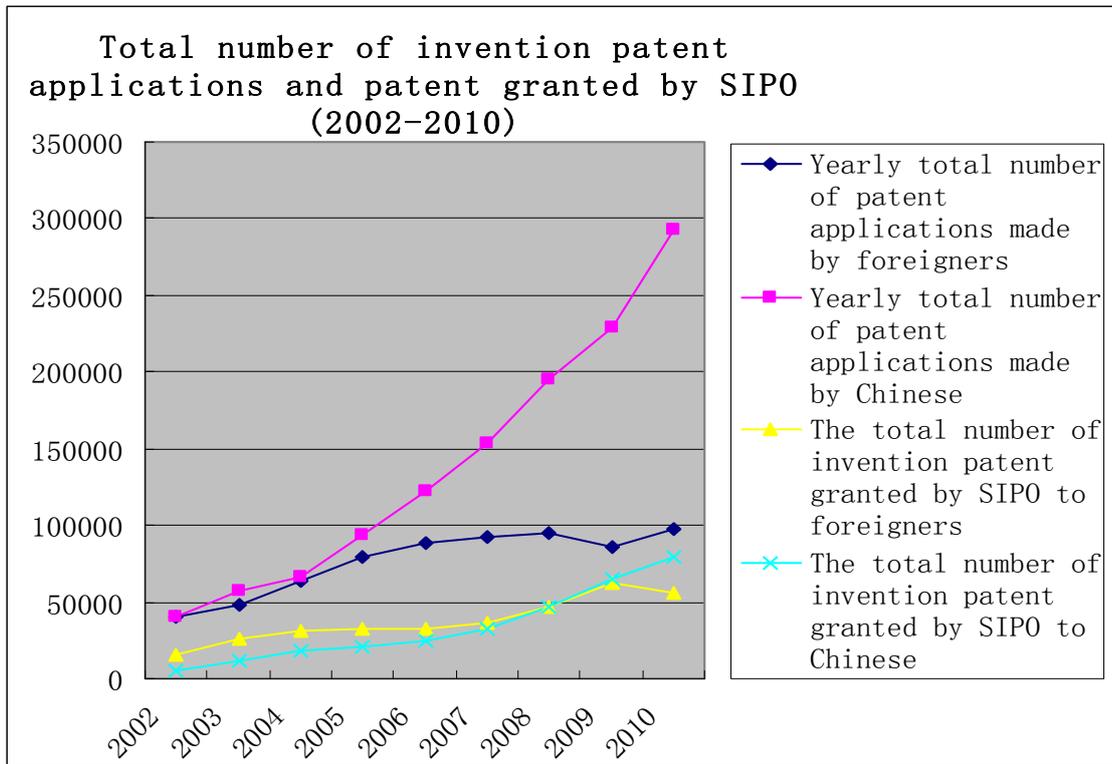


Source: The statics come from the SIPO website (Sate Intellectual Property Office) (2002-2010)

<http://www.sipo.gov.cn/sipo2008/tjxx/> . Visiting time: 16-01-2011.

The conclusion is the same with the Figure 2 in 2002.

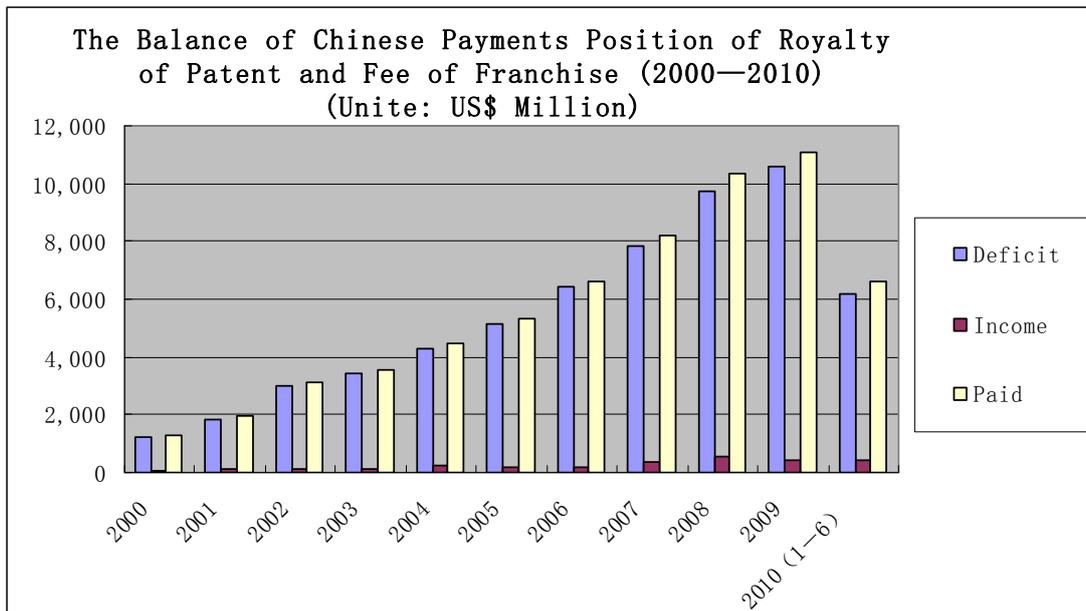
Figure 8: The Total Number of Invention Patent Application to SIPO and Invention Patent granted by SIPO (foreigners vs. Chinese)



Source: The statics come from the SIPO website (Sate Intellectual Property Office) (2002-2010) <http://www.sipo.gov.cn/sipo2008/tjxx/> . Visiting time: 16-01-2011.

