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ARTICLE

RESEARCH ON THEORY, LEGISLATIONS AND PRACTICES ABOUT REGULATING NON-PRACTICING ENTITIES IN CHINA

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Abstract Non-Practicing Entities (NPE), as a subject, is a neutral concept, but the derogatory sense of translation and understanding on this concept and the chaos of understanding make the legal regulation of NPE encounter more difficulties and challenges. In fact, NPE issues are concerned, discussed and researched in China within quite a long period, however, it would not become an outstanding legal issue nowadays. NPE as a market entity, its existence is legitimate *per se*, and what the law should focus on is the unfair conduct that NPE might be engaged in rather than the subject of NPE itself. It is not necessary to make specific articles and provisions on the subject of NPE at present in the Patent Law of the People's Republic of China (PRC) and the Anti-Unfair Competition Law of the PRC which are revised in China, and a serial of rules and guidelines for Anti-Monopoly Law of the PRC which are formulated in China. It proved that the unfair conducts of NPE should be regulated according to Patent law, Anti-Unfair Competition Law and Anti-Monopoly Law as well as, reconfirmed that the conclusion that the regulation of NPE in China laws focus on conducts rather than subject in a serial of cases such as the anti-monopoly investigation case against INTERDIGITAL Corporation initiated by the National Development and Reform Commission, the case that the Ministry of Commerce imposed restrictive conditions to approve that Microsoft acquired Nokia equipment and service business, and the commercial defamation case that *Shenzhen Libang Precision Instrument Co., Ltd vs Shenzhen Mairui Biological Medical Electronic Co., Ltd* which was reviewed by the Supreme People's Court.

Keywords Non-Practicing Entities, improper conduct, Patent Law, Anti-Unfair Competition Law, Anti-Monopoly Law

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INTRODUCTION

According to the statistics of Patent Freedom, the patent lawsuits brought by Non-Practicing Entities (NPE) increasingly tend to rise. There were 588 cases in 2004, increasing to 4,602 cases in 2011. Some large companies such as APPLE, HP, Samsung, AT&T, DELL, SONY and HTC were the most frequent respondents in the attack of NPE lawsuits, for instance, APPLE encountered 44 cases in 2012 alone.[1] James Beson and Michael Meurer, of the Boston University Law School, found in a research that 62% of

[1] CHENG Yongshun & WU Lijuan, "专利地痞" 在中国的现状评述及对策研究 (*Comments on Current Situation of "Patent Troll" in China and Research of Counter-Policy*), 8 知识产权 (Intellectual Property Right) 3, 4 (2013).

all patent tort lawsuits in 2012 were brought by NPE and the direct losses incurred by respondents in the lawsuits reached USD 29 billion till the date of December, 2012.[2] There are a few cases involving NPE in China, however, China's enterprises have increasingly encountered lawsuits from NPE in overseas countries and regions. For example, SIVEL made a sudden strike upon China's household electrical appliance enterprises such as Hisense, Haier, and Skyworth for a patent tort in the international consumption electronic exhibition in Germany in 2008, disclosing its intention to drive out Chinese products from the European and American markets. Helferich Patent Licensing (HPL) accused ZTE for infringement of five patents in US, and at the same time, demanded that the involved product exit the American market.[3]

Considering the commercial mode of NPE and its influences on technological research and development, as well as existing as a potential threat to social innovation, consumer welfare and market competition, the patent operation conduct of NPE received extensive attention from international society. It is also the same situation in China, and the theme of NPE is increasingly mentioned and discussed even in the amendments to China's Patent Law and Anti-Unfair Competition Law, and its formulation of anti-monopoly rules and regulations. For example, when China's anti-monopoly enforcement authorities formulated the guideline for anti-monopoly enforcement in the field of intellectual property rights, there were some opinions that the global intelligent manufacturing industry was busy with the response to the lawsuits because of outrageous "patent troll" lawsuits. Thus, the Guideline for Anti-Monopoly Enforcement in the Field of Intellectual Property Right shall make the special balance on such case.[4] Such news stems from inaccurate understandings that anti-monopoly law regulates NPE issues, however, it also reflects public opinion that society hopes that the Anti-Monopoly Law can impose powerful regulations upon NPE, and demonstrates the value of research on the theory, legislation and practices of the regulation of NPE in China.

It is necessary to ask — how do we accurately define NPE, Patent Assertion Entities (PAE) and Patent Troll? Is NPE doing all manner of evil? Is the existence of NPE, as a subject, legal and reasonable? Is there legal accountability in the commercial mode of NPE? Are there any differences in the issue of NPE between China and other countries, especially US? Is it necessary for China's law to make special articles or provisions to specifically regulate NPE? When the law regulates NPE, is it to be different from other

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[2] WEN Xikai, "专利蟑螂"的反垄断法规制 (*The Regulation of "Patent Troll" under Anti-Monopoly Law*), 6 知识产权 (Intellectual Property Right) 3, 4 (2014).

[3] ZHANG Kequn, XIA Weiwei & YUAN Jianzhong et al, 非专利实施实体的定义、形态与特征研究 (*Research on Definition, Form and Characteristics of Non-Practicing Entities*), 15 科技管理研究 (Science and Technology Management Research), 141–142 (2015).

[4] LIN Yuan, "专利蟑螂"滥诉行为将遇"天敌" (*Abuse of Litigation by "Patent Troll" Will Encounter "Natural Enemy"*), 经济参考报 (*Economic Information Daily*), (Oct. 23, 2015), available at http://ip.people.com.cn/n/2015/1023/c136655-27731912.html (last visited Jan. 6, 2016).

market entities? What laws might make necessary regulation of NPE? How do the Patent Law, Anti-Unfair Competition Law, and Anti-Monopoly Law regulate the improper conduct of NPE?

I. ACCURATE DEFINITION OF THE NPE CONCEPT IS THE CORNERSTONE OF LEGAL REGULATION OF NPE IN CHINA

The understanding of NPE concept is more confused at present in China, even it is usual to translate into patent troll, or confuse the use of NPE and PAE or patent troll. The choice and understanding of the concept in the current phase in China reflect that the understanding of NPE is undue or inaccurate in China, the derogatory sense of translation and understanding, the chaos of concept application also lead to more difficulties in the legal regulation, so that, the legal regulation of NPE encounters the challenge that should not be encountered.

A. Legal Regulation Should Focus on Conduct rather than the NPE Subject

In October 2003, the report, "To Promote Innovation: The Proper Balance of Competition and Competition Law and Policy" issued by the Federal Trade Commission (FTC) in the US, raised the concept of NPE ,[5] which referred to the entities that hold the patent but do not use the patent in the actual production. In China, NPE might be enterprises, as well as colleges, scientific research institutes, public institutions, persons, and so on.

