

ASPI – ChinePI Blog Conference

# STRATEGIES FOR PATENT INFRINGEMENT LITIGATION IN CHINA

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PARIS 28/09/2017



# STRATEGIES FOR PATENT INFRINGEMENT LITIGATION IN CHINA

- I. How to Choose Jurisdiction?
- II. How to Collection Evidence on Patent Infringement?
- III. How to Determine the Amount of Indemnity?

# I COURT JURISDICTION

- **1. Fundamental Rules of Court Jurisdiction**
  - Jurisdiction by the court in the area where the defendant locates
  - Jurisdiction by the court in the area where the infringement behavior happened (e.g. where the infringed product is produced/sold/promised to sell/is imported)

# I COURT JURISDICTION

- 2. Try to choose the court of the plaintiff location.
- Advantages for the plaintiff:
  - a. lower expenses for business travelling;
  - b. more convenience for managing procedural issues;
  - c. more easy to understand the jurisprudence of the court;
  - d. and maybe more likely to get more sympathy from the court.

# I COURT JURISDICTION

- 3. Try to choose experienced court
- Among civil litigations, patent infringement litigation can be the most complicated type of litigations.
  - a. On the objective aspect of the case, patent litigation often involves technical disputes, which will probably be very difficult for the judges to understand and will have to be resolved by starting another special procedure called “technical authentication”.
  - b. On the procedural aspect of the case, patent litigation usually refers to the *suspending procedure* caused by invalidation procedure by the defendant.

# I COURT JURISDICTION

- 4. Sometimes choose the court of higher level deliberately
  - The higher the court's rank is, the higher its competence of trying cases is. You can choose the higher court than the court you choose according to common practice by increasing the damage amount in purpose. Of course ,if you do so, you have to pay more court fees for the case.

## II EVIDENCE COLLECTION FOR PROVING THE INFRINGEMENT BEHAVIOR

- **1. Buying the accused product.**
  - a. The core evidence proving that the defendant actually infringed the patent right of the plaintiff is the infringing product. In china, buying this kind of product is suggested to completed under the supervision of notary.
  - b. After buying the product, a technical comparison between the patent claims and the technical features involved in the product shall be made and provided to the court at proper time.

## II EVIDENCE COLLECTION FOR PROVING THE INFRINGEMENT BEHAVIOR

- 2. Preserving evidence relating to the product used by the third party
  - In many cases, we cannot buy the accused product or are not willing to buy because of too high price. In this situation, we can take some preservation measures upon the product, e.g. take picture/video/collect some documents from the user. These measures can be taken by lawyers or through the court.

## II EVIDENCE COLLECTION FOR PROVING THE INFRINGEMENT BEHAVIOR

- 3. Pictures/videos of the accused product on the website/advertisement/brochures of the defendant
  - In case that we cannot obtain the evidences directly relating to product, we can consider to find these in-direct evidences of the product. Although this kind of evidences cannot be used for purpose of technical comparison. They can be used to prove that the defendant has actually carried out infringement activities and on the basis of which we can apply for evidence preservation measures by the court.

## II EVIDENCE COLLECTION FOR PROVING THE INFRINGEMENT BEHAVIOR

- 4. Application of evidence collection by the court
  - In case that we cannot collect the evidences we need because these evidences is in the tight control of the defendant, we can apply the court to take preservation measure of evidence collection. This kind of application may be launched before and during the process of the case.

# III HOW TO DETERMINE THE AMOUNT OF DAMAGE

- **2. Damage amount determined by the court**
  - In most cases, the damage amount is evaluated by the court instead of being proved by the plaintiff. The plaintiff bears a lighter duty of proof, which is suitable for the purpose of protecting market of the plaintiff.

# III HOW TO DETERMINE THE AMOUNT OF DAMAGE

- 3. Requirements for huge amount of damage
  - The plaintiff managed to obtain the accused product and may conclude that the infringement of patent will be recognized by the court.
  - The defendant is able to pay a large amount of damage, e.g. a large-scaled enterprise.
  - The plaintiff has collected enough evidences proving that the defendant produced/sold the accused products in large scale.



THANKS FOR YOUR ATTENTION