Now let's focus our attention to the total number of invention patent application to SIPO and Invention patent granted by SIPO (foreigners vs. Chinese), we can clearly see that although, there is great amount of invention patent application to SIPO conducted by the Chinese, but comparing with the total number of invention granted by SIPO to foreign, and the total number of invention granted by SIPO to Chinese, the quality of the application of invention patent conducted by the Chinese is not so good.

Figure 9: The Balance of Chinese Payments Position of Royalty of Patent and Fee of Franchise (2000—2010) (Unite: US\$ Million)



Source: The statics come from the SAFE (Sate Administration of Foreign Exchange) annual report(2000-2010)

http://www.safe.gov.cn/model_safe/tjsj/tjsj_list.jsp?ct_name=中国国际收支平衡表&id=5&ID=110500000000000000. Visiting time:16-01-2011.

http://www.safe.gov.cn/model_safe/tjsj/pic/20101111133632096.pdf. Visiting time: 16-01-2011.

From this Figure 9 , we can clearly see that China is still a large country with huge technology imported.

3.3 The consciences or awareness of protection IPR should be further strengthened and the legal enforcement of IPR should be step a new stage

4 The Abuse of IPR in China and its restrictions

4.1 The IPR Abusing behaviors in China

In the practical case aspect, there are really some big companies abusing their IPRs in China.

4.1.1 The investigation report, named *The International Multinational Companies' Anti-competition Activities in China and Their Related Regulation*, conducted by SAIC in 2004^{309 310}

According to the investigated report, named *The International Multinational Companies' Anti-competition Activities in China and it Related Regulation*, conducted by the Bureau of Fair-dealing of SAIC, in the operational system of software market, the materials for the photo market, the camera market and soft-packaging material market, etc., there are dominated monopoly position made by foreign multinational companies. And most of these monopoly positions of foreign multinational companies were based on their IPRs' advantages. Therefore, with their IPRs' advantages, some of these companies have abused their IPRs, and more common practice of these foreign multinational companies are that they use the "private contract" to restrict the related business or do the business with the fixed partner, such as in the soft-packaging material market, LiLe company (Swiss) do not sold some part of machines and materials to some Chinese company, who do the same business. Beside based on their IPRs advantage, some of these multinational companies use the prejudice price to conduct the anti-competition activities, for example, one of Microsoft's operational systems of software was sold very lower price outside Mainland China.

According to this report, it claimed that the foreign multinational companies dominated monopoly positions were made by their huge capital and IPRs, especially by their IPRs advantages. And therefore, it is easier for some of them to abuse their IPRs advantages and conduct the anti-competition activities.

³⁰⁹ There are two important investigation reports about the multinational companies' anti-competition activities in China, one is *The International Multinational Companies' Anti-competition Activities in China and their Related Regulations*, sponsored by the Bureau of Fair-dealing of State Administrative and Commercial, and conducted by Prof. Shen Jieming, from Beijing University in 2004. Another is *The Investigation on the Abuses of Intellectual Property conducted by the International Multinational Companies in China and their related regulations*, the key project of state scientific researching plan sponsored by the State Scientific Bureau, conducted by Prof. Wang Xianlin, from Anhui University in 2005. 王先林,(2005), 跨国公司在华知识产权滥用, 《商务周刊》(2005年11月5日)。 (该文章是王先林教授所主持的科技部国家软科学研究计划重点课题《在华跨国公司知识产权滥用情况及其对策研究报告》的结项成果)

³¹⁰ <http://finance.sina.com.cn/g/20040515/1533762239.shtml>

4.1.2 Some typical IPR abuse cases in China

The following IPR abuse cases are from the article of *Intellectual Property Right Abuses in the Patent Licensing of Technology Standards from Developed Countries to Developing Countries: A Study of Some Typical Cases from China*³¹¹

According to the article named *Intellectual Property Right Abuses in the Patent Licensing of Technology Standards from Developed Countries to Developing Countries: A Study of Some Typical Cases from China*, written by Ying Zhan, Xuezhong Zhu, and published on *The Journal of World Intellectual Property* (2007) (Vol. 10, nos. 3/4, pp. 187–200), there are some typical cases of IPRS abuses in the patent licensing of technology standards from the multinational corporations of western countries to the Chinese companies.