Concepts which confuse with the concept of NPE include PAE and Patent Troll, but these three concepts are different in meaning and extension. PAE refers to companies that take the purchase of patents and assertion of patent rights as a major commercial mode, not including colleges, scientific research institutes, public institutions, or individual inventors. In March 2011, the report of "Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition" issued by the FTC of US quoted the concept of PAE, and PAE referred to companies that are not engaged in technological research & development (R&D) and product sales, but simply take patent license negotiation and lawsuits as profitable manner by means of acquiring patent ownership or depending on the least R&D investments to the development of patent technology.[6] In 1993, US used Patent Troll to describe the companies that are active to bring patent tort lawsuits, such title was often translated into Patent Cockroach or Patent Rogue in China, referring to

[5] See *To Promote Innovation: The Proper Balance of Competition and Competition Law and Policy: A Report by the Federal Trade Commission*, (Oct. 2003), available at https://www.ftc.gov/sites/default/files/documents/reports/promote-innovation-proper-balance-competition-and-patent-law-and-policy/innovationrpt.pdf (last visited Jan. 19, 2016).

[6] See *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition*, available at https://www.ftc.gov/reports/evolving-ip-marketplace-aligning-patent-notice-remedies-competition (last visited Jan. 19, 2016).

enterprises or individuals that acquire a patent by the means of purchase, but put no use of such patent into production of products or provision of services; as well as obtain the patent royalty in large amounts through litigation threats or mediation without any intention of patent implementation.

NPE and PAE, as concepts of entities, are neutral concepts, disclose characteristics of the commercial mode in such enterprises to some extent. The commercial mode of NPE and PAE takes patent rights as a crucial point, patent licenses as a lever, and patent lawsuits as a driving force, in order to try its best to achieve the given target of maximum benefits. This commercial mode should be interpreted as the use of the patent system, rather than a breach of the patent system. It is apparent that the commercial mode of NPE and PAE is legally permitted. Even if they do not apply any patent, it is certain that the owner of patent is entitled to benefits by means of the patent. The law also allows even encourages operators to obtain profits through the intellectual property rights trade. Therefore, it is reasonable and legal that there are NPE and PAE, and naturally, they are neutral concepts. The legal concern and regulation should not be the entities of NPE and PAE *per se*, rather, the question should be whether the entities are engaged in any improper conduct.

In essence, the concept of Patent Troll is closer to being a concept of conduct, rather than a concept of subject. In most cases, it should refer to the improper conduct of NPE and PAE abuse patent right or right of action. This is the reason that Patent Troll in China is translated into Patent Cockroach, Patent Rogue or Patent Pirate. Thus, as a concept of subject, Patent Troll is neutral; as a concept of conduct, it is accountable in law. Considering the complexity of subject nature and conduct nature, the meaning and extension of the concept of Patent Troll are uncertain and unstable. Therefore, the concept of Patent Troll should be used cautiously in the research of theory, legislation and practices about regulating NPE, to prevent further undue confusion and misunderstanding.

B. Only a Part of NPE Need Legal Regulation Because It Is Easy to Be Engaged in Improper Conduct

There are a lot of classifications in NPE, however, only a part of NPE need to be regulated.

From the organizational form of NPE, NPE may be divided into: (1) agent *ad litem*, who assists his or her client to realize the litigation interests of patent rights in the name of the agent, and receives the risk agency charges; (2) assets management agent, who accepts the commission of the patent technology holder, to agree on the operation of his patent right on behalf of him, and outsource the business of commercializing intangible assets; (3) intellectual property right companies, which aim at special enterprise or groups, purchase from patent right holders, and carry out strategic operations; and (4) patent defense alliances or funds, which show in the face and function of defense, at the same

time, play the role of rights maintenance.[7] The differences in organizational form of NPE do not lead to any special attention directed towards legal regulation.

From the target of NPE, NPE may be divided into: (1) operative NPE, which purely carry out patent technology transactions and transfers, play the role of patent intermediary and hope that patent technology can be applied, to ensure that the patent technology inventor can obtain their due return; (2) speculative NPE, which acquire and declare the motive of patent right is not trying its best to promote the application of patent technology, but endeavoring to seek for the target object which is applying patent technology, and force the enterprise which applies the patent to apply for patent license or pay tort expenses by means of threat to sue or litigation, so as to obtain considerable high profits; and (3) defensive NPE, which establish a large patent resources warehouse through Merger & Acquisition or its member contributions; when its member encounters the threat of a patent tort lawsuit, it will help its member bring a cross action with its own patent resources, to reduce or eliminate the threat. The differences in the target of NPE make speculative NPE become the focus of legal regulation.

From the identity attributes of NPE, NPE may be divided into enterprise NPE, college NPE, scientific research institutes NPE, public institution NPE and individual NPE. According to the statistics report of the State Intellectual Property Office of the People's Republic of China (PRC), until November 2015, among the five kinds of patent holder entities in China (enterprise, college, scientific research institute, public institution and individual), the number of effective invention patents held by enterprises totals 568,089, accounting for 63.3% of domestic effective invention patents; for colleges, totaling 169,557 and accounting for 18.9%; for individuals, totaling 80,902 and accounting for 9%; for scientific research institutes, totaling 68,680 and accounting for 7.7%; and for public institutions, totaling 9,790 and accounting for 1.1%.[8] The above-mentioned statistical data not only refers to NPE, but we can grasp a fundamental picture of China's patent holder. The commercial operative mode of NPE makes it possible to play the role and function of patent operation and patent speculation which are almost opposite. College NPE, scientific research institute NPE, public institution NPE and individual NPE have no interest in patent speculation, and the target and interest of such entities do not lie in it, therefore, the focus of legal regulation should be placed upon enterprise NPE. This is also the reason that research about the issue of NPE in recent years is gradually focusing on PAE, that is to say, trying to exclude colleges, scientific research institutes,

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[7] CAO Yaoyan & ZHAN Ailan, 专利海盗的类型、特征及其应对——基于技术创新专利化的价值链视角 (*The Type, Characteristics and Response to Patent Pirate — Based on the Value-Chain of Technological Innovation Patenting*), 2 浙江工业大学学报(社会科学版) [Journal of Zhejiang University of Technology (Social Science)] 233, 233–234 (2013).

[8] See 国家知识产权局专利业务工作及综合管理统计月报 (*The Monthly Statistics of the State Intellectual Property Office on Patent Affairs and Comprehensive Management*), available at http://www.sipo.gov.cn/tjxx/ (last visited Jan. 19, 2016).

public institutions and individuals from legal regulation.

C. Legal Regulation Aims at Controlling the Negative Function of NPE

With the complication of technological development, the technological dependence among enterprises is also increasingly deepening. It objectively produces market demand for special supply of technologies, and the role of technological intermediary is increasingly stronger. As a lot of patents are concentrated by NPE, it is favorable for technological implementation parties to rapidly find the patent holder, reduce search costs, and facilitate negotiations and transactions of patent licenses. NPE, as an organic part of the intellectual property market, play the role of "finding value, matching supply and demand, realizing and maintaining value" in the market. It may ensure that special commodities of intellectual property can be traded and operated effectively, as well as, assist small to medium patent holders obtain profits of their own inventions and innovations in a more convenient manner.

