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Latest Developments of Patent Enforcement in China

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New Judicial Interpretations

- Error in claims
  - If the wording of a technical feature in a claim has an error which is so obvious that a person skilled in the art, in light of the description, the drawings and the claims, can immediately determine the correct and sole understanding of the technical feature, that understanding shall prevail.
  - Otherwise, the technical feature should be interpreted as it is.
New Judicial Interpretations

- When interpreting protection scope of a claim, features in preamble can be limiting.
- Scope of prosecution history: when interpreting protection scope of a claim of the patent in suit, prosecution history of its mother or divisional patent applications, if any, can also be consulted.
New Judicial Interpretations

- Functional feature: a functional feature in a claim should be construed as covering the specific embodiments contained in the description and the equivalents thereof. The “equivalents” here means that the corresponding feature performs the same function in substantially the same way to obtain the same result, which a person skilled in the art can conceived of without inventive work.

- Working environment feature: if the accused product cannot be used in the working environment defined in the claim of patent in suit, there is no infringement.
New Judicial Interpretations

- Product-by-process claim: if the accused product is not manufactured by the process defined in the product-by-process claim of the patent in suit, there is no infringement.

- Process claim: where the order of steps in a process claim is not expressly specified in the claim, if a person skilled in the art, in light of the description, the drawings and the claims, can directly and clearly understand that the steps must be performed in a specific order, this order is limiting.
New Judicial Interpretations

- Numerical range in claims: Where a numerical range is defined in a claim by wordings, such as “at least” or “no more than”, if a person skilled in the art, in light of the description, the drawings and the claims, can realize that those wordings are critical to the invention, the doctrine of equivalents is not applicable to this numerical range.

- Prosecution history estoppel: The patentee cannot seek to cover under the doctrine of equivalents a subject matter that it surrendered, either through amendments or arguments, in order to obtain the patent during the prosecution process or to sustain the patent during the invalidation process. However, if the amendments or arguments are not accepted by the examiner, the subject matter is not regarded as being surrendered.
New Judicial Interpretations

- Provisional protection
  - The patentee can obtain provisional protection only if the accused product/process is covered by both the claims as published and the claims as granted.
  - The appropriate fee paid to the patentee should be determined with reference to royalties.
New Judicial Interpretations

- Contributory infringement
  - Contributory infringement is an act of infringement committed by one who supplies a component exclusively used to implement a patent to another who directly infringes the patent. The contributory infringer must know that the component is especially made or adapted for use in the infringement.
  - The contributory infringer and the direct infringer shall be jointly and severally liable for the infringement.
New Judicial Interpretations

- Inducing infringement
  - Inducing infringement is an act of infringement committed by one who induces another to directly infringe a patent.
  - The inducing infringer and the direct infringer shall be jointly and severally liable for the infringement.
New Judicial Interpretations

- SEP
  - Implementing an SEP, whose info has been expressly indicated in the standard, without license constitutes infringement.
  - If the patentee and the accused infringer of the SEP cannot reach an agreement on licensing terms, either party can ask the court to set the licensing terms. When doing so, the court should observe the FRAND rule and consider the SEP’s importance to the standard, as well as the standard’s importance, technical field and scope of implementation.
New Judicial Interpretations

- **Injunction**: Where infringement is established, if the plaintiff asks the court to issue an injunction, the court should do so. Exceptionally, if an injunction would be detrimental to national or public interest, the court can refuse to issue but ask the defendant to pay royalties.

- **Damages**: If the plaintiff has submitted preliminary evidence on how to calculate the illegal profit of the defendant, as damages, the court can request the defendant to submit its internal materials, such as accounting book. If the defendant refuses to do so without justification, the court can proceed to calculate the profit based on the preliminary evidence. If the plaintiff and the defendant has concluded an agreement on the sum of damages or how the damages should be calculated, the agreement shall prevail.
IP Courts

- IP court has been set up in Beijing, Shanghai and Guangdong. If the operations of these exemplary courts prove to be satisfactory, IP courts would be set up in other provinces.

- In the meantime, the Supreme Court is considering a uniform appellate IP, which could be more helpful to standardize IP litigation practice in the country.
Beijing IP Court

- In 2016, Beijing IP court received 8305 cases, including:
  - 1754 patent disputes, including 1104 administrative disputes
  - 5969 trademark disputes, including 5936 administrative disputes
  - 420 copyright disputes, wherein 417 cases relate to software
Beijing IP Court

From the foundation of Beijing IP Court (Nov. 6, 2014) to June 30, 2017, the court
- received 74 patent infringement cases in which patentees are foreign companies;
- adjudicated 13 patent infringement cases in which patentees are foreign companies, where the winning rate is 76.9% and the average sum of damages is RMB 1.022 million.
Beijing IP Court

- Trends
  - Damages are getting higher and higher. In 2016, the average damages for patent infringement cases are RMB 1.41 million. In one patent infringement case, the defendant paid RMB 49 million in damages and RMB 1 million of attorney fees to the plaintiff.
  - Evidence preservation has been widely used. In one patent infringement case, the court ordered the defendant to submit test data relating to infringement determination.
Beijing IP Court

- Precedents are playing more and more important role. In 2016, 168 cases were adjudicated according to precedents. This makes outcomes of IP litigations more consistent and predictable.
Statistics on IP Infringement Litigations

Number of IP Infringement Litigations

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Statistics on IP Infringement Litigations

Percentage of each IP Infringement Litigation

- Design patent 10.04%
- Utility model patent 3.88%
- Invention patent 1.71%
- Right of information network dissemination 28.25%
- Trademark 34.17%
- Screening right 8.20%
- Other property right 7.65%
- Other copyright 6.10%
Statistics on IP Infringement Litigations

Venues of IP Infringement Litigations

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Statistics on IP Infringement Litigations

Foreign Countries Involved

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Statistics on IP Infringement Litigations

Pendency (day)

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Statistics on IP Infringement Litigations

How IP Infringement Litigations Closed

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Statistics on IP Infringement Litigations

- **Trends**
  - The number of patent infringement cases in telecommunication industry has increased considerably. Examples: Huawei sued Samsung in 2016 at the Intermediate Court of Quanzhou City, Fujian Province; Iwncomm sued Sony in 2017 at Beijing IP Court; Qualcomm sued Meizu in 2016 at Beijing IP Court; Huawei sued ZTE in 2014 at Zhejiang High Court.
Statistics on IP Infringement Litigations

- Patent-related anti-monopoly cases emerge. Examples: Huawei sued IDC at Guangdong High Court; Apple sued Qualcomm at Beijing IP Court (Apple claims RMB 1 billion damages).
- The amount of damages continues to substantially increase.
Statistics on IP Infringement Litigations

- Enforcing GUI design patent is becoming a hot topic. For example, Apple sued Beijing IP Office at Beijing IP Court.
- The number of cases where both parties are foreign companies is increasing. Examples: Apple v. Qualcomm; Nagra v. Apple; Wilan v. Sony.
Thank you for your attentions!

Any questions?

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