Therefore, “In recent years, a catchphrase has been prevailing in China. It is said that “a third-rate enterprise sells product, a second-rate enterprise sells technology, a top-ranking enterprise sells standard”. It reflects the fact that one who controls the standard can often dominate the related market. However, the top-ranking enterprises that sell the standard are almost all multinational corporations of western countries. Similar situations occur not only in China but also in other developing countries. In the past, technology standards always excluded intellectual property rights (IPRs) such as patent rights. However, this tradition has been broken over the past few years. More and more standards are beginning to include patent technology. At the same time, a new problem has emerged: some enterprises that own the patent attributed to a standard have tended to abuse their patent rights. This problem is particularly serious in the process of patent licensing from developed countries to developing countries.

In this article, the authors provide some typical cases as the followings:

4.1.2.1 IPR Abuses under De Facto Standards

Case 1: Intel Corp. v Dongjin Ltd.

In September 2004, Intel lodged a complaint with Shenzhen Intermediate People’s Court, accusing Dongjin, a Chinese company, of using an “Intel Head File” in its DN series voice cards and assisting users to obtain or deliberately violate the protocols of this file. In the complaint, Intel stated that the DN sound card invented by Shenzhen Dongjin infringed on its SR5.1.1 software and that Dongjin had helped other users in illegally acquiring or breaching the license. Intel also

³¹¹ The following materials are cited from the article, Ying Zhan and Xuezhong Zhu, (2007), *Intellectual Property Right Abuses in the Patent Licensing of Technology Standards from Developed Countries to Developing Countries: A Study of Some Typical Cases from China*, *The Journal of World Intellectual Property*, Vol. 10, nos. 3/4, pp. 187–200.

questioned the compatibility between the products of both parties. Intel claimed US\$7.96 million compensation from Dongjin (Wen, 2005).

The focus of this case is the “header file” in Intel SS5.1.1 documents. A header file is a descriptive file that contains transparent information about the file or the transmission. With header files, other manufacturers can make their products compatible with Intel products. Dongjin argued that its NADK does not contain Intel’s header file, and that it is just compatible with the SR5.1.1 applications interface (API), especially the header file. As a result, former Intel voice card users can easily switch to Dongjin’s products, which is Intel’s real worry. We can deduce this from the fact that Intel directly filed the lawsuit without warning or negotiating with Dongjin in advance. In April 2005, Dongjin brought a countercharge against Intel in Beijing, accusing Intel of illegally monopolizing technology and hindering technology development by virtue of a restrictive fixed item in its license agreement

This case has still not been closed by the court in Beijing due to its great importance and the arguments it has caused in China.

Case 2: Cisco Inc. v Huawei Inc.

In January 2003, Cisco Systems Inc., the world’s largest maker of equipment that directs internet traffic, sued China’s Huawei Technologies as well as its subsidiaries Huawei America Inc. and Future Wei Technologies Inc., accusing them of infringing on its intellectual property. The lawsuit was filed in the United States District Court for the Eastern District of Texas. Cisco alleged that Huawei’s Quidway product line pirated Cisco’s IOS software, including source code, copied Cisco documentation and other copyrighted materials and infringed several Cisco patents (Roberts, 2003).

Huawei denied that it had infringed on Cisco’s patents or copied its software. The largest Chinese telecommunications equipment maker just admitted that it had used Cisco’s proprietary protocol at a customer’s request. Proprietary protocol is a non-standard communications format and language developed by a single enterprise or organization. In a response statement, Huawei stated that it “has always respected and protected intellectual property rights, investing heavily on product research and development” (Zou, 2003). As of 30 September 2006, Huawei had 56,333 employees, of whom 48% are dedicated to research and development (R&D).⁷ Each year, the firm allocates no less than 10% of its annual sales to R&D. Huawei accused Cisco of trying to keep a competitor out of the market, and that this was the real purpose of the lawsuit. On 1 October 2003, Cisco and Huawei came to an agreement to halt the lawsuit. Both companies agreed on a process for an independent review of the changes in Huawei’s related software and documents. A completion of the review that was satisfactory to both parties would end the lawsuit. On 28 July 2004, the US court terminated the lawsuit.

In this article the authors argue that the above two cases indicate the same mode of IPR abuse: blocking competitors by taking advantage of the status of controlling de facto standards.

4.1.2.2 IPR Abuses under De Jure Standards

Case 3: Orient Power Ltd v DVD3C

On 28 December 2005, two Chinese-based DVD manufacturers, Wuxi Multimedia Ltd and Orient Power (Wuxi) Technology Ltd, filed a lawsuit against the DVD3C Patent Pool in the United States District Court for the southern District of California. DVD3C consists of Sony Corp., Philips, Pioneer Corp. and LG Electronics. The two plaintiffs accused the patent pool of using and employing abusive and coercive strategies to intimidate parties to pay royalties to the defendants by:

- (1) creating unlawful tying arrangements;
- (2) anti-competitively dominating the DVD player markets;
- (3) engaging in price fixing in violation of United States laws;
- (4) misrepresenting the nature of their licensing activities to the DOJ;
- (5) operating at variance with the terms of the DOJ business review letter;
- (6) demanding and collecting double royalties; and
- (7) refusing to license manufacturers of DVD players.