However, when NPE try to obtain huge patent royalties from other companies by means of litigation, there is a risk that the patent system becomes alienated in the hands of NPE. In June 2013, the Executive Office of the President of the US issued the report of "Patent Assertion and U.S. Innovation,"[9] which was drafted by the Council of Economic Advisers, the National Economic Council, and the Office of Science and Technology Policy. This report analyzed the unfavorable influences that might be caused by NPE commercial mode, that is to say, NPE aim at not promoting "technological transformation," and they are not concerned whether really to transform the patent right claim into the product available or service which may be provided. The alienated NPE are always bringing claims for patent tort after the enterprise participant carries out irrevocable investments. The acquisition of patent only aims at huge compensation from patent tort lawsuits or threat of patent tort lawsuits.[10] The alienated NPE make the patent royalty abnormally increase, a part of patent value to be overestimated evidently, wealth of patent application party to be transferred unreasonably, so it is possible to reduce consumer welfare and social welfare, even final barrier innovation. Therefore, it is necessary to impose legal regulations on such alienated NPE on the basis of respecting and protection of patent right.

Establishing patent operation institutions and promoting the utilization of patents are currently important tasks in the patent industry development in China. Therefore, affirming the value and importance of patent utilization and encouraging the

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[9] See Executive Office of the President, *Patent Assertion and U.S. Innovation*, available at https://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf?utm_source=Feldman+White+House+Patent+Report&utm_campaign=Startup+Clinic+10-4&utm_medium=email (last visited Jan. 19, 2016).

[10] YI Jiming, 遏制专利蟑螂——评美国专利新政及其对中国的启示 (*Suppression of Patent Troll — Review on the New Patent Movement in the US and Enlightenment to China*), 2 法律科学(西北政法大学学报) [Science of Law (Journal of Northwest University of Political Science and Law)] 174, 175–176 (2014).

establishment of NPE should be the foundational attitude in China's strategic push. However, it is necessary to remain attentive to the speculative NPE, and impose legal regulation on any unfair conduct that NPE may be engaged in, such as abuse of patent rights and rights of action, and so on.

II. NPE ISSUES WILL NOT BECOME AN OUTSTANDING LEGAL PROBLEM AFTER A LONG PERIOD IN THE FUTURE IN CHINA

In December 2013, the U.S. House of Representatives passed the Innovation Act, which endeavored to suppress increasingly pervasive Patent Troll by reforming the patent litigation procedure.[11] In the US, NPE abuse the system of patent rights and patent litigation, by bringing a lawsuit after a producer has invested sunk costs. In addition to the lawsuit, NPE seek exclusion orders and cease and desist orders from the International Trade Commission (ITC) so as to make extravagant profits. This then becomes an issue attracting widespread attention. However, in China, within a long period, NPE are only concerned, discussed and researched, and therefore will not become an outstanding legal problem.

A. The Intellectual Property Service Industry with Lower Marketization Degree in China

Patent services include patent application agency service, patent litigation, mediation, arbitration, judicial expertise service, patent consultancy service, patent right maintenance and assistance service, patent technologic incubation transfer service, patent technological finance and industrialization service, patent information service, patent license trade service, patent technological service, industrial product appearance design service, integrated circuit layout design agency service, patent industrial group service, and other patent services. Such intellectual property right service ideas such as patent investments and patent operations are still in the embryonic stage in China, and the intellectual property service industry is still in its beginning phase. Thus, there is no fertile soil for producing a lot of NPE at present in China, and the intellectual property service industry with a lower marketization degree is unfavorable to the appearance of a large number of NPE.

B. China's Patent Policy and Legal System Are Unfavorable to the Appearance of a Lot of NPE

The reason that the NPE issue is of great concern in the US lies in its unique litigation culture and "pro-patent" patent system and environment. For instance, the broad patent policies which are adopted in the US to ensure the leading status in all fields especially in IT, result in an increase in patent applications and a decline in patent quality. The increase

[11] See H.R.3309-*Innovation Act*, 113th Congress (2013–2014), available at https://www.congress.gov/bill/113th-congress/house-bill/3309/text (last visited Jan. 19, 2016).

in the questioned patents creates the soil and conditions for NPE to obtain profits by entering "litigation market"; the intellectual property and litigation system in the US cause expensive litigation costs and significant compensation amounts, therefore attracting NPE to get profits by means of litigation; "kind" conditions for issuing an "injunction order" and the system where attorney expenses are shared respectively under general circumstances in civil procedures that exist in the US also push NPE to pursue huge profits by means of litigation.

The situation in China is different from the US, as the costs of patent rights maintenance in China are higher, the damages compensation amount is lower according to the Patent Law, and there is no punitive damage system in China. The profits which may be got from the patent tort litigation are not too much attractive for NPE, the system that the losing party undertakes litigation costs and reasonable attorney expenses in China also make the litigation cost of NPE higher, even under some circumstances, it is departure from the hope to minimize costs and maximize profits for NPE. It is more important that the scope of computer software patent tort litigation is wide in the US, and litigation continues to increase, so it is easier to lead to litigation and disputes, and it is the most favorable field for NPE to gain profits. According to the statistics of the US government, 82% of NPE lawsuits are tort lawsuits on basis of computer software.[12] However, computer and software enterprises are not very strong in China, and its protection does not lie in Patent Law but Copyright Law (which is dominant). The current patent policy and legal system in China suppresses the appearance of abundant NPE.

C. The Relatively Effective Regulation of Patent Right Abuse in China

The NPE issue in China mostly appears in discussions, and the number of NPE and lawsuits involving NPE is not large. At present, enterprises in China hold a more neutral attitude towards NPE, and the unfair conducts of NPE have been effectively regulated to some extent by Patent Law, Anti-Monopoly Law and Anti-Unfair Competition Law. For example, the injured party to the malicious action may bring a counter-claim in the patent tort lawsuit case to resolve the problem on abuse of right of action, so as to regulate the conduct that patent right holder abuses the patent licensing procedure or hasty action, in order to provide the respondent in the alleged patent tort case with a more effective legal remedy channel against the blackmail of NPE.[13] When NPE holds a dominant market position because it holds a lot of standard essential patents (SEPs) or non-standard essential patents (Non-SEPs), China's Anti-Monopoly Law imposes effective restrictions upon NPE unfair conduct or abuse of patent right by the regulation for the activity that an enterprise with dominant market position is engaged in unfair pricing conduct and other

[12] See YI, fn. 10 at 176.

[13] See 江苏省南京市中级（2003）宁民三初字第 188 号民事判决书 (Civil Judgment ([2003] No. 188, ningminsan chuzi) of Intermediate People's Court of Nanjing, Jiangsu Province).

unreasonable conduct. On this point, the value orientation is closer between China's anti-monopoly law and the competition law of the EU, however, the antitrust law of the U.S. generally does not regulate the unfair pricing conduct. The differences in the choice of system design in anti-monopoly law between China and U.S. lead to the discrepancy to some degree on the strength and mode of regulation for the unfair conduct of NPE.

