

Establishment of Indirect/Contributory Patent Infringement in China

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The act of indirect/contributory infringement of patent is relative to the act of direct infringement of patent. The conception of indirect/contributory infringement of patent is, to a large extent, to meet the practical need for the protection of the patent right. In practice, to avoid liability for patent infringement, one sometimes does not exploit all, but only some, technical features defined in a claim of a patent, or several people jointly exploit all the technical features of the claim. According to the All Elements Rule in determination of patent infringement, if an accused article does not cover all the technical features or equivalent features of a patent claim, say with one of the essential technical features or an equivalent feature missing, it does not directly constitute an infringement of the patent. Judgment of the kind is likely to make the protection of the patent right less effective or make the full, effective protection of the patent right impossible. It is to prevent situation like this from happening that the indirect/contributory infringement theory has been developed.

This article seeks to present an overview and in-depth study of the theory and practice in relation to establishment of indirect/contributory infringement of patent in China.

Law basis of indirect/contributory infringement of patent in China

1. Provisions of the Patent Law

The current Chinese Patent Law does not set forth express provisions for the constitution of, or fixation of liability for, acts of indirect/contributory infringement of patent.

2. The General Principles of the Civil Law and Supreme People's Court's judicial interpretation

However, Article 130 of the General Principles of the Civil Law of the People's Republic of China as of 1987 provides for the contributory infringement and way of fixation of

liability therefor. Besides, Article 148 of the Supreme People's Court's (SPC) Opinions on Several Issues Relating to the Implementation of the General Principles of the Civil Law as of 1988 (tentative) further provides for the specific circumstances of contributory infringement. Under Article 130 of the General Principles of the Civil Law of the People's Republic of China as of 1987, two or more persons or entities that cause damage or injury to others shall be severally and jointly liable. Under Article 148 of the SPC's Opinions on Several Issues Relating to the Implementation of the General Principles of the Civil Law of the People's Republic of China as of 1988 (tentative), one who aids and abets others in performing an act of infringement is a contributory infringer and should be civilly liable jointly.

Under the said provisions of the General Principles of the Civil Law and the SPC's judicial interpretation, two or more persons or entities jointly infringe another party's patent right shall be severally and jointly liable; one who aids and abets others in performing an act of infringement is a contributory infringer and should be civilly liable.

3. Bluebook No. 7

It is held in Bluebook No. 7 on the Intellectual Property System in China prepared by the State Commission of Science and Technology in 1992 that there are mainly five acts of indirect infringement of patent as follows:

- 1) intentionally making, selling or importing key components or parts that are used only in a patented product;
- 2) licensing another person a patented technology without authorisation of the patentee;
- 3) licensing a third person a patented technology by the licensee in violation of a patent licensing contract;
- 4) licensing a third person to exploit a patented technology by a co-owner of a patent right without consent of the other patent owner(s); and

5) using a patentee's patented technology without his authorisation by one entrusted with technical service provision when solving a particular technical problem for the entruster.

From the above one may learn that the indirect patent infringement as defined in the Bluebook No.7 has its broad meanings and comprises both the patent indirect infringement and patent contributory infringement as defined in certain foreign countries. In other words, indirect infringement of patent is different from contributory infringement of patent in meaning in some foreign countries, however, they are not distinguished from each other under the Bluebook No.7.

Given that a patentee is given the right to prevent a third party from offering for sale under the current Patent Law as of 2000 and considering that the special character of indirect infringement of a process patent, it is argued in this article that the acts of indirect infringement of patent mentioned in Bluebook No.7 is now possibly construed as including the following:

1) making, selling, offering for sale or importing key components or parts that are used only in a patented product or moulds specially used for making a patented product, or machinery or intermediate raw material specially used for exploiting a patented process;

2) licensing another person a patented technology or entrusting another person with exploitation of a patented technology without authorisation of the patentee or the other patentee(s); and

3) other acts of contributory infringement including aiding and abetting another person in performing an act of infringement;

The acts in 3) include, among other things, acts of using a patentee's patented technology without his authorisation by one entrusted with technical service provision when solving a particular technical problem for the entruster.

4. Beijing Higher People's Court's guiding opinions

With a view to harmonising the standards for the establishment of indirect infringement of patent within its jurisdiction, the Beijing Higher People's Court has developed the following guiding opinions in the Opinions on Several Issues Relating to Patent Infringement Adjudication (For Trial Implementation) as of 2001:

73. By indirect infringement is meant that the act of an actor does not constitute a direct infringement of another person's patent right, but it or he intentionally induces, aids and abets others in exploiting that person's patent, thus resulting in an act of direct in-

fringement. The actor has the subjective intention to induce or aid and abet others in infringing another person's patent right, and objectively creates the necessary conditions for another person's act of direct infringement to take place.

74. The objects of the indirect infringement are not articles in general use, but those used for special purposes, by which is meant the key part used only to exploit another person's product or the intermediate product of a process patent. It constitutes a part of the exploitation of another person's patented technology (product or process), having no use for any other purposes.

75. As far as a product patent is concerned, indirect infringement is to provide, sell or import the raw material or spare parts for the manufacture of the patented product; as regards a process patent, indirect infringement means providing, selling or importing the material, apparatus or equipment specially used for the patented process.