This case has brought about great repercussions in China, with many Chinese enterprises and scholars paying considerable attention to it. China is the largest DVD manufacturing country in the world; about 80% of all DVD players are made in China, and there are about 110 licensees of DVD3C in China. However, their profit is very small. The total patent royalties per DVD player needed to be paid to DVD3C, DVD6C, 1C, etc. were up to US\$23.5. The royalties accounted for 40% of the total cost when the price of DVD players continually declined. As they could not afford such high patent fees, many Chinese DVD manufacturers were forced to go bankrupt or leave the trade. Although they feel very indignant about the IPR abuses of those Western patentees, it is hard to file an antitrust law suit in China due to the absence of an efficient antitrust system. Wuxi Multimedia and Orient Power (Wuxi) had to sue DVD3C in the United States. However, the District Court for the southern District of California rejected the plaintiff's claim because the court thought their evidence was insufficient. This has seriously disappointed DVD manufacturers in China.

Case 4: IPR Abuse by the CD-R Patent Pool

In early 2001, the main CD-R manufacturers in Chinese Taiwan brought an unfair trade practice claim to Taiwan's Fair Trade Commission against the CD-R patent pool. The pool was formed by

three companies: Philips, Sony Corp. and Taiyo Yuden. It is the sole patent pool under the standard of recordable CD-ROM. As the main licensees of the CD-R patent pool in the world, Taiwanese CD-R manufacturers accused the pool of:

- (1) licensing in package and excluding competition between patentees in the pool;
- (2) engaging in tying arrangements by virtue of a restrictive fixed item for package licensing;
- (3) irrationally maintaining a high royalty rate even while the CD-R price declines heavily; and
- (4) refusing to explain adequately the necessity, scope and term of their patents.

The Taiwanese Fair Trade Commission adopted allegations 1, 3 and 4 in the above and ruled that the three companies had illegally colluded by jointly enacting CD-R patent licensing agreements, irrationally maintaining royalty, compelling licensees to accept unreasonable terms. As a result, Philips, Sony and Taiyo Yuden were separately fined NT\$8 million, NT\$4 million and NT\$2 million (Huang, 2002).

4.2 “337” investigation to Chinese companies

4.2.1 What is the “337”?

The “337” investigations are conducted by the U. S. International Trade Commission under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337)³¹². The most of 337 investigations often involve claims regarding intellectual property rights, including allegations of patent infringement and trademark infringement by imported goods. Both utility and design patents, as well as registered and common law trademarks, may be asserted in these investigations. Other forms of unfair competition involving imported products, such as infringement of registered copyrights, mask works or boat hull designs, misappropriation of trade secrets or trade dress, passing off, and false advertising, may also be asserted. Additionally, antitrust claims relating to imported goods may be asserted.³¹³

There are the following remedies available in section 337 investigation:

- (1) After the investigation, if the ITC deliver her ruling that there is the violation of Section 337, and then , the ITC will issue an permanent exclusion order that directs Customs to stop infringing goods imports from entering the United States.
- (2) During the 337 investigation , in order to protect the interests of the US IPR owner, the Commission may issue cease and desist orders against named importers and other persons engaged in unfair acts that violate Section 337. Expedited relief in the form of temporary exclusion orders

³¹² TITLE 19 > CHAPTER 4 > SUBTITLE II > Part II > § 1337. Unfair practices in import trade

See http://www.law.cornell.edu/uscode/uscode19/usc_sec_19_00001337----000-.html. The last visiting time: 20-03-2011.

³¹³ USITC---Section 337 investigations. See http://www.usitc.gov/intellectual_property/. The last visiting time: 20-03-2011.

and temporary cease and desist orders may also be available in certain exceptional circumstances.