D. Necessary to Pay Attention to NPE Issues in China

It is difficult to appear a lot of domestic NPE at present in China, and international NPE imposed influences upon China enterprises in a later period. For example, Intellectual Ventures was established in 2000, but entered the Asian market in September 2007, and formally entered into the China market in October 2008. The Beijing intellectual venture which is regarded as NPE in China's mainland was established in May 2012, and the first fund focusing on patent operation and technology transfers in China — the "Ruichuang patent operation fund" was founded in Zhongguancun on April 25, 2014. However, this does not mean that China enterprises will not be in trouble of issue on international NPE. Huawei and ZTE encounter a lot of NPE lawsuits on the road of approaching internationalization, which indicated this problem. The litigation war of *Huawei vs IDC*, and Microsoft acquisition of Nokia caused the discussions over the question of how China's Anti-Monopoly Law regulated NPE.

It is more important that China always follows the policy for supporting patents since the birth of the patent system, and produces a lot of low-quality patents, even including some "questionable patents" or "junk patents." These low-quality patents might be "potential weapons" of NPE. Due to the lack of intellectual property consciousness in China enterprises, it is very easy for China enterprises to become targets of NPE. In 2014, the Standing Committee of the National People's Congress carried out patent law enforcement inspections, pointing out the following outstanding problems in the enforcement of China's Patent Law, such as the patent quality is still lower in general, and cannot adapt to the demand in economic and social development; torts sometimes happen, and there is larger distance between actual result of patent protection and the expectation of innovating entities; the ability of patent utilization is not adequate, and the market value of patent is not fully shown; the ability of patent public and social services is not strong, and there is a larger gap between this ability and the rapidly increasing social demand.[14] With the amendment to some articles in China's Patent Law, for instance, the increase in legal compensation amounts, the establishment of punitive damages, the transfer of proof burden for tort profits etc., while China strengthens the protection of patent right, it is also possible to foster the unfair conduct of NPE. Although it will not become an outstanding legal issue after a long period in the future in China, research and

[14] See 关于《中华人民共和国专利法修改草案（征求意见稿）》的说明 [*Explanation of Patent Law of the People's Republic of China (Revised Draft) (Consultation Draft)*], available at http://www.sipo.gov.cn/zcfg/zcjd/201504/t20150402_1096196.html (last visited Jan. 5, 2016).

attention are essential.

III. LEGISLATIVE REGULATION: REGULATION OF UNFAIR CONDUCT OF NPE BY PATENT LAW, ANTI-UNFAIR COMPETITION LAW AND ANTI-MONOPOLY LAW

As NPE are market entities, the existence of them is fair and legal. They should be entitled to property rights, rights of action and rights of contract freedom like other market entities. Legal regulation is unnecessary unless NPE abuse the rights. It is necessary to impose legal regulation on unfair conduct of NPE, but it is worth further discussing how to regulate and what the degree of regulation.

A. The Regulation of Unfair Conduct of NPE under the Patent Law

The nature of patent system lies in granting exclusive right to inventor for a certain period by means of system design, on the premise of technological disclosure, so as to realize a virtuous cycle between technological innovation encouragement and innovation reinvestment. NPE, as a kind of commercial mode, presents as a new challenge to the patent system. The unfair conduct of NPE mainly take advantage of the system on patent protection, therefore, the regulation for their abuse of rights, shall come from the patent law itself at first. It is necessary for patent law to think how to enhance patent quality in the expansion of patent protection, at the same time, to prevent from alienating the patent protection system especially the system on patent tort litigation. It is necessary to think whether unfair conduct of NPE is a departure from the value and goal that patent law encourages innovation, and even prevents innovation and the implementation of technology. Due to this concern, the Innovation Act adopted by the U.S. House of Representatives on December 9, 2013, amended the patent tort litigation procedure in an attempt to prevent NPE from abusing rights of action. The key amendments include: the plaintiff shall provide additional necessary details for litigation, and enhance the transparency of patent ownership; the losing party shall undertake the litigation expenses, recreate the procedure for evidence discovery, the exception of terminal user litigation, and regulation of commercial method patent, etc.[15]

Article 47 in the applicable Patent Law of the PRC provides: "however, the damage caused to other persons in bad faith on the part of the patentee shall be compensated…," Article 48 provides that "under any of the following circumstances, the patent administration department under the State Council may, upon the request of an entity or individual which is qualified to exploit the invention or utility model, grant a compulsory license to exploit the patent for invention or utility model…where the exercising of the patent right by the patentee is legally determined as an act of monopoly, for the purposes of eliminating or reducing the adverse effects of the conduct on competition." It is an

[15] YI Jiming, 美国《创新法案》评析 (*Review of Innovation Act of the US*), 4 环球法律评论 (Global Law Review), 146 (2014).

important legal basis of defenses for the patent implementation party which is threatened by NPE and injured by unfair conduct, to some degree, and may restrain NPE from abusing patent rights and litigation in patent negotiation and patent litigation.

The Provisions on the Application of Law for Stopping Infringement of Patent before Litigation of the Supreme People's Court provide the evidence and guarantee requirements when a party applies for an interim injunction order, termination of interim measures, and a review of application for reconsideration, and indirectly play to some degree the role of preventing NPE from abusing their rights of action.[16] Article 18 in the Interpretation on Some Questions about Application of Law in the Trial of Patent Tort Dispute Case of the Supreme People's Court provides: "where the patent right holder sends a warning letter about patent tort to others, and the warned party or interested party sends the patent right holder a written notice to exercise the right of action, but the patent right holder neither revokes the warning letter nor brings a lawsuit within one month after receiving such written notice or within two months after sending the written notice, the warned party or interested party brings a lawsuit to the people's court to claim for confirming its conduct does not infringe the patent right, the people's court shall accept."[17] The article allows the patent implementation party to bring a lawsuit to confirm non-tort lawsuit, to provide the regulation thought from the patent law to resist NPE abusing warning notice or lawsuit.

The State Intellectual Property Office of China reported and requested to the State Council to examine the Draft of Amendment to Patent Law (Consultation Draft), and tried in all ways to strength the protection of patent rights and limit abuse of patent rights. The newly-added Article 14 provides: "the application for patent right and exercising patent law shall follow the principle of good faith. It is forbidden for abuse of patent to injure the public interests or unreasonably eliminate or restrain competition." The newly-added Article 79 provides: "the patent authorities at every level shall promote the implementation and application of patents, encourage and regulate the service of patent information marketization and patent operation activity." The newly-added Article 85 provides: "the patent right holder which participates in the formulation of state standard does not disclose its own SEP in the formulation of standard, it shall be deemed that it grants the license to the implementation party to use its patent technology. The license royalty may be agreed by both parties; if both parties fail to reach an agreement, they may apply to the patent authority of the State Council for ruling. Where the parties refuse to

[16] See 最高人民法院关于对诉前停止侵犯专利权行为适用法律问题的若干规定 (*The Provisions on the Application of Law for Stopping Infringement of Patent before Litigation of the Supreme People's Court*), available at http://www.sipo.gov.cn/zcfg/flfg/zl/sfjs/201510/t20151021_1191716.html (last visited Jan. 20, 2016).