76. The indirect infringer has the intention to induce, aid, and abet others in directly infringing another person's patent right.

77. The actor, knowing that another person prepares to perform an act of infringement of the patent right, but creating the condition for the infringement, commits indirect infringement.

78. Indirect infringement, in general, presupposes the emergence of direct infringement, without which there exists no indirect infringement.

79. Where the following circumstances arise in which an act of direct infringement is not investigated and handled, or is not deemed to be an infringement of the patent right, the indirect infringer may be directly investigated and handled for its or his liability for the infringement:

1). Where the act is not deemed to be an act of infringement of the patent right under Article 63 of the Patent Law; and

2). Where the act is a personal act to manufacture or use the patented product or use the patented process for non-commercial purposes.

80. Where an act of direct infringement as established under the Chinese law takes place or is likely to take place overseas, the actor of the indirect infringement may be investigated and handled for its or his liability for the infringement.

As is shown in the definition of indirect infringement of patent made in Article 73 of the Opinions on Several Issues Relating to Patent Infringement Adjudication (For Trial Implementation), the Beijing Higher Court bases its provisions concerning indirect infringement of patent on Article 130 of the General Principles of the Civil Law of the People's Republic of China as of 1987 and Article 148 of the SPC's Opinions on Several Issues Relating to the Implementation of the General

Principles of the Civil Law of the People's Republic of China as of 1988 (tentative) concerning the provisions for contributory infringement. In other words, the Chinese courts have not been distinguishing the concept of indirect patent infringement from that of contributory patent infringement. Instead, they prefer to generally define both of them as indirect patent infringement, as shown in the previous cases as introduced hereinbelow.

The Opinions on Several Issues Relating to Patent Infringement Adjudication have enumerated the specific circumstances of the indirect infringement of patent, which is meaningful in guiding the courts under it in establishing indirect infringement of patent, but the circumstances of aiding and abetting others in directly infringing another person's patent right are evidently inexhaustible. All forms of such acts are likely to happen in the judicial practice of establishing indirect infringement of patent. For that matter, determination of whether an act is one of indirect infringement of patent should also be made on the basis of the provisions of the upper-level law and SPC's judicial interpretation.

Analysis of causality between acts of indirect infringement and those of direct infringement

It is provided in the laws of most countries that an act of indirect infringement of patent is constituted in the presence of a direct infringement of patent as is the case in Germany. The US Patent Act also requires that the presence of direct infringement of patent be the precondition of indirect infringement of patent. But it provides for an exception in § 271 (f) (1) of the US Patent Act that "whoever without authority supplies or causes to be supplied in or from the United States all or a substantial portion of the components of a patented invention, where such components are uncombined in whole or in part, in such manner as to actively induce the combination of such components outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer."

Under the relevant Chinese laws, an indirect infringer, by nature, is a contributory infringer; hence, the precondition for the constitution of an act of indirect infringement of patent is that the person who is aided and abetted has carried out an act of direct infringement of patent. One of the elements

constituting an act of indirect infringement of patent is the occurrence of a direct act and the presence of causality between an indirect act and a direct infringing act since the presence of a direct infringing act makes the "contributory infringement" possible; without it, the indirect infringing act as constituting a "contributory infringement" is impossible to occur.

Under the circumstance where an indirect act is one exploiting the key component or part of a patented product, where an actor only exploits part of the essential technical features of the patent, without exploiting all the essential technical features of a claim as a whole, according to the general doctrine for judging (direct) infringement of patent, namely the All Elements Rule, such act does not constitute an infringement of the patent. However, since said key component or part is specially used for the patented product, and made by the actor specially to be provided to another person to exploit the patent, what he does is aiding another person in performing an act infringing the patent. When a direct infringing act actually takes place, his act constitutes an indirect infringement of patent. But if the direct infringing act does not actually take place, it should not be determined that the indirect infringement of patent is constituted.

Under the circumstance where an actor makes, sells, offers for sale, or imports moulds specially used for making a patented product, or machinery or intermediate raw material specially used for exploiting a patented process, since the moulds, machinery or intermediate raw materials are not patented products, in which a patentee does not enjoy the patent right, such an act per se does not constitute an infringement of the patent right. However, since the act of providing moulds, machinery or intermediate raw material is one to aid (if not to abet) another person in performing an act of infringing a patent, once a direct infringing act of patent actually takes place, said act constitutes an indirect infringement of the patent, and the actor is a contributory infringer of the patent.

Since the act of unauthorised licensing a patent to another person per se directly infringes a patentee's right of disposition in the patent in the sense of the civil law, the actor may also be directly held liable for the infringement of the right of disposition. Nevertheless, in the spirit of the SPC's Notice on the Issue Relating to the Regional Jurisdiction over Cases of Patent Infringement Disputes as of 1987, said act is treated as an indirect infringement of the patent. In other words, strictly according to the definition of direct infringe-

ment of patent, an actor's unauthorised licensing does not constitute an act of direct infringement of patent. Only when a licensee actually exploits the patented technology, that is, a direct infringement of patent is constituted, does there exist an act of aiding or abetting a licensee by an unauthorised licensor and is the indirect infringement of patent constituted.