4.2.2 Since the accession to WTO, the number of Chinese companies suffered by US 337 investigation is steady increasing

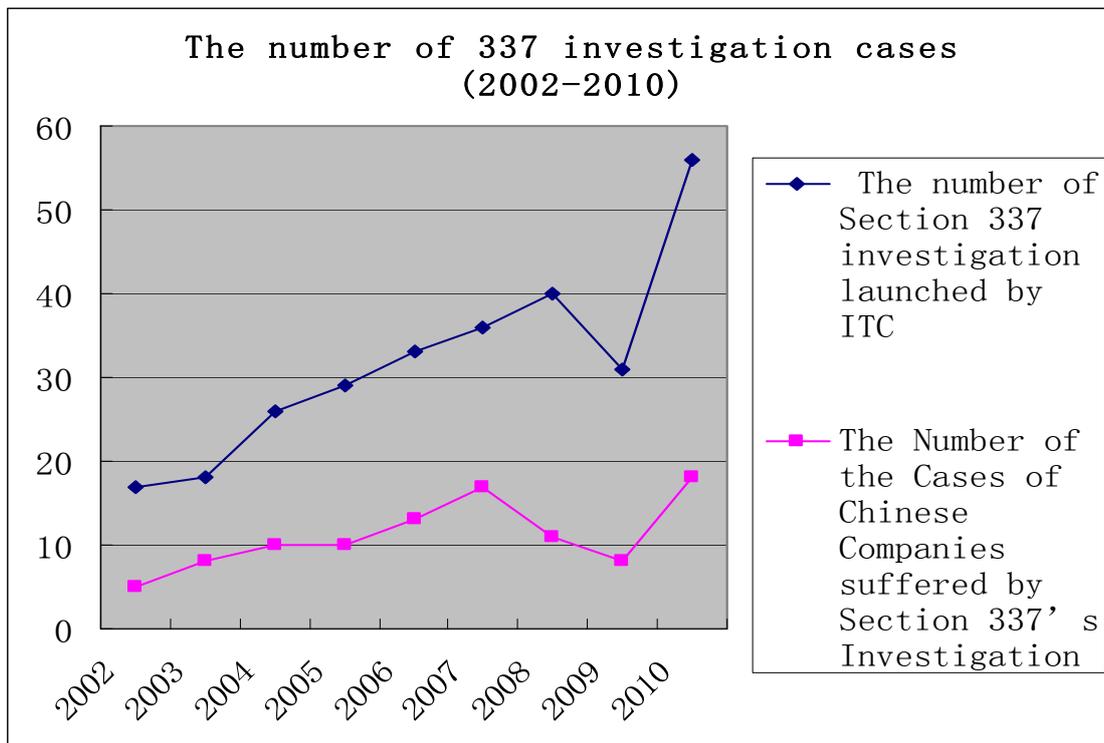
Since the accession to WTO, the number of Chinese companies suffered by US 337 investigation is steady increasing, and the total number is 101.

Figure 5: The Number of the Cases of Chinese Companies (including Taiwan/Hong Kong/Macao) suffered by Section 337's Investigation (2002-2010)

Year	The number of Section 337 investigation launched by ITC	The Number of the Cases of Chinese Companies suffered by Section 337's Investigation	Percentage(%)
2002	17	5	29.4
2003	18	8	44.4
2004	26	10	38.5
2005	29	10	34.5
2006	33	13	39.4
2007	36	17	47.2
2008	40	11	27.5
2009	31	8	25.8
2010	56	18	32.1

Source: The statics come from the USITC website and Chinese MOFCOM website http://www.usitc.gov/intellectual_property/inv_his.htm; Visiting time: 16-01-2011. <http://gpj.mofcom.gov.cn/cp/cp.html>. Visiting time: 16-01-2011.

Figure 5: The Number of the Cases of Chinese Companies (including Taiwan/Hong Kong/Macao) suffered by Section 337's Investigation (2002-2010)



Source: The statics come from the USITC website and Chinese MOFCOM website http://www.usitc.gov/intellectual_property/inv_his.htm; Visiting time: 16-01-2011. <http://gpj.mofcom.gov.cn/cp/cp.html>. Visiting time: 16-01-2011.

4.2.3 In China, some scholars regard the US 337 investigation is kind of IPR abuse

In China, some scholars regard the US 337 investigation is kind of IPR abuse. But I do not think so, the reasons are followings:

- (1) The US 337 investigation is the US domestic law, and conducted by the US ITC;
- (2) The subjects of US 337 investigation are all the goods which import US, it is not specifically toward the goods from China;
- (3) During the proceedings of US 337 investigation, the subject of the investigation can enjoy legal rights to make good defense themselves.

Therefore, my conclusion is that, the US 337 investigation is not a kind of IPR abuse. The only important thing for Chinese company which suffering the US 337 investigation to do is to join the 337 investigation and make good use of the legal procedures to defense himself.

4.3 The characteristics of IPR abusing in China

(1) The IPR abuses in China are mainly concerning the patent, especially, the industrial product patent technology.

The reason of this is that most of Chinese companies do not have the advanced technologies. They just obtain the patent licenses from the technologically advanced party to make good use of such patented technology.

(2) The some multinational companies abuse their IPR in the standards application process

The reason of this is that more and more standards are beginning to include patent technology. At the same time, a new problem has emerged: some enterprises that own the patent attributed to a standard have tended to abuse their patent rights. This problem is particularly serious in the process of patent licensing from developed countries to developing countries.

5 To restrict the IPR abusing in China

5.1 In the academic aspect, how to restrict the IPR abusing is one of hot issues to be discussed by Chinese IPR scholar

At present, China has established a well-organized IPRs legal protection system, and from the legal practice point of view, the owner of IPRs can enjoy very good protection. However, according to several markets investigation reports conducted by some Chinese authorities, there are some big companies abusing their IPRs and conducted some anti-competition activities. These anti-competition activities of big companies seriously destroyed the market competition order and prejudiced the interests of customers. But, even the worse, in China present legal system, there is no any specific law or regulation to deal with these IPRs' abusing activities.

Therefore, how to effectively restrict the IPRs' abusing in Chinese present situation becomes a very urgent question for the academic researcher to find suitable answer.