[17] See 最高人民法院关于审理侵犯专利权纠纷案件应用法律若干问题的解释 (*Interpretation on Some Questions about Application of Law in the Trial of Patent Tort Dispute Case of the Supreme People's Court*), available at http://www.sipo.gov.cn/zcfg/flfg/zl/sfjs/201510/t20151021_1191717.html (last visited Jan. 20, 2016).

accept the ruling, they may bring a lawsuit to the people's court within 15 days after receiving the notice."[18] The above-mentioned articles will make stern or loose regulations for unfair conduct of NPE from various aspects. Of course, there are a lot of imperfect points in the above newly-added articles in the Draft of Amendment to Patent Law (Consultation Draft) which is seeking for the public opinions, and the academic circle and enterprise circle also have issued various comments and opinions. However, in any case, the Patent Law of the PRC is increasingly improving and developing, strengthening the patent review procedure and patent quality, and preventing from abuse of patent rights, so as to play the role of regulating the unfair conduct of NPE by patent law.

B. The Regulation of Unfair Conduct of NPE under Anti-Unfair Competition Law

The patent right is exclusive, but the realization of the right cannot occur without social cooperation — "rights are neither a present of the God, nor a result of nature, and rights need social cooperation."[19] As far as the nature is concerned, the patent right is an exclusive right, thus, the necessary restraints just show the social attribute of patent rights from a social dimension. NPE master the patent technology but do not produce any product, and it is not wrong or unfair to actively launch a patent tort lawsuit. However, if NPE tries to get interests for itself by the unfair conduct of increasingly bringing one after another lawsuits, at the same time, causing losses to others, real innovator and the social public interests, it is departure from the ultimate target of patent system, and it is undue expansion of individual interests so as to injure the public interests, as well as, to break the due interests balance of patent system,[20] it is certain to be subject to legal regulation.

In 2012, NPE issued more than 100,000 attorney letters, which threatened the global 500 top enterprises, small café operators, and daily consumers. The damages and influences are especially evident to small enterprises which are established newly. In the investigation of 223 newly-established technological companies, 40% of the companies thought that it imposed important influences on the operation of their companies. In 116 investigated enterprises, the company with the business volume of more than RMB100 million alleged that the requirement of patent troll affected their business development.[21] The issuance of warning letter on intellectual property tort belongs to one of forms that

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[18] See 国务院法制办公室关于《中华人民共和国专利法修订草案（送审稿）》公开征求意见的通知 [*Notice of Legislative Affairs Office of the State Council on Requesting Public Comment on Patent Law of the People's Republic of China (Revised Draft) (Consultation Paper)*], available at http://www.chinalaw.gov.cn/article/cazjgg/201512/20151200479591.shtml (last visited Jan. 1, 2016).

[19] Stephen Holmes & Cass R. Sunstein, *The Cost of Rights Why Liberty Depends on Taxes*, translated by BI Jingyue, Peking University Press (Beijing), at 165 (2004).

[20] WANG Xuling, 对"专利蟑螂"滥诉行为法律规制的正当性分析 (*Analysis on Fairness of Legal Regulation for "Patent Troll" Abuse of Action*), 5 兰州大学学报(社会科学版) [Journal of Lanzhou University (Social Science Edition)], 100 (2015).

[21] See YI, fn. 10 at 177.

the intellectual property right holder exercises its right, however, it is easy to abuse the commercial tool to defame the goodwill of competitors, so as to injure the interests of free competition. Therefore, if there is any conduct that NPE abuses the issuance of warning letter, files an undue application for injunction before action, or abuses the right of action, it is certain to be subject to regulation under competition law. Article 5 of the Federal Trade Commission Act of the U.S. pays attention to NPE from the ban of fraud and unfair transaction. When NPE has no patent rights or takes advantage of expired patent rights to mistaken threat of action, the U.S. FTC may resort to Article 5 to protect the enterprise from being injured by fraudulent NPE.

Article 15 of the Provisions of the Administration Authorities for Industry and Commerce on Prohibiting the Abuse of Intellectual Property Rights to Preclude or Restrict Competition (Consultation Paper) which were delivered to the public discussions by the State Administration for Industry & Commerce of the PRC in 2014 states that: "the operator with dominant market position shall not abuse the issuance of warning letter so as to eliminate or restrain the competition in relevant market, where its intellectual property term is expiry or ineffective, or others have provided the adequate evidences that it does not constitute intellectual property tort."[22] In most opinions, the conduct that an operator abuses the tort warning letter should be regulated by the Anti-Unfair Competition Law rather than the Anti-Monopoly Law, thus, the article was not included in Provisions on the Prohibition from Eliminating and Restraining Competition by Abuse of Intellectual Property issued by the State Administration for Industry & Commerce of the PRC on April 7, 2015.[23] However, the discussions over this article, to some degree, indicate the competition laws pay the attention and make legislative thoughts on effective regulation for NPE abusing the issuance of warning letter. While the Anti-Unfair Competition Law of the PRC is in the course of amendment, the regulation for the conduct that the operators with competitive relationship abuse issuance of warning letter or abuse litigation is also one of legislative amendments and discussions. It is suggested that one article, "any operator shall not abuse the issuance of tort warning letter, or abuse the administrative or judicial procedure, to injure the goodwill of operator with the competitive relationship and do harm to the fair and competitive order," can be newly-added in Chapter 2 of the Anti-Unfair Competition Law of the PRC when it is revised.

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[22] See 关于《工商行政管理机关禁止滥用知识产权排除、限制竞争行为的规定（征求意见稿）》公开征求意见的公告 [*Announcement on Requesting Public Comment on the Provisions of the Administration Authorities for Industry and Commerce on Prohibiting the Abuse of Intellectual Property Rights to Preclude or Restrict Competition (Consultation Paper)*], available at http://www.saic.gov.cn/gzhd/zqyj/201406/t20140610_145803.html (last visited Jan. 20, 2016).

[23] See 关于禁止滥用知识产权排除、限制竞争行为的规定 (*Provisions on Prohibiting the Abuse of Intellectual Property Rights to Preclude or Restrict Competition*), available at http://gkml.saic.gov.cn/auto3743/auto3746/201504/t20150413_155105.htm (last visited Jan. 20, 2016).

C. The Regulation of Unfair Conduct of NPE under the Anti-Monopoly Law

An important task of the modern anti-monopoly law is to regulate the abuse of intellectual property rights. The intellectual property right is a legal exclusive right *per se*, and the law protects the fair exercise of intellectual property rights. However, where the intellectual property rights holder exercises the right beyond a reasonable extent — so as to restrain and eliminate competition — it is certain that he or she will be subject to regulation under the anti-monopoly law. The exercise of intellectual property rights shall be subject to the restraint and direction of anti-monopoly law, just like other property rights, to protect social benefits and maintain competition in the market.

The business activities of NPE impose some potential influences on competition order and consumer welfare, therefore, they have gradually attracted the attention of anti-monopoly enforcement authorities and scholars in all countries and regions. Patent implementation entities with competitive relationships might conclude horizontal monopoly agreements by the establishment of NPE joint venture, so as to eliminate and restrain competition. NPE with SEP might hold the dominant market position and carry out abusive activities such as unfair pricing or tied sale. NPE may also constitute the concentration of undertakings through large-scale patent acquisition transactions, so as to strengthen the ability and incentive of NPE to abuse market forces, and cause hindering effects on the special technological market. The above-mentioned activities of NPE are not certain to occur but may occur, but they are possible to breach the Anti-Monopoly Law, and constitute the monopoly agreement, abuse of dominant market positions, and concentration of undertakings which are activities prohibited under the Anti-Monopoly Law.