When a direct infringing act does not take place, an indirect actor should not be liable for an indirect patent infringement. Therefore, where a direct actor has the legitimate right to exploit a patent, if an indirect actor provides a direct actor with parts or components or transfers (or licenses) him a technology specially used for exploiting the patent, the indirect act does not constitute an indirect infringing act, and he does not have to be liable as an infringer. Similarly, where a direct act of exploitation is performed in a region where the Chinese Patent Law is nonenforceable, for lack of a direct infringing act, it is not possible for such an act to be established as an indirect infringement on the basis of the "contributory infringement" doctrine, nor should the indirect actor be held liable for the infringement. This practice should be fundamentally differentiated from that of some foreign countries which provide for some specific exceptions in their legislation. Without such provisions for the exceptions, a patentee's exercise of this exceptional right would be legally baseless.

Of course, considering to accord more protection to patentees, relevant provisions on the exceptions may be set forth when relevant laws are to be formulated. Under the law provisions for the exception, patentees enjoy these exceptional rights. Under such exceptional circumstance, taking place of a direct infringement of a patent may not be an element of a constituted indirect infringement of a patent.

Analysis of psychological state of indirect actor's subjective intentionality

Once an act of indirect infringement is regarded as an act of contributory infringement including one of aiding or abetting another person in carrying on an act of patent infringement, an indirect patent infringer should be deemed to have the subjective, psychological intention to do so. For example, a contributory infringer should subjectively be a "co-wrong doer" of the joint infringement. Generally speaking, in case of psychological intentionality to aid or abet another person, his fault should be established as an act of aiding or abetting. Even in the United States where the principle of strict

liability applies to acts of direct infringement of patent, an actor of indirect infringement of patent is held liable only when he acts "knowingly". The German Patent Law with which the Chinese Patent Law is historically related to a certain extent also provides that an actor is liable only when he acts "knowingly or obviously knowingly". That is why it is expressly provided, when the State Commission of Science and Technology enumerated acts of indirect infringement in the Bluebook No.7 on the IP System in China as of 1992, that "intentionality" must be the precondition for an indirect act of "making, selling or importing key parts specially used for a patented product" to constitute an act of indirect patent infringement.

Under the circumstance of unauthorised licensing a patent to another person, while said Bluebook does not expressly provide for whether an actor is subjectively intentional, the licensor, as a technology provider, often has to consult a great deal of literature in his development of the technology, and often knows perfectly well that the patent is there. For that reason, such an act of unauthorised licensing is, in fact, often knowingly and intentionally carried out. Under a few circumstances where a licensor does not know, or negligently believes that his technology has nothing to do with a patent, if a licensor infringes another person's lawful rights and interests negligently or faultlessly by his licensing his own patented or non-patented technology, he should not be punished for indirect infringement of a patent even if his act results in direct infringement of the patent if he subjectively does not aid or abet another person in performing the act of patent infringement. Strictly speaking, when negligently or faultlessly licensing another person a patent or entrusting a third person with exploitation of another person's patent, the licensor does not subjectively aid or abet another person in carrying on an act of patent infringement, and he should not be held liable for indirect infringement of patent as a contributory infringer. It is worth noting, however, that Article 42 of the former Chinese Technology Contract Law provides that "where a licensee's (or assignee's) exploitation of a patent or use of a non-patented technology under a contract results in infringement of another person's lawful rights and interests, the licensor (or assignor) shall be liable therefor. The current Contract Law also provides that in the absence of agreed arrangement on who would be liable for likely patent infringement, a licensee's exploitation of a patented technology under a contract results in infringement of another person's lawful rights and interests, the licensor (assignor) shall be liable therefor. Article 89 of the SPC's

Opinions on Several Issues Relating to the Implementation of the General Principles of the Civil Law of the People's Republic of China as of 1988 (tentative) provides that where shared property is one a third person has acquired in good faith and with payment made therefor, the third person's lawful rights and interests should be protected; the losses of other co-owners should be compensated by the owner of the property who has disposed of it without their consent. The Chinese law has set forth this provision to maintain safe technology transfer, to stabilise the socio-economic order, and to protect the lawful rights and interests of those who acquire their paid property in good faith in the trade of technology. For that matter, where a third person acquires a patented technology in good faith, it may be adjudged that the illegal licensor is liable.

However, it needs to be noted that where a licensor is not psychologically intentional in aiding or abetting another person in exploiting a patent, his liability is not one for indirect infringement of the patent, but one for breach of contract, that is, it is not liability for infringement, but a contractual liability. Where a licensor is psychologically intentional in aiding or abetting another person in exploiting a patent, he may be held liable for indirect infringement of the patent. Then, there exists an overlap of liability for infringement and one for breach of contract.

Imposition of liability for indirect infringement of patent in judicial practice

While the current Chinese Patent Law does not expressly provide for the constitution of an indirect infringement of patent and imposition of liability therefor, in the judicial practice, the local courts always impose civil liability on indirect infringers of patent by following the General Principles of the Civil Law and other relevant law provisions.

In the judicial practice, the acts the courts establish as indirect infringement of patent include: making or selling key components or parts or moulds that are used specially in a patented product, or making or selling machinery or intermediate raw material specially used for exploiting a patented process, jointly exploiting the steps of a patented process, and licensing another person a patent without authorisation.