In the academic aspect, there are many articles and books dealing with this question, such as, the article named Intellectual Property Right Abuses in the Patent Licensing of Technology Standards from Developed Countries to Developing Countries: A Study of Some Typical Cases from China, written by Ying Zhan, Xuezhong Zhu, and published on The Journal of World Intellectual Property (2007) Vol. 10, nos. 3/4, pp. 187–200; the PhD dissertation named IPR's misusing and it related legal regulation in the foreign trade aspect, written by Cheng Jianping, from the China Economy and Trade University; For the books, according to my reading, there are four books having made a deep analyses of IPRs' misusing, these are: (1) Wang Xianlin, Intellectual Property and Antimonopoly Law—Study on Antimonopoly Issues of Abuse of IPRs, Beijing: Law

Press, 2008; (2) Wang Xianlin, IPRS' Misusing and its regulation, Beijing: FAZHI Press, 2008; (3) Xu Lifeng, On Patent Extension and its Regulation, Beijing: IPR Press, 2007; (4) GUO JIA ZHI SHI CHAN QUAN FA ZHAN ZHONG XIN, Regulation of the usages of IPRS, Beijing: IPR Press, 2004; (5) Feng Xiaoqing, On the Theory of the Balance of IPRS Interests, Beijing: ZHONG GUO ZHENG FA DA XUE Press, 2006.

5.2 In the legal aspect, there are four important laws/regulation and interpretations concerned about the regulation of the IPRS' abusing.

In the Chinese legislation aspect, there are four important laws/regulation and interpretations concerned about the regulation of the IPRS' abusing, such as, the Compendium of China National IP Strategy, the Third Amendment to the Patent Law and the Anti-trust Law of the P.R.C.

5.2.1 Compendium of China National IP Strategy is promulgated in 2008

On June 5, 2008, the State Council officially promulgated the Compendium of China National IP Strategy (2008-2020) (hereinafter referred to as the "Compendium"). The issuance of the Compendium serves as a milestone in the history of intellectual property development in China.

It is emphasized by the Compendium that the IP development strategy should be regarded as an important national strategy, and the ability for creation, application, protection and management of intellectual property should be greatly improved.

In its foreword, the Compendium points out that "intellectual property infringements are serious to some extent and the abuse of intellectual properties are common.", therefore, "Preventing abuse of intellectual property" is becoming one of key points of this Compendium, and then, the Compendium asks the "Relevant laws and regulations shall be formulated to reasonably define limits of intellectual property so as to prevent abuse of intellectual property, maintain market order for fair competition and safeguard legitimate rights of public.

The Compendium is not the source of the law, but it indicates the direction of the IPR's legislation and makes a top guideline for the judge to apply the IPR laws.

5.2.2 The Third Amendment to the Patent Law

The decision on the third amendment to the Patent Law was adopted at the Sixth Session of the Eleventh National People's Congress in December 2008, and this decision will become effective as of the date of October 1, 2009. There are many important points of this third amendment of the Patent Law, but there is no article concerned about the regulation of patent misusing.

However, in the draft of the patent law (third amendment), to regulate patent misusing is one of key points.

Article A10, Paragraph 2 of the draft reads: Where any patentee, knowing well that the technology or design for which the patent is granted belongs to prior art or prior design, maliciously accuses other person of infringing its or his patent and institutes legal proceedings in the people's court, or requests the Patent Administrative Authority to handle the matter, the alleged infringer may request the people's court to order the patentee to compensate for the damages caused therefrom to the alleged infringer. This provision is newly added to prevent abuse of patent rights.

According to the speech of the spokesman of Chinese legislature, Mr. Cheng Guangjun, "the reasons of why there is no article concerned about the patent misusing are that (1) the main purpose of patent law is to encourage and protect invention, and there are some balances between the protection of the invention and the regulation of patent misusing. At present, in China, the Chinese government should pay more attention to protect the patent; (2) There is article of regulation of IPRS misusing in the Anti-trust Law of PRC, therefore, the patent law should coordinate with it.

5.2.3 On 1st August, 2008, the Anti-trust Law of the P.R.C. was taken into effect

On 30th August, 2007, The Anti-trust Law of PRC was passed and will come into effect on August 1, 2008. There is only one article (Article 55) concerning about regulating the IPRs abusing. It is too general to be applied in the practice.

Article 55 This law shall not apply to the conduct of business operators to exercise their intellectual property rights in accordance with the laws and relevant administrative regulations on intellectual property rights; however, this Law shall apply to the conduct of business operators to eliminate or restrict market competition by abusing their intellectual property rights.

Anti-trust Law of the People's Republic of China

5.2.4 On 1st February 2011, the latest SAIC's regulations concerning about the anti-trust activities

From the day of 1st February 2011, three regulations concerning about the anti-trust activities promulgated by the State Administration for Industry & Commerce (the "SAIC") comes into effect, including the Provisions of SAIC on Prohibiting Monopoly Agreement, (No.53),³¹⁴ Provisions of

³¹⁴工商行政管理机关禁止垄断协议行为的规定 (第 53 号), (颁布时间: 2010 年 12 月 31 日, 生效时间: 2011 年 2 月 1 日) See <http://www.chinaiprlaw.cn/file/2011010818314.html>. The last visiting time: 16-01-2011.
Provisions of SAIC on Prohibiting Monopoly Agreement, (No.53), (Issuing date: 31-12-2010, Effective date: 01-02-2011).

