

Patent Litigation in China in 2025

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Throughout 2024, China's patent litigation remained active. The IP Tribunal of the Supreme People's Court (SPC) has issued decisions providing further guidance on damages calculation in the SEP/FRAND and life sciences sectors. The SPC has also leveraged pertinent decisions outlining the liabilities of patentees acting in bad faith. These decisions showcase the current juridical practice of Chinese courts relating to the said issues, yet it remains to be seen how the jurisprudence will evolve in 2025.

SEP/FRAND

In 2024, one of the key issues in Chinese SEP litigation was the determination of royalty rate. Into 2025, the current Chinese practice aligns with that of other jurisdictions in using the comparable licence method and the top-down method in assessing royalty rate.

In December of 2023, the SPC issued the second-instance decision (2022) Zui Gao Fa Zhi Min Zhong Nos. 907, 910, 911, 916, 917 and 918 on disputes over infringement of six SEP patents and royalty determination thereof between, inter alia, a US company ("plaintiff") and a Chinese domestic cell phone manufacturer ("defendant"). The SPC's decision provides a framework of reference as to how Chinese courts could approach royalty determination and calculation of damages.

The SPC held that damages awarded to a patentee of a SEP patent should be the royalty the implementer of the SEP patent should have paid plus the patentee's loss of interest the royalty should have yielded. To calculate damages, the SPC followed a four-step approach, namely:

- determination of the number of infringing cell phones sold;
- determination of royalty rate per unit;

- determination of liability of culpa in contrahendo for both patentee and patent implementer (whether they follow FRAND principle); and
- determination of damages.

In determining the royalty rate per unit, the SPC commented that both the comparable licence method and the top-down method were commonly used, and in a given case which method is to be adopted would hinge on the evidence produced. In this decision, the SPC followed the comparable licence method. The rationale behind this is: such method was specifically requested by the plaintiff and only comparable licence agreements were adduced as evidence. In identifying the comparable licence agreement for comparison, the SPC factored in the negotiation background of the licence agreement, the resemblance in licensor and licensee, in the SEP patent at issue and in the content of the licence agreement. Accordingly, the SPC selected a comparable licence that concerned the licensing of the same SEP patents within China for a comparable number of cell phones, with the licensee being another major domestic player in telecommunication. The comparable licence set forth an aggregate royalty for all six SEP patents. On that basis, the SPC calculated the royalty rate per unit to be USD0.008 for all the six SEP patents.

Regarding the determination of liability of culpa in contrahendo, the SPC stated that the liability was only relevant to determining how the patentee's loss caused by the non-payment of royalty of the patent implementer should be apportioned between the parties. To determine whether a party followed the FRAND principle, the test was whether a party had displayed a genuine intent to reach a licence agreement. In this regard, the SPC found that the patentee and the patent implementer were equally liable for not reaching a licence agreement.

In reaching this conclusion, the SPC examined the following factors in assessing the intent of the patentee to reach a licence agreement:

- whether the patentee brought the litigation seeking royalty awarded without informing the patent implementer of the infringement in writing;
- whether the patentee explicitly rejected the request of the patent implementer for a licence agreement;
- whether the patentee directly proceeded or repeatedly threatened to sue the patent implementer for infringement or injunction during negotiation;
- whether the patentee ceased negotiation without any reasonable cause;
- whether the patentee disclosed to the patent implementer all necessary information about the SEP patent at issue;
- whether the patentee refused to disclose to the patent implementer the basis or calculation method for the proposed royalty or royalty rate;
- whether the patentee offered no explanation as to why the proposed royalty for the patent implementer was obviously or substantially greater than its proposed royalty for the other competitors in the same field under the same circumstances;
- whether the patentee timely responded to the patent implementer for its counter-offer within a reasonable time period; and
- whether the patentee refused the request of the patent implementer for clarifying relevant technical questions.