1. Lu Xuezhong v. Aviation Institute, a case of patent infringement in which unauthorised making or selling key components or parts of a patented product constitutes an indirect infringement of patent

The Shanghai No.1 Intermediate People's Court that heard the case established that the accused synchronic traction engine did not have all the technical features of the sewing-machine as stated in the independent claim of the patent in suit; hence the defendant did not directly infringe the patent right. However, once the accused synchronic traction engine is combined with a sewing-machine, the technical features cover all those of the patent in suit. The defendant did not present evidence to prove that the synchronic traction engine had its own independent value in use or could be used for other purposes if it was detached from the sewing machine. Besides, the defendant made it clear to its clients in the specification of its product that said product was specially used together with sewing-machine of all types, and demonstrated in detail the way the synchronic traction engine was combined with a sewing-machine. The defendant was subjectively intentional to make the direct infringement possible. Its act to make and sell the synchronic traction engine resulted in the consequence of infringement, so it should not be exempt from the liability for indirect infringement of the patent in suit.

The plaintiffs Lu Xuezhong and Xiao Chaoxing were both from the Taiwan region, and lawful patentees of the utility model patent ZL95200055.5. Said patent disclosed a device for installation of cloth-drawing means used in sewing-machine, comprising sewing-machine, the cloth-drawing means and an installation member. In the description of the patent was described in many places how the design of the installation device worked together with the fixed structure of various sewing-machines, with drawings attached.

The defendants the Shanghai Aviation Survey and Control Technology Institute (ASCTI) and the Shanghai Changjiang Garment Machinery Plant (CGMP) were both corporate entities. On 23 July 2003, ASCTI sold a TBJ-2 type synchronic traction engine and on the package of the product were indicated the name and address of CGMP. Besides, on the cover of the Manual of the Synchronic Traction Engine were printed photograph of the combination of the sewing-machine, cloth-drawing means, installation means and the "PACIFIC" trademark. In the Manual were clearly described and demonstrated how to assemble the installation means and how to put it together with the sewing-machine and the cloth-drawing means. The court discovered that the defendant's product was identical with the structure of the product as described in the Manual. As the comparison of the feature with the technical features of the patent in suit showed, the

product did not have the technical features of the sewing-machine in the preamble portion of claim 1, but had all the other technical features in the preamble portion of claim 1 and all the technical features of the characterising portion thereof, and had the technical features of the parts of claim 2.

Upon hearing the case, the Shanghai No.1 Intermediate People's Court held that the technical feature of the sewing-machine in the preamble portion of claim 1 should constitute the essential technical feature of the patent in suit together with all the other technical features. The comparison clearly showed that the TBJ-2 synchronic traction engine made and sold by the two defendants did not have the features of the sewing-machine of the claims of the patent in suit; hence, the technical features of the two defendants' product did not fully cover all the technical features of the patent in suit, and they did not constitute direct infringement of the patent right. However, once the TBJ-2 synchronic traction engine was combined with a sewing-machine, all the technical features of the patent in suit read on the combination. The documents of the patent in suit clearly showed that the object of the utility model was to rectify the former deficiency and to design an installation means of the cloth-drawing means more suitable for all types of sewing-machines. The two defendants made and sold the product of the synchronic traction engine and sewing-machine. The synchronic traction engine comprising the cloth-drawing means and installation means worked with sewing-machine to perform the function and to achieve its effect. However, the two defendants did not present evidence to prove that the synchronic traction engine had its own independent value in use or could be used for other purposes if detached from the sewing machine. Besides, the two defendants made it clear to their clients in the specification of their product that said product was specially used together with sewing-machines of all types, and demonstrated in detail the way the synchronic traction engine was combined with a sewing-machine. The defendants were subjectively intentional to make the direct infringement possible. It was obvious that the clients bought the synchronic traction engine to use or sell it together with sewing-machine. Their act to make and sell the synchronic traction engine resulted in the consequence of infringement, so they should not be exempt from the liability for indirect infringement of the patent in suit. The two defendants, being corporate entities and related sub-entities and having performing the acts of making and selling, should be jointly liable for infringement.¹

2. Taiyuan Heavy Machinery Plant v. Taiyuan Electronic

System Engineering Corporation, a case of patent infringement, analysed with thoughts on whether unauthorised making or selling of key components or parts of a patented product constitutes an indirect infringement of a patent in the absence of act of direct infringement of the patent.

The first-instance court, the Taiyuan Intermediate People's Court established that the technical features of the accused product did not fully cover all the technical features of a claim of the plaintiff's patent, and the defendant did not infringe the patent; the second instance court, the Shanxi Higher Court decided that the accused product was specially used to make the patented product in suit, and the defendant had indirectly infringed the patent in suit. After the second instance judgment took effect, the former second instance court held that the judgment was erroneous. Upon retrial of the case, the two interested parties gave up their respective claims, and the case was closed by way of settlement, which, in fact, denied the outcome of the appeal regarding the indirect infringement of the patent.