SAIC on Prohibiting Abuses of Dominant Market Position, (No.54),³¹⁵ Provisions of SAIC on Prohibiting Abuses of Administrative Power to Exclude or Restrict Competition, (No.55)³¹⁶(collectively, "Regulations"). Such Regulations offer further interpretations to the Anti-Monopoly Law ("the AML") and form the legal guidance for the SAIC to exercise jurisdiction over monopolizing activities. However, close reading of the provisions suggests that the SAIC may go beyond the lines delineated by the AML.

These three SAIC's regulations concerning about how to determine the two general catalog anti-trust activities: one is the collusion, mainly by ways of contract (agreement); another is abuse the dominant position. And provide the detailed explanations to the relevant articles of AML. Especially, on how to define the market dominate position, and the transaction terms as abuse of market dominance, and how to define the "market dominant position"

6 Some comments and suggestions on regulation of the IPR abusing in China

China is still a large developing country with not so high ability of innovation generally. And in this new economy, the IPRs are becoming very important capitals for global competition. Therefore, for China, the most important thing to do is to stimulate the innovation and take more effective and efficient legal system to protect the IPR. For this perspective, the Chinese government has done it and achieved great achievements.

However, in this new economy (high-technology industries), there is really probability of the owner of IPR to abuse his dominant position. And with the characteristics of network externality and lock-in effects, there are probabilities for the IPR owners to abuse their IPR. Just because the average innovation abilities of Chinese companies are not so high, and then, the Chinese government should be paying more attention to regulate any IPR abuse. But, how to effectively regulate the IPR abuse by way of competition law in Chinese situation, from the law and economic theories' perspective, from the legislation perspective, and from the judicial practice perspective, there are a lot thing for the Chinese government to do.

In order to effectively and efficiently regulate the IPR abuse, we should do the following ways:

(1) The construction of law and economy theories

In order to effectively and efficiently regulate the IPR abuse, we should pay more attention to the theories construction, especially, the law and economic theories. That means we clearly know what

³¹⁵ 工商行政管理机关禁止滥用市场支配地位行为的规定（第54号），（颁布时间：2010年12月31日，生效时间：2011年2月1日）Provisions of SAIC on Prohibiting Abuses of Dominant Market Position, (No.54), (Issuing date: 31-12-2010, Effective date: 01-02-2011). See <http://www.chinaiprlaw.cn/file/2011010818336.html>. The last visiting time: 16-01-2011.

³¹⁶ 工商行政管理机关制止滥用行政权力排除、限制竞争行为的规定（第55号）（颁布时间：2010年12月31日，生效时间：2011年2月1日）

Provisions of SAIC on Prohibiting Abuses of Administrative Power to Exclude or Restrict Competition, (No.55), (Issuing date: 31-12-2010, Effective date: 01-02-2011). See <http://www.chinaiprlaw.cn/file/2011010818312.html>. The last visiting time: 16-01-2011.

the relations among the innovation /competition/monopoly and entrepreneurship, and how we evaluate the dynamic antitrust model and efficient market structure, etc.

And for construction of the law and economy theories in China, I think, we should get further research on the Austrian Economy School, especially, the Schumpeter's "perennial gale of creative destruction" theories, and the relationships among the innovation /competition/monopoly and entrepreneurship.

(2) To detail the relevant laws/regulations concerning about the regulating the IPR abuse

As we also know that it is quite common to apply the competition law to regulate the IPR abuse, but in China, till 2010, the Chinese Anti-competition law has just been enforced less than 2 years. And besides this law, there is no any specific guidelines or specific instructions to deal with the more complicated matters which involved in the regulation of IPR abuse in such rapidly changed new economy circumstance. Therefore, it is very urgent for Chinese relevant authorities to issue the relevant laws/regulations concerning about the regulating the IPR abuse in detail.

(3) According to the theories of Austrian Economy School, the innovation/competition/monopoly and entrepreneurship are correlated, and then, we should pay more attention to cultivate the entrepreneurship, stimulate the inspirations of companies' innovation, and strengthen the IPR protection.

Chapter Six Conclusion

Conclusion 1

From the political and economic perspective---free competition in the market is kind of economic democracy, and this is the reflections of Freedom and political democracy.

“The guiding principle, that a policy of freedom for the individual is the only truly progressive policy, remains as true today as it was in the nineteenth century.”³¹⁷

In the free market economy, the main purposes of the competition law are such as, to keep the order of market, to vitalize the fair competition, and to benefit the customer, and the main purposes of the IPR law are to protect the creative productivity and provide the incentives to creativity.³¹⁸ The fundamental aims of these two institutions are to secure the fundamental function of the market mechanism in allocating the resource effectively and maximizely, to pursue the freedom of the individual in the market and equality among them. And these are directly reflection of the political democracy and individual freedom.

³¹⁷ Hayek, F. A. (1940-1944). *The road to serfdom*. London: G. Routledge & Sons, (First Published in March 1944). P178.