Besides the Anti-Monopoly Law and the relevant rules, the Provisions on Prohibiting the Abuse of Intellectual Property Rights to Preclude or Restrict Competition issued by the State Administration for Industry & Commerce of the PRC in 2015 made specifications on the refusal of license, tying products, imposing unreasonable trading conditions, applying differential treatment, patent pool and business operators with dominant market position eliminating and restraining competition in the formulation and implementation of standards.[24] Such provisions regulate the improper conduct of NPE to some degree under the Anti-Monopoly Law. The Guidelines for Anti-Monopoly of Abuse of Intellectual Property Rights (Consultation Paper) which is formulated by the National Development and Reform Commission, will also impose necessary regulations on the improper conduct of NPE through specific provisions on abuse of intellectual property rights to eliminate and restrain competition.[25] It is necessary to pay attention to, the

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[24] Id.

[25] See 《关于滥用知识产权的反垄断指南》（征求意见稿）公开征求意见 (*Requesting Public Comment on Guidelines for Anti-Monopoly of Abuse of Intellectual Property Rights*), available at http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201512/t20151231_770234.html (last visited Jan. 10, 2016).

Anti-Monopoly Law aims at the anti-monopoly review basis for patent operation conduct of NPE, there is no essential difference from other entities in the anti-monopoly review basis, and for the same logic analysis framework is followed in the enforcing of Anti-Monopoly Law.

IV. LEGAL ACTION: THE PRACTICES THAT CHINA INTELLECTUAL PROPERTY AUTHORITIES, ANTI-MONOPOLY ENFORCEMENT AUTHORITIES, AND THE COURT REGULATE UNFAIR CONDUCT OF NPE

In order to prevent NPE from blackmailing technological companies or production enterprises by means of litigation or threats of litigation, most countries and regions are concerned about how to regulate the unfair conduct of NPE, and have accumulated some practices and experience, China is not exceptional. The relevant enforcement authorities and courts play an important role in the course of regulation, but it is not ignored that the most important and effective regulation comes from the market as for NPE abusing patent rights or right of action, because market entities may resist the unfair conduct of NPE by the patent law. For example, there is a commercial mode in the US in recent years, *i.e.* "defensive patent alliances" (DPAs). Its basic mode is the service organization purchases the patent that NPE might be interested in from the market in advance, and then grants licenses to members of the organization for defense, and members invest or pay membership dues to the organization. The representatives of DPAs are Allied Security Trust (AST) and Rational Patent X (RPX), etc.

A. The Measures of Government Organs for Regulation of Unfair Conduct of NPE

The State Council issued the Opinions of the State Council for Accelerating Construction of Powerful State Construction of Intellectual Property Rights under New Situation on its website on December 22, 2015. The opinions were completed on December 18, 2015. Part 3 in the opinions "implementing strict intellectual property right protection" puts forward, "to regulate the abuse of intellectual property right: improving the legal system which regulates the abuse of intellectual property right, and formulating the guideline to anti-monopoly enforcement. To improve the intellectual property right anti-monopoly supervisory system, and investigate by laws the monopoly conduct such as abuse of intellectual property right to eliminate and restrain competition. To make SEP fair, reasonable, nondiscrimination license policy, and the rule for application of stopping tort."[26]

On February 13, 2014, the Shenzhen Intellectual Property Bureau issued the Guidelines for Overseas Intellectual Property Right Cooperation of Enterprises of Shenzhen

[26] See 国务院关于新形势下加快知识产权强国建设的若干意见 (*Opinions of the State Council for Accelerating Construction of Powerful State of Intellectual Property Rights under New Situation*), available at http://www.gov.cn/zhengce/content/2015-12/22/content_10468.htm (last visited Jan. 18, 2016).

in accordance with the laws and rules on intellectual property, to push the exemplary city construction of intellectual property rights in Shenzhen, improve the core competitive force of industries in Shenzhen, and direct enterprises in Shenzhen to respond to overseas intellectual property rights.[27] Article 10 of such directive provides: "enterprise may choose cooperation from the following fields in overseas market… (12) responding to the litigation and commercial competition conduct of new patent operation organizations such as NPE by laws…" The above-mentioned measures of governmental authorities have reflected that China intellectual property right authorities are concerned about the regulation of unfair conduct of NPE.

B. The Practice that the National Development and Reform Commission Regulates Unfair Conduct of NPE

With regard to anti-monopoly regulation for abuse of intellectual property rights, various countries and the same country in various periods had various choices. It is presently necessary for China to lay importance to intellectual property rights protection, and at the same time, to strengthen the anti-monopoly enforcement of intellectual property rights abuse. In June 2013, the Price Supervision and Inspection and Anti-Monopoly Bureau under the National Development and Reform Commission initiated the anti-monopoly investigation of INTERDIGITAL, and obtained evidence that INTERDIGITAL was suspicious of price monopoly activity. In March 2014, INTERDIGITAL submitted an application to the National Development and Reform Commission for suspension of the investigation, putting forward specific measures to eliminate the result of questioned monopoly conduct, including conduct not to charge discriminatory high price license royalty to China enterprises, not to grant tied license between non-SEPs and SEPs, not to request China enterprises to grant free counter-license of patent rights, not to directly seek litigation to force China enterprises to accept unreasonable license conditions, and so on. On May 22, 2014, the National Development and Reform Commission made the determination for suspension of investigation in the case that INTERDIGITAL was suspicious of price monopoly, carried through continuous supervision over the performance of commitments made by INTERDIGITAL, and eliminated the result of the questioned monopoly activity.[28] INTERDIGITAL in this case is a NPE, and this case received more attention and discussions about the question of how the anti-monopoly law regulates SEP, however,

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[27] See 深圳市知识产权局关于印发《深圳市企业海外知识产权协作指引》的通知 (*Notice of the Shenzhen Intellectual Property Bureau on Issuing Guidelines for Overseas Intellectual Property Right Cooperation of Enterprises of Shenzhen*), available at http://www.szmqs.gov.cn/scjd/xxgk/tzgg_56389/zscqbh/201409/t20140929_2586326.htm (last visited Jan. 14, 2016).

[28] See 国家发改委对美国 IDC 公司涉嫌价格垄断案中止调查 (*The National Development and Reform Commission Made Decision of Suspension of Investigation in the Case that INTERDIGITAL of US Was Suspicious of Price Monopoly*), available at http://www.ndrc.gov.cn/gzdt/201405/t20140522_612466.html (last visited Jan. 29, 2016).

there were less discussions over NPE. However, the basic judgment which may be concluded is that in the enforcement of Anti-Monopoly Law, the Anti-Monopoly Law is equally applicable to NPE and other business operators, and the anti-monopoly analysis framework will not be changed in any way because of NPE; while the special commercial mode of NPE is a factor in need of specific consideration in the anti-monopoly analysis, just as it is also necessary to specifically consider such a factor — postal industry in the anti-monopoly analysis if the questioned monopoly enterprise is a postal enterprise.