The plaintiff, the Taiyuan Heavy Machinery Plant (HMP), owned the patent ZL85203717 for the utility model of magnetic-mirror type direct current electric arc furnace. The claims of said patent went like this: a magnetic-mirror type direct current electric arc furnace for melting metals, calcium carbide, silicon compound, yellow phosphorus and particularly, steel, whose electric part comprised the breaker, reactor, transformer, silicon diode rectifier and whose mechanic part comprised the cover and furnace, wherein said magnetic-mirror type direct current electric arc furnace was one with a magnetic-mirror coil around the furnace added to the upper part of the ordinary direct current electric arc furnace perpendicular to the central line thereof and connected to the electric supply of the magnetic-mirror, the reactor was connected in series between the breaker and transformer, the cathode of the direct current rectified by the silicon diode rectifier was connected to the graphite electrode on the sides and the anode to the graphite electrode in the middle. The main technical feature of the magnetic-mirror direct current electric arc furnace of the claim was that a magnetic-mirror coil around the furnace added to the upper part of the ordinary electric arc furnace perpendicular to the central line thereof, with a function to form a magnetic field strong in the upper part and weak in the lower part within the furnace.

The Taiwan Jinmao Xingye Co., Ltd. (JX), upon knowing about the utility model patent, said to HMP on many occasions between May 1990 and January 1992 that it would like

to buy the patent at the price of \$300,000. In February 1992, the first inventor of said patent was retired from HMP and went to work for the defendant, the Taiyuan Electronic System Engineering Corporation (TESEC), as a counsel thereto. JX immediately ended its negotiation with HMP. In May 1992, the defendant TESEC, accepting the entrustment of the Hong Kong-based agent of the JX, made four field coils for JM according to the requirement of the technical solution of the magnetic-mirror direct current electric arc furnace. After the entrustment, TESEC entrusted, in June of the same year, the Yangquan No. 2 Electronic Equipment Plant (YEPP) with the manufacture of four field coils.

Knowing about it, HMP believed that the field coils made by the two defendants were used for direct current electric arc furnace, and infringed its patent for the utility model of magnetic-mirror direct current electric arc furnace. It then sued in the Taiyuan Intermediate People's Court in March 1993, accusing the two defendants of joint infringement by making and selling its patented product for business purposes without its authorisation.

Upon hearing the case, the Taiyuan Intermediate People's Court held that the plaintiff's utility model patent sought to protect all the essential technical features of the magnetic-mirror direct current electric arc furnace as stated in the claims of said patent. Only when all these technical features of a patent claim were covered was the plaintiff's patent right infringed. Certain technical features of the patent claim were absent in the field coils made by the two defendants, which and these coils did not fall within the extent of protection accorded to the plaintiff's patent right, so the defendants did not infringe the plaintiff's patent right, and it was adjudged, in November 1993, to have rejected the litigant claims of the plaintiff.

Dissatisfied with the judgment, the plaintiff appealed to the Shanxi Higher People's Court, arguing that the defendants' act constituted an indirect infringement of the patent in suit.

The Shanxi Higher People's Court held that the magnetic-mirror direct current electric arc furnace invented by the appellant was validly patented by the SIPO. Within the term of the patent, the appellee TESEC, not authorised by the patentee, objectively performed the act of making for the direct infringer the field coils specially used as the key part of the patented product, and was subjectively intentional in causing another party's direct infringement. Such act was obviously in a cause-and-effect relation with the direct in-

fringement, so it constituted an indirect infringement of the appellant's patent. The appellee YEPP was entrusted by TESEC and made the field coils, the special part of the patented product, and its subjectively act constituted a joint indirect infringement of the patent of the appellant. Accordingly, the two appellees should be held jointly liable for the damages because of the infringement.

However, it is worth noting that the part of field coil made by the defendants was not assembled into a patented product in mainland China; hence there existed no direct infringement of the patent there. After the final judgment, TESEC objected to it, and invited the Chemical Engineering and Metallurgic Institute of the China Academy of Sciences to appraise the two technical solutions of the magnetic-mirror direct current electric arc furnace and the cusped magnetic direct current electric arc furnace. It was concluded in the appraisal that the two technical solutions were substantially identical in the solution of design and mechanism, but the latter was more advanced than the former; the two were the improvements of electric arc furnace, and there were similar improvements made before. TESEC applied to the Shanxi Higher People's Court for retrial on the grounds that it was factually and legally baseless to have determined in the final judgment that its act constituted an indirect infringement of the utility model of the HMP, and the request it filed for invalidation of the HMP's patent for the utility model of magnetic-mirror direct current electric arc furnace was accepted by the Patent Reexamination Board (PRB) of the State Intellectual Property Office (SIPO). The court invited PRB to make a technical determination of the two technical solutions in dispute during the trial, and it was concluded that the technology of the magnetic-mirror direct current electric arc furnace was closer to the technology in existence before. Accordingly, the Shanxi Higher People's Court held that its former judgement had its errors and TESEC's application for retrial met the requirement, and it decided to retry the case in May 1995.