³¹⁸ The main function of IPR legal system is a kind of optimal institution in broader sense as a way of creating incentives to innovate and to produce more and more intellectual products.

For this point, the new economy growth theory has better illustrated it. According to the new growth theory, creativity is the main driver for economic development. The new growth theory is based on the following golden rule:

FREEDOM- CREATIVITY-TECHNICAL PROGRESS- DEVELOPMENT³¹⁹

From the above rule of the new growth theory, we can clearly observe that the freedom of the individual in the market, and especially in the political life, is the fundamental cornerstone of the whole economy development---that is, by way of creativity/technology progress and competition. Therefore, there is “nothing can prevent creativity to perform abundance except a backward step of freedom.”³²⁰ And according to the new growth theory, objective limits (of the economy growth) do not exist, and psychological limits (of the economy growth) are not linked to economics. The only threat (of the economy growth) comes from political limits.³²¹

Therefore, in China, it is a very complicated process to construct the institution to regulate the abuse of the IPRs. Because to establish this institution in China, the specific legal institution’s construction building is important, but comparing with the legal institution, the political institution’s construction is more important, especially, the values of pursue the freedom/equality and fair competition are even more important. However, being a Chinese legal scholar, I am confident in this legal and political institutional construction, and will devote myself to constructing this great mission!

Conclusion 2

The relationship between the IPR and competition law is interactive, not contradict. From the long perspective, the purposes of IPR and competition are the same, both of them are to benefit the consumer and promote the social progress.

Conclusion 3

In the new economy, there is probability of the owner of IPR to abuse his dominant position. And *‘the risk is sensible that a convulsive combination of intellectual property rights and economic effects will vest the dominant undertakings with the power not just to monopolize the market but to shift such power from one market to another, to create strong barriers to enter and, in so doing,*

³¹⁹ See NEW GROWTH THEORY---CREATIVITY, available at <http://www.freeworldacademy.com/globalleader/ecodev.htm>. The last visiting time:21-08-2010.

³²⁰ Ibid.

7-THE LIMITS OF GROWTH

According to the new growth theory, objective limits do not exist, and psychological limits are not linked to economics. The only threat comes from political limits.

Nothing can prevent creativity to perform abundance except a backward step of freedom.

³²¹ Ibid.

granting the perpetuation of such dominance for quite a long time”³²²

Conclusion 4

In order to regulate efficiently the IPR abuse, we should apply the Austrian Economic School theories to analyze the relationship among the innovation, intellectual property right and competition law.

Conclusion 5

To apply the competition law to regulate the IPR abuse is the common way in the world, especially, in EU and US. But in the new economic reality, the articles of competition law is too general to be applied. Therefore, there are a lot of guideline and instructive of regulating IPR abuse issued to instruct the judge to deal with the IPR abuse case.

Conclusion 6

China is a large developing country with less advanced technology in some aspect. According to the Chinese reality, the most important task is to strengthen the IPR protection, and at the same time, to pay close attention to regulate IPR abuse. However, how to regulate IPR abuse, there is a long way for China to go!

³²² Arezzo, Emanuela, (2007). Intellectual Property Rights at the Crossroad Between Monopolization and Abuse of Dominant Position: American and European Approaches Compared. forthcoming in *John Marshall Journal of Computer & Information Law*, Vol. 24, No. 3. P41
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EU LAWS

Treaty on European union (92/C 191/01) (Official Journal C 191, 29 July 1992)

(Maastricht Treaty, which was signed in Maastricht on 7 February 1992, entered into force on 1 November 1993)

Available at <http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html>. The last visiting time: 02-03-2011.

Treaty of Amsterdam amending the treaty on European union, the treaties establishing the European communities and related acts (Official Journal C 340, 10 November 1997) (signed on 2 October 1997, entered into force on 1 May 1999.)

Available at <http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html>. The last visiting time: 02-03-2011.

Treaty of Nice amending the treaty on European union, the treaties establishing the European communities and creating and certain related acts (2001/C 80/01) (Official Journal C 80, 10 March 2001) (signed on 26 February 2001, entered into force on 1 February 2003)

Available at http://www.ecb.europa.eu/ecb/legal/pdf/en_nice.pdf. The last visiting time: 02-03-2011.

Available at <http://eur-lex.europa.eu/en/treaties/dat/12001C/htm/12001C.html>. The last visiting time: 02-03-2011.

European union consolidated versions of the treaty on European union and of the treaty establishing the European community (2002/C 325/01)

Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:325:0001:0184:EN:PDF>. The last visiting time: 02-03-2011.

Available at <http://ec.europa.eu/competition/information/treaty.html>. The last visiting time: 02-03-2011.

Treaty of Lisbon amending the treaty on European union and the treaty establishing the European community (2007/C 306/01)

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0001:0010:EN:PDF>

The Treaty of Lisbon entered into force on 1 December 2009. Here is a brief summary of the main changes.

Available at

http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/111652.pdf. The last visiting time: 02-03-2011.

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Colophon

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