In the meantime, the following factors were examined in scrutinising the intent of the patent implementer:

- whether the patent implementer timely responded to the patentee's written notification of infringement or informed the patentee of its unwillingness to negotiate within a reasonable time period;
- whether the patent implementer actively responded to the patentee's offer for a licence agreement within a reasonable time period;
- where the patent implementer believed the patentee's offer was unreasonable, whether the patent implementer actively provided a reasonable counter-offer or suggestions for the licence agreement, or whether the patent implementer timely deposited the royalty proposed in its counter-offer;
- whether the patent implementer postponed or ceased negotiation without any reasonable cause; and
- whether the licence agreement proposed by the patent implementer was obviously unreasonable.

For calculation of damages, the SPC held that the damages awarded to the patentee should include:

- royalty the patent implementer should have paid; and
- the patentee's loss of interest the royalty should have yielded. The interest loss was calculated through multiplying royalty by interest rate for the overdue period of the royalty and liability percentage of the patent implementer in culpa in contrahendo. To calculate the overdue period, the SPC found in general a licence agreement would be reached within 12–18 months, and it would take five additional days to process the payment of royalty. As such, the date on which the royalty should have been paid was derived by adding the period of the maximum 18 months for negotiation plus five days for royalty payment to the date on which the patent implementer first responded to the patentee's written notification of infringement.

Accordingly, the SPC awarded the patentee a royalty of approximately RMB15.4 million (USD0.008/unit x 272,109,806 units at issue x exchange rate 7.07 RMB/USD) plus its interest, with the interest to be calculated from the day when the royalty became overdue to the day of actual payment of the patent implementer.

High damages in life sciences cases

In China, it has long been acknowledged that it can be a challenge to obtain high damages in patent litigation, due to the high evidentiary hurdle the plaintiffs have to overcome in justifying the damages claimed. As such, many foreign patentees would aim for an injunction, rather than high damages, in patent litigation in China. In December of 2023, the SPC issued the second-instance decision on a patent infringement dispute between a US plaintiff and two domestic defendants ((2021) Zui Gao Fa Zhi Min Zhong No. 2480), awarding the US plaintiff damages of RMB18.5 million in total.

The patent at issue related to a protein having a specific sequence and endoglucanase activity and a preparation containing the same for washing use or fabric processing. The plaintiff, with an exclusive licence to exploit the patent at issue, sued two

domestic defendants as per the authorisation of the patentee. The two defendants were the manufacturer and the vendor of the infringing product respectively.

In China the patentee may request that damages be determined by the following methods:

- a patentee's actual loss caused by infringement;
- if the patentee's actual loss cannot be determined, damages may be determined based on the infringer's illegal gains generated through infringement;
- if neither of the above can be ascertained, damages may be determined with reference to the reasonable multiple of royalty; and
- if none of the above can be determined, statutory damages up to RMB5 million may be awarded.

As is the case with most plaintiffs of patent infringement disputes under Chinese practice, the plaintiff in this case requested the court to award damages based on illegal gains, which the defendants generated out of infringement.

First instance

The plaintiff requested damages be awarded based on illegal profits yielded during 59 months of infringement and presented three models for calculating damages. The plaintiff only obtained limited evidence regarding the defendants' sales of the infringing products, and hence all three calculation models of damages the plaintiff presented were predicated on a number of assumptions. Shanghai IP Court, the first-instance court, found these calculation models inadequate to substantiate the actual sales figure and profit of the defendants and thus adopted the method of reasonable multiples of royalty fees to calculate damages as follows.

Damages = sales of infringing product of 11 months acknowledged by manufacturer/11 months x 2 x 59 months x royalty rate in licence agreement x 3

It is worth noting that in the above calculation the first-instance court doubled the average monthly sales of the infringing product of the manufacturer, in view that the two defendants defied the court's order to produce evidence relating to the sales of the infringing product. The court also trebled the royalty rate prescribed in the licence agreement for calculating damages, considering the nature of the patent at issue, the nature and severity of the infringement and the content of the licence agreement.