During the retrial, the interested parties had doubts about whether the patent was valid and whether the accused field coil had caused the direct infringement of the patent. The court held mediation and the two interested parties voluntarily reached an agreement. Regarding the case of patent infringement of the magnetic-mirror direct current electric arc furnace between HMP and the two defendants and the request filed by one of the defendants, TESEC, for invalidation of the utility model patent, the two parties agreed on reconcil-

iation through negotiation that they would no longer hold each other liable. So the two parties gave up their claims and had the case closed through mediation, thus, correspondingly denied the second instance court's conclusion on the indirect infringement of the patent in suit.²

3. Kumiai Co. v. Jisu Co., a case of patent infringement in which making the essential ingredient of a patented chemical composition constitutes an indirect infringement of patent

In the present case, as regards whether making the essential ingredient of a patented chemical composition constitutes an indirect infringement of patent the first instance court the Nanjing Intermediate People's Court required the plaintiff to present evidence to show that the accused raw drug bispyribac-sodium was used only for preparing herbicidal compositions which the patent sought to protect. The plaintiff was unable to present the evidence so that its claim that the defendant's act of making bispyribac-sodium constituted an indirect infringement of the patent was not supported. The second-instance court the Jiangsu Province Higher People's Court held that whether there was any other commercial uses was a negative fact, which was hard to be proven with evidence. The burden of proof should be shifted to the defendant for it to show that the bispyribac-sodium had any one of other uses, so as to deny the plaintiff's claim that bispyribac-sodium was used only for preparing herbicidal compositions which the patent sought to protect. The defendant failed to do so within the time limit for presenting the evidence. The court decided that bispyribac-sodium was an essential ingredient used only for preparing the chemical composition of the patent, and the defendant's act of making bispyribac-sodium constituted an indirect infringement of the patent in suit.

The plaintiffs Kumiai Chemical Industry Co., Ltd. and Ihara Chemical Industry Co., Ltd. were both Japanese corporate entities and owners of the patent ZL 92112424.4 for an invention of a novel herbicidal composition (patent 92 for short). The independent claim of said patent went like this:

"A novel herbicidal compositions, comprising pyrimidine derivative or its salt of Formula (I) having 0.5-95% (wt) and optional carrier, surface active agent, dispersant agent and/or farming adjuvant". The pyrimidine derivative of Formula (I) includes bispyribac sodium, which is the general name of sodium 2, 6-bis [(4, 6-dimethoxypyrimidin-2-yl) oxy] benzoate.

The court discovered that Jiangsu Jisu Research Co., Ltd. (Jisu) advertised, from 2001 to 2002, that the pesticide it

made contained bispyribac-sodium.

Between 2001 and 2002, No.4 Experimental Plant of Jisu exported, four times, the product of bispyribac-sodium 20% wp prepared by Jisu to Panama. In November 2002, the PANAME product was available in the E1 Rodeo Farm and Animal Husbandry Product Store, on the package of which were printed that "the chemical components of PANAME 20 wp herbicidal agent—bispyribac-sodium was sodium 2, 6-bis (4, 6-dimethoxypyrimidin-2-yl) oxy] benzoate", and the words of "made and prepared by the Jisu Research Institute".

In December 2003, Jisu began to market the bispyribac-sodium 20% wp.

Upon hearing the case, the Nanjing Intermediate People's Court held that the herbicidal composition containing 20% bispyribac-sodium made and marketed by the defendant fell within the extent of protection of patent 92, and constitute an infringement, so the defendant should be held legally liable. However, the two plaintiffs did not present evidence to show that bispyribac-sodium was used only for preparing herbicidal compositions which patent 92 sought to protect; so their allegations that the two defendants' purpose of making the bispyribac-sodium was also to prepare the herbicidal compositions claimed by patent 92, and their act of making bispyribac-sodium accordingly constituted an indirect infringement of patent 92 were not supported.

Upon hearing the case of second instance, the Jiangsu Higher People's Court held that to establish that making bispyribac-sodium constituted an indirect infringement of patent 92, it must be first determined that the bispyribac-sodium was the essential ingredient for preparing the product of patent 92, that is, making the product was the sole business purpose of bispyribac-sodium. Kumiai Co. And Ihara Co. argued that the sole business purpose was to prepare the product protected by patent 92; Jisu argued that it had other business purposes; since its having no other business use is a negative fact and it was hard to show it with evidence, Jisu should have met its burden of proof if it alleged that it had any one other business purpose. Under the doctrine of fairness and according to an interested party's ability to adduce evidence, Jisu should be under the burden of proof. Jisu failed to present the relevant evidence within the time limit after this court re-distributed the burden of proof, so it should bear the adverse legal consequences. Therefore, this court decided that the bispyribac-sodium was the essential ingredient solely used for preparing the product of patent 92. In the present case, Jisu and its No. 4 Experimen-

tal Plant made the product that had infringed patent 92, and neither party objected to the fact that bispyribac-sodium was the necessary active ingredients (namely the key raw material) for preparing the product of patent 92. Besides, they failed to present evidence to show that the bispyribac-sodium used for making the infringing product came from a difference source; hence it should be established that Jisu and its No.4 Experimental Plant had made the bispyribac-sodium. To conclude, their act to make bispyribac-sodium constituted indirect infringement of patent 92, and the claim made by Kumiai Chemical Industry Co., Ltd. and Ihara Chemical Industry Co., Ltd. was tenable and should be supported.³

4. Li Chengxiang v. Fengda Plant, a case of patent infringement in which separately exploiting part of the steps of a patented process constitutes an indirect infringement of said patent.

In the present case, the court decided that while one of the defendants Yaohua Corporation (YH) had exploited part of the patented process in suit, the steps it exploited were the key steps of the plaintiff's patented process in suit, it was subjectively intentional in allowing the other defendant the Fengda Plant (FDP) to infringe the plaintiff's patent right in suit, made it convenient for FDP to carry out the infringement, and objectively infringed the plaintiff's lawful interests; hence its act had indirectly infringed the plaintiff's patent right, so should be severally and jointly liable for the infringement together the defendant FDP that had directly infringed the plaintiff's patent right. Each step of the plaintiff's patented process in suit was one of the necessary, indispensable steps of the whole technical solution of the patented process in suit. The two defendants had respectively exploited the steps of the patented process in suit for the purpose of intentionally circumventing the law, and of exploiting the whole technical solution of the patent in suit. A process patent was protected to prevent a patented process from being used without authorisation of the patentee. If the two defendants' infringing acts were not to be stopped, the effect of protection of the patent right would be reduced, and it would be impossible for the patent right for process to be fully and effectively protected.

The plaintiff Li Chengxiang owned the patent ZL98110582.3 for the invention of a process for making alkali-free, wax-free glass fibre insulate band for use in high-pressure electric appliances. The claim of the patent went like this: a process for making alkali-free, wax-free glass fibre insulate band for use in high-pressure electric appliances,

wherein the alkali-free glass fibre yarn was treated by being soaked in silane agent, and the soaked yarn was then woven into band with braiding machine.

The plaintiff Li Chengxiang was the legal representative of the Shandong Chengxiang Corporation (SCX). The defendant the Shanghai Yaohua Alkali-free Fibre Co., Ltd. (SYH) concluded a supply agreement with SCX, in which it was agreed that SYH was to supply, each month, SCX 160-count silicon oil yarn, 40-count silicon oil yarn and 60-count silicon oil yarn; the latter had the right to exclusively use the formula of the yarn supplied by the former, and the former should not divulge SCX's technical secret to others.

After the contract between them terminated, the defendant SYH directly made the alkali-free glass fibre by soaking it in silane agent, and sold the product to the defendant Liyang Fengda Electric Appliances Plant (FDP). After it bought the yarn, it wove it into band with braiding machine and exported the product.

Upon hearing the case, the Nanjing Intermediate People's Court held that the two defendants' acts jointly infringed the plaintiff's patent right in suit. The patent in suit was a patent for process comprising two steps: 1) directly soaking the alkali-free glass fibre yarn in silane agent; and 2) the soaked yarn was then woven into band with braiding machine. According to the facts ascertained in the present case, said patented processes respectively exploited by SYH and FDP. The former made and sold to the latter the alkali-free glass fibre, so exploited the first step of the plaintiff's patented process in suit, that is, directly soaking the alkali-free glass fibre yarn in silane agent. The defendant FDP exploited the second step of the plaintiff's patented process, that was, it wove the alkali-free glass fibre it bought from SYH into band with braiding machine and exported the product.

The court first determined that FDP's act directly infringed the plaintiff's patent right. Article 11, paragraph one of the Patent Law provided that "no entity or individual shall, without the authorisation of the patentee, exploit the patent, and make, use, offer to sell, sell or import the patented product, or use the patented process, and use, offer to sell, sell or import the product directly obtained by the patented process, for production or business purposes". This shows that a process patent protects the process per se, and the protection is also extended to the product directly obtained by the patented process. The defendant FDP bought the alkali-free glass fibre yarn treated in silane agent, and then woven it into band for sale without the authorisation of the plaintiff. In

this way, it not only exploited the plaintiff's patented process, but also sold the product directly obtained by the patented process. Its act was an element of an infringement of the patent right for process, so it should be established that the patent infringement was constituted.

The court further determined that SYH's act constituted an indirect infringement of the patent in suit. The court held that in their acts, FDP and SYH were subjectively intentional to carry on a joint infringement of the plaintiff's patent right. For FDP, the technical solution the patent sought to protect was a known technology after the patent for the process was granted and announced, and as a manufacturer of insulate products of high pressure electric appliances, it should have known about the patented technology, and was obliged to avoid illegally using it in its production and business transaction. According to the description of the patent in suit, the alkali-free glass fibre was soaked in silance agent, a change from the method of soaking it in wax, and then weaving it into band to replace the existing high pressure de-waxation process of glass fibre band. On the package of alkali-free glass fibre yarn sold by SYH was clearly indicated the content of silicon oil of said "yarn". Besides, its agent explained before court that "silicon oil" was a plain name for "silane" and it specially indicated alkali-free, wax-free glass fibre band when selling the glass fibre band of high pressure electric appliances, which showed that it knew that said "yarn" was made with the plaintiff's patented process in suit when it bought the alkali-free glass fibre yarn from SYH and that it clearly knew about the practical use after the yarn was woven into band. For SYH, under the supply agreement it concluded with the Shandong Chengxiang Corporation (SCX), for which the plaintiff served as the legal representative, the SCX had the exclusive right in the formula of the alkali-free, and wax-free glass fibre. SYH should not divulge its technical secret. Said Agreement was concluded after the plaintiff's patent was disclosed. Considering the Supply Agreement it concluded with SCX, SYH knew that said alkali-free glass fibre yarn was made with the plaintiff's patented process in suit. Besides, it also failed to present evidence to this court to show that the yarn it made was a product for general use. SYH should have clearly known that said yarn was used only to be woven into insulate band to be used in high-pressure electric appliances. Moreover, it was also implied in the terms of the Supply Agreement that SYH should not sell the yarn made with the plaintiff's patented process to another person. After the Agreement was concluded, SYH was