C. The Practice that the Ministry of Commerce Regulates Unfair Conduct of NPE

When the Anti-Monopoly Bureau under the Ministry of Commerce carried out the anti-monopoly review for concentration of undertakings, it lays special importance to NPE, but it is concerned with whether the concentration produces NPE so as to make the preventive regulation of unfair conduct that NPE might be engaged in. The typical case is the case that the Ministry of Commerce approved that Microsoft acquired Nokia equipment and services on the additional restrictive conditions.[29]

On September 2, 2013, Microsoft International Holdings B.V. (wholly owned subsidiary of Microsoft) and Nokia concluded the Agreement of Shares and Assets Purchase (hereinafter referred to as "the Agreement"). According to the Agreement, Microsoft would acquire all equipment and services of Nokia, and Nokia would retain all invention patents relating to communication and smart mobile phones. Microsoft would pay a consideration of €5.44 billion (about RMB45.862 billion) to Nokia. €3.79 billion would be used to purchase all equipment and services of Nokia, and €1.65 would be used to pay for the patent agreement and future options. After the concentration, Nokia would exit from the mobile phone production market, and Nokia would become a NPE holding thousands of SEPs in the field of communication technology. As Nokia would essentially exit from the downstream equipment and service market, it would no longer be necessary to obtain the cross license for the mobile phone business after the concentration. It would reduce the driving force to maintain the entire patent charging level at a lower level in the mobile phone industry. The lack of demand would increase in the motive that Nokia depends on patent royalty to obtain profits, and smart mobile phone manufacturers, as the potential licensee, would not have the effective ability to balance any longer where Nokia enhances the patent royalty or asks for excessive royalties. As for overall mutual connection and seamless communication, since communication standards are the basis, the technological patents necessary for enforcement of the standard might cause barriers in market entry. If the communication technology patent holder abuses the patent right, refuses licenses, enhances the patent royalty or grants discriminatory licenses, it is

[29] See 关于附加限制性条件批准微软收购诺基亚设备和服务业务案经营者集中反垄断审查决定的公告 (*The Public Notice on the Anti-Monopoly Review Determination for Concentration of Undertakings to Approve Microsoft Acquires Nokia Equipment and Services on the Additional Restrictive Conditions*), available at http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400542415.shtml (last visited Jan. 21, 2016).

possible to enhance to a large degree the entry into smart mobile phone market, even in fact it is unable to enter such market. In the case of anti-monopoly review for the concentration of undertakings in China, anti-monopoly enforcement authorities seldom require the business operator to be merged for commitment, but this case belongs to the exceptional category. Anti-monopoly enforcement authorities were concerned that the concentration might make Nokia change its former activity mode and motive, and would eliminate and restrain China smart mobile phone market competition by means of its SEP licenses. After the completion of concentration, Nokia might makes change in its strategy on SEP charges, so as to change the pattern of smart mobile phone market competition in China. This would result in an increase in total intellectual property costs of smart mobile phone manufacturers, and then finally impair the terminal consumer interests. Therefore, the Ministry of Commerce hoped that Microsoft and Nokia made their commitments to eliminate the influences that anti-monopoly enforcement authorities were worried about. Finally, Microsoft and Nokia all made the commitments, and Nokia's commitments as below: (1) confirm to continue performing the commitments which were made to the standard setting organizations, and to grant its SEP licenses in compliance with the principle of fair, reasonable and non-discriminatory (FRAND) intellectual property policies under Standard Setting Organizations (SSOs); (2) confirm the following principles — under the premise of reciprocity, it may not enforce the injunction for SEPs to prevent the implementation of standards committed with FRAND principle, unless the patent right holder has provided the condition of license in conformity with FRAND principle, and the potential licensee fails to conclude that the FRAND license is undertaken with good faith and follows such license terms and conditions; (3) on the premise of reciprocity, and conformity with intellectual property policies of SSOs, and the relevant judicial interpretation increasingly developing, if Nokia thinks that one of the factors that the enforcement authorities determine whether one party is good faith licenser or licensee may be: where one party fails to delay in an unreasonable manner, it will submit any dispute whether there is any discrepancy between the licensing conditions raised by Nokia and the FRAND liabilities undertaken by Nokia to an independent ruling institution for resolution, and will be subject to such ruling, to conclude the agreement of FRAND license based on such ruling result, and pay any damages and FRAND license royalty which might be caused on basis of such ruling result and agreement; (4) under the condition of reciprocity, in compliance with FRAND liabilities committed to SSOs, Nokia grants the license of SEP subject to FRAND liabilities under SSOs intellectual property policies, and shall not be preconditioned by the licensee must accept the patent license that Nokia is not subject to the relevant FRAND liabilities at the same time; (5) when Nokia will transfer a SEP to a new owner in the future, Nokia may not transfer unless the new owner accepts the condition that it is subject to the FRAND liabilities committed (including restated) by Nokia to SSOs for such SEP, so that FRAND liabilities shall be transferred to the new owner at the same time; (6) Nokia takes overall consideration for the practices of evaluating each FRAND license value including but not

limited to the following factors (omitted); (7) only for the purpose of avoiding question and prohibiting from the evasion of the committed liabilities, such commitments shall not affect the rights held by Nokia or the liabilities borne by Nokia for its SEPs except the scope covered by the current FRAND liabilities, restrain Nokia from licensing or transferring any legal patent right, modify or cause the amendment to any contract concluded by Nokia and any third party, or set any liability to Nokia for obtaining license on the technologies which does not use; and (8) although there are the above statements, the commitments in article (6) shall not apply to the company which asserts any patent right for Nokia manufacturing, selling or providing any mobile communication product or service.

China anti-monopoly enforcement authorities were concerned in the reviewing: Would Nokia become a NPE after the completion of acquisition? Would the commercial mode be changed because there was no restraint of cross license after Nokia becomes a NPE? Would Nokia sell its patents to other NPE so as to evade the performance of FRAND commitments? Would Microsoft and Nokia strategically prevent competitors from entering or cause the blocking effects by means of NPE? This case shows that China anti-monopoly enforcement authorities would have reasonable concern and worry about competition for NPE which might occur in the case of concentration of undertakings. The route for resolution of competition worry is to require NPE for necessary commitment to eliminate the competition injury which might be caused after the concentration of undertakings. Such regulating choice may be provided to anti-monopoly enforcement authorities in all countries in the anti-monopoly review for concentration of undertakings for reference.

D. The Practice that the Court Regulates the Unfair Conduct of NPE

NPE effectively avoid a counterclaim in patent litigation by means of "non-practicing" operational mode, so that it is always keeping a positive position, therefore, the court imposes necessary regulation on unfair conduct of NPE in judicial trials. For example, the Federal Supreme Court of the U.S. rarely continued to make the rulings for patent cases for six times in the first half year of 2014. The rulings in at least five of the cases might serve as important measures in targeting speculative NPE. These five cases were involved in: the abstract method combined with universal computer does not belong to the object which may be protected, enhancing the definiteness of right claim protection scope, strengthen local court's discretionary power that the losing party shall undertake attorney fees, the review principle for discretionary power, and the principle that the patent right holder shall undertake the proof burden in non-tort lawsuit etc.[30]

[30] ZHOU Wangsheng, 美国"专利流氓"将盛极而衰 (*U.S. Patent Troll Will Decline from the Prosperous*), 中国知识产权报 (*China Intellectual Property News*), (Oct. 22, 2014), available at http://www.cipnews.com.cn/zgzscqb/html/2014-10/22/content_46529.htm?div=-1 (last visited Jan. 29, 2016).

The judicial trial practices in the people's courts of the PRC also are concerned with patent rights holders abusing the issuance of warning letters or abusing the right of litigation. For example, in a commercial defamation dispute between Shenzhen Libang Precision Instrument Co., Ltd, and Shenzhen Mairui Biological Medical Electronic Co., Ltd, the Supreme People's Court of the PRC perceived the issuance of a tort warning letter, utilized to protect the patent right, may be deemed as an important channel for parties to resolve the dispute through consultation. It conforms to the spirit of encouraging parties to resolve disputes through consultation, as well as the due and fair practice that the patent right holder exercises their patent right. However, a patent right holder who issues a tort warning letter may not abuse the tort warning to inflict harm to legal rights and interests of other parties and cause disorder in the market competition. If a patent right holder abuses a tort warning in an unfair manner in order to seek market competition advantage or injure the competitive advantage of competitors, it shall be deemed that it is beyond the scope of the exercise of their rights, and constitutes commercial defamation or other unfair competition activity. The division between fair tort warning and unfair competition is involved in the balancing of interests between rights protection and maintenance of fair competition. It is necessary to allow fair tort warnings and to protect the performance of that right, as well as, effectively preventing abuse of tort warnings and protect the legal rights and interests of competitors. The tort warning belongs to fair maintenance or constitutes unfair competition, shall be judged on the basis of the specific details of an issuance of a tort warning letter and the relevant legal provisions.[31]

The judicial trial practices of the people's courts in China show that they are concerned about the issue that patent right holders could abuse their patent rights and injure competition. For instance, in a serial of cases of *Huawei vs INTERDIGITAL*, due to the fact that INTERDIGITAL holds a lot of patent technologies necessary for 3G standard including WCDMA, CDMA2000 and TD-SCDMA, it was necessary for "half of all 3G mobile equipment which are sold in the whole world" to pay patent royalties to INTERDIGITAL. Huawei Corporation also used the patent technologies of INTERDIGITAL in the production of 3G communication equipment, however, both parties failed to agree on how to pay the patent royalty. Huawei Corporation and INTERDIGITAL had no objection to the patents being classified as SEPs, but surrounding the SEPs, especially due to the issue of royalty, both corporations initiated a serial of lawsuits in China.[32] In the SEP royalty dispute case that Huawei brought against

[31] See Civil Retrial Determination for Commercial Defamation Dispute between Shenzhen Libang Precision Instrument Co., Ltd, and Shenzhen Mairui Biological Medical Electronic Co., Ltd [(2015) Minshenzi No. 191], available at http://www.court.gov.cn/zgcpwsw/content/content?DocID=5cf66675-69ad-4794-a263-1db4a34f3cb1&KeyWord=Mairui (last visited Jan. 18, 2016).

[32] Huawei Corporation and US IDC Corporation brought the lawsuits against each other in Shenzhen Intermediate People's Court, Case No. is respectively Shenzhongzhi minchuzi No. 386, 387, 388, 475, 476, 477, 478, 857 and 858.

INTERDIGITAL, the Higher People's Court of Guangdong Province made the final ruling on October 16, 2013. The first instance court and the second instance court ruled that INTERDIGITAL granted Huawei licenses for China SEPs and SEP applications. They further held that the royalty rate shall be calculated on basis of actual selling prices of relevant products, but should not exceed 0.019% in accordance with Article 4 of the General Principles of Civil Law, Articles 5 and 6 of the Contract Law, and Paragraph 1, Article 64 of the Civil Procedure Law.[33] In the *Huawei vs INTERDIGITAL* anti-monopoly dispute case, the Higher People's Court of Guangdong Province made the final ruling on October 21, 2013. The first instance and second instance people's courts ruled that INTERDIGITAL set too high prices for the involved SEPs and the tied sales constituted the abuse of dominant market position, and in accordance with the provisions in the Anti-monopoly Law, decided that INTERDIGITAL shall compensate Huawei Corporation for economic losses amounting to RMB20 million.[34]

The rulings and judgments made by the courts of the PRC are not for NPE specifically in a serial of cases, however, if the patent right holder is NPE, whether it abuses the patent right, or abuses the issuance of warning letter, or abuses the right of litigation, it shall be regulated by the patent law, anti-unfair competition law and anti-monopoly law. This also proved from the other side that the focus of regulation is not subject but conduct, as well as, the effective regulation of the court for the improper conduct of NPE.

CONCLUSION

NPE are the entities which hold the patent rights but put no investment into actual production, its existence is reasonable and legal. At present, China needs to sort out the current situation of confusion of the use of these three concepts about NPE, PAE and Patent Troll, and it is necessary to resume the nature of NPE as a neutral concept, and to pay attention to what might lead to legal problem is PAE, rather than colleges, scientific research institutes, public institutions and individual inventors among NPE. No matter how, NPE are not always wicked, and the law need not make special articles and provisions for the subject of NPE *per se*. The law should be concerned about the unfair activities that might be conducted by NPE rather than the subject of NPE. This is also one of the reasons that there are many deep discussions and attention directed towards NPE in all countries, but it is very cautious to draft special articles to NPE entities in relevant legislation. China is not exceptional, it is unnecessary to make special provisions on NPE

[33] See Civil Judgment of Guangdong Province Higher People's Court (2013) Yuegaofa minsanzhongzi No. 305, available at http://www.gdcourts.gov.cn/gdcourt/front/front!content.action?lmdm=LM43&gjid=20140417024309113155 (last visited Jul. 3, 2015).

[34] See Civil Judgment of Guangdong Province Higher People's Court (2013) Yuegaofa minsanzhongzi No. 306, available at http://www.gdcourts.gov.cn/gdcourt/front/front!content.action?lmdm=LM43&gjid=20140417030902158689 (last visited Jul. 3, 2015).

at present in the Patent Law and the Anti-Unfair Competition Law which are revised and a serial of anti-monopoly law rules which are formulated in China.

The laws to regulate unfair conduct of NPE in China are the Patent Law, Anti-Unfair Competition law and Anti-Monopoly Law. These laws impose necessary legal regulation for unfair conduct of NPE when realizing their respective legislative targets. At present, the unfair activities of NPE do not change the analysis framework and system design of such laws. Of course, due to the special commercial mode of NPE, it is necessary to consider some personalized factors when the laws regulate the unfair conduct of NPE. Therefore, it will push the perfection of legislation, enforcement and jurisdiction under the Patent Law, Anti-Unfair Competition Law and Anti-Monopoly Law.