The court awarded punitive damages for the last three months of infringement, as the law providing for punitive damages was not effective until then. Specifically, the court awarded quintuple damages apportioned to the last three months of infringement, in view of the brazenness of the two defendants to infringe and the duration and scale of infringement.

As a result, the first-instance court awarded damages of RMB10 million.

Second instance

Both the plaintiff and the two defendants appealed to the SPC. Whilst also finding infringement, the SPC took a different approach to damages calculation.

Upon the request of the plaintiff, the SPC issued a ruling demanding that the two defendants produce their books of accounts. In response, the manufacturer produced its books of accounts for more than three years. The vendor produced some purchase contracts, tax receipts and orders of infringing products, but still refused to produce its books of accounts.

Based on the books of accounts of the manufacturer, the SPC calculated the profits made by the manufacturer out of selling the infringing products during that time period. The SPC then found most (around 90%) of the infringing products manufactured were sold to the vendor at prices approximately 1.5 times the factory gate prices. In calculating the vendor's sales revenue, the SPC used the figures of the manufacturer as a benchmark and multiplied it by 90% (to reflect the sales figure of the vendor) and 1.5 (to reflect the vendor's sales price of the infringing products). The court then projected the derived revenue throughout the entire period of infringement, using an estimated gross profit margin of 33% (estimated based on the vendor's operation mode and sales price of the infringing product) and an estimated minimum operating profit margin of 12% (estimated based on data used by the vendor in calculating its own profits). The SPC also applied a contribution rate of 100% for the patent at issue, as the infringing product included protein of the amino acid sequence of the patent at issue. The vendor's profits were therefore calculated to be more than RMB23 million.

Based on this calculation, and by taking into account the procrastination of the manufacturer and the defiance of the vendor in turning in their books of accounts, the court awarded damages of RMB18.5 million as claimed by the plaintiff without applying punitive damages, as the claimed damages had already been granted.

Another major divergence from the first-instance court is the SPC found the two defendants were severally and jointly liable for the full amount of damages awarded, and the vendor's defence of legitimate source should not apply. The SPC reasoned that the vendor's active involvement in the infringement suggested that it was more than an innocent vendor.

Bad faith litigation

Bad faith litigation has been garnering attention in recent years. It refers to litigation that is brought by a plaintiff out of no legitimate legal or factual basis to obtain illegal or illegitimate benefits and thus causing financial losses to a defendant. The concept of bad faith litigation arises from the principle of honesty and trustworthiness now codified by the Civil Code.

As the principle of honesty and trustworthiness is introduced as a fundamental rule by the legislator without elaborating on the circumstances as to how bad faith litigation can be established, stakeholders could only rely on case law to decipher the thinking of the Chinese judiciary in that regard. It is pivotal that multinational companies follow closely the development of the

jurisprudence in this area to avoid the pitfall of being labelled as acting in bad faith in litigation or falling victims of bad faith litigation.

Two SPC decisions could shed some light on this matter.

(2022) Zui Gao Fa Zhi Min Zhong No. 1861

The decision (2022) Zui Gao Fa Zhi Min Zhong No. 1861 is the first decision where the SPC found a patent infringement action brought by a patentee could constitute bad faith litigation and ruled the patentee was liable for financial compensation to the accused infringer.

In this case, the patentee owned a utility model ("patent at issue"), which later lapsed due to insufficient payment of annuity unbeknownst to the patentee. Shortly after the lapse, the unwitting patentee sued the accused for infringement of the patent at issue. Infringement was not found until at the retrial stage of the case, which took place years after the original expiry date of the patent at issue. At that time, as neither the court nor the accused were aware the patent at issue had already lapsed, the court found infringement and the accused paid the financial compensation as ordered by the court.

The patentee subsequently filed a second litigation, claiming RMB3.5 million as damages for the period from the filing date of the first litigation to the date when the patent at issue would have expired. This time, the accused found out about the lapse of the patent at issue and informed the court, and the patentee withdrew its complaint. The accused then applied to the Supreme People's Procuratorate (SPP) to protest the erroneous decision of the first litigation, on the basis that the patent at issue had already lapsed at the time when the first litigation was brought. However, the SPP rejected the application of the accused. Meanwhile, the patentee initiated an administrative proceeding challenging the CNIPA's decision to terminate the patent at issue due to insufficient payment of annuity, but later withdrew the complaint.

Then the patentee filed a third litigation against the accused, claiming damages of RMB4.5 million for the same time period as the second litigation, but once again withdrew its complaint later. A fourth litigation ensued shortly. This time the patentee applied for interim preservation of the accused's property, and the court granted its application before eventually dismissing the patentee's claim.

The accused then sued the patentee, contending that the third and fourth litigation constituted bad faith litigation, requesting financial compensation for losses caused by, inter alia, its disqualification by the wrongful accusation of patent infringement from biddings for a contract and the interim preservation measure applied for by the patentee in the fourth litigation. The case went through two instances, and courts of both instances found the third and fourth litigations filed by the patentee constituted bad faith litigation. In finding bad faith litigation and assessing liability for financial compensation to the accused, the SPC affirmed the following reasoning of the first instance court:

"... civil litigation is an important route for patentees to enforce their lawful rights, yet the patentees are still obligated to abide by the principle of honesty and trustworthiness. Considering the patentee and the accused are competitors in the same trade and given the patentee's withdrawal of its complaints and non-payment of litigation fees, it would be unconvincing to the court that the patentee brought the third and fourth infringement actions to assert its lawful rights and to exercise its right to sue. In

both of these actions, the patentee claimed damages of as high as RMB4.5 million, which is way above the damages of RMB125,000 awarded by the court in the first infringement action. Further, the patentee applied for interim preservation of property, and RMB4.5 million of the accused was frozen upon the patentee's request. As such, it can be determined that the patentee knew that its infringement actions were unwarranted, and it was highly likely that the patentee sought to obtain illegitimate financial gains. It can be inferred that the patentee has the direct intent to infringe the lawful rights of the accused."

(2022) Zui Gao Fa Zhi Min Zhong No. 2586

Another SPC decision, (2022) Zui Gao Fa Zhi Min Zhong No. 2586, discussed a patentee's liability for damages caused by bad faith litigation.

In this case, the patentee of a utility model ("patent at issue") approached the accused with the drawings, which embodied the patent at issue, and requested the latter to produce samples according to such drawings. The patentee notarised the receipt of the ordered samples and sued the accused for patent infringement using those samples as evidence. Meanwhile, the patentee sent warning letters to customers of the accused, stating the accused was suspected of infringing the patent at issue and advising those customers to refrain from purchasing the infringing products. The infringement action filed by the patentee went through two instances. Both courts ruled against the patentee, finding the alleged infringement was the result of the patentee's inducement.

The accused subsequently sued the patentee for bad faith litigation and business defamation, requesting compensation from the patentee for, inter alia, the reasonable expenses incurred for responding to the infringement accusation. In both instances, the courts affirmed the patentee's infringement action constituted bad faith litigation and the sending of the warning letters constituted business defamation.

Specifically, the SPC found that the patentee collected evidence of infringement in a way that it actively induced the accused to commit infringement. As such, and given the lack of other evidence of infringement by the accused, the patentee's act contravened the principle of honesty and trustworthiness, as opposed to being a mere defect in its evidence collection. The evidence so collected should not be admitted, and the infringement action based on such evidence obviously had no factual basis.

The SPC also commented on indicators of bad faith on the part of the patentee, underlining that:

- the patentee induced the accused to produce the infringing product, even though there was no evidence showing the accused had or was about to commit infringement;
- in the infringement action, the patentee withheld the information that the infringing product was produced upon its request and according to the drawings it provided;
- in the infringement action, the patentee claimed damages that were unreasonably high without supporting evidence, and applied for interim preservation of the accused's property; and
- the patentee sent warning letters to customers of the accused before the issuance of final decision of the infringement action.