obliged not to sell the yarn made with the plaintiff's patented process to any person other than the plaintiff. But it sold it for economic benefits to the other defendant FDP without the plaintiff's authorisation to assist FDP to make the band for sale. While it had only exploited part of the plaintiff's patented process, the steps it had exploited were the key steps of said patented process. It was subjectively intentional to allow FDP to directly infringe the plaintiff's patent right in suit, made it convenient for the latter to do so, and objectively impaired the plaintiff's lawful interests. For that reason, its act had indirectly infringed the plaintiff's patent right in suit, so it should jointly liable for the infringement with the direct infringer of the plaintiff's patent right.

The court also analysed the necessity for the protection. For the court, while the two defendants had respectively exploited a step of the patented process in suit, both steps were essential, indispensable parts of the whole technical solution of the patent. The two defendants had acted to respectively exploited one step of the patented process to work jointly to circumvent the law and to exploit the whole technical solution of the patent's patent. A process is protected as a patent to prevent unauthorised use of it as patented. Failure to effectively cease the two defendants' infringing acts would reduce the patent protection, and make it impossible to fully and effectively protect the patent right for process.⁴

During the hearing of second instance, the defendants presented to the Jiangsu Higher People's Court a Book entitled *Manufacture and Application of Glass Fibre* published in May 1974. Based on the book, the second-instance court made another judgement, determining that the defendants' use of a process identical with the technology disclosed in the book did not constitute a patent infringement and the defendants' prior art defence was tenable. But, it is worth noting that the second instance court did not deny the way the indirect infringement of patent was established by the first instance court.

5. Alfa Laval Corporation AB v. Hankering Corporation, a case of patent infringement in which moulds specially used to make the product infringing the patent right indirectly infringed the patent right in suit.

In this case, the Shanghai No.2 Intermediate People's Court, after establishing that the defendant's product infringed the plaintiff's patent rights, further decided on destroying the moulds specially used to make the product infringing the patent rights though said moulds per se were not

related technical features of the patent right, nor were they those stated in the claims of the patent.

The plaintiff Alfa Laval Corporation AB, owned the two patents ZL94192808.X (patent 94) and ZL96198973.4 (patent 96) for two inventions entitled plate-type heat exchanger. Patent 94 disclosed a plate-type heat exchanger, comprising a group of heat exchanging plates used for heating the fluid to be heated in the first conduit with the heated fluid in the second conduit to improve the efficiency in heat exchange through a distribution system on the plate-type heat exchanger for controlling the flow speed. To patent 96 a second distribution system was added on the basis of patent 94 to further improve the heat exchange efficiency.

The defendant Jiangyin Hankering Refrigeration Equipment Co., Ltd. (JHL) made and marketed, and the defendant Shanghai Xingfeng Refrigeration Equipment Co., Ltd. (SHF) marketed, the series of ZL 95A (including ZL 95A-28) and ZL 50D (including ZL 50D-30) plate-type heat exchangers made by the defendants JHL. It was concluded in the technical appraisal that 1) the technical features of the alleged infringing products ZL95A-28 plate-type heat exchangers fully corresponded to the essential technical features of the claim of patent 94, with two new technical features added; 2) the technical features of the alleged infringing products ZL 95A-28 plate-type heat exchangers fully corresponded to the essential technical features of the claim of patent 96; and 3) the technical features of the alleged infringing products ZL 50D-30 plate-type heat exchangers fully corresponded to the essential technical features of the claim of patent 94.

Upon hearing the case, the Shanghai No.2 Intermediate People's Court held that the technical features of the ZL 95A-28 plate type heat exchangers made by JHL covered the essential technical features of the claims of patent 94, with two new technical features added, and the products ZL 50D-30 plate-type heat exchangers made by JHL covered the essential technical features of the claims of patent 94; the technical features of the ZL 95A-28 and ZL50D-30 plate-type heat exchangers made by JHL fell within the extent of protection of the patent right 94. These products infringed the plaintiff's patent right 94, and JHL should cease its infringement and pay for the damages. The technical features of the ZL95A-28 plate-type heat exchangers made by JHL were exactly identical with the essential technical features of the claim of patent 96; hence these technical features also fell within the extent of protection of patent right 96, and the de-

fendant's ZL 95A-28 plate-type heat exchanger infringed the plaintiff's patent right 96, so it should be liable for ceasing the infringement and paying for the damages.

The Shanghai No.2 Intermediate People's Court, after determining that the ZL95A and ZL50D series of plate-type heat exchangers made by JHL infringed patents 94 and 96, further held that since the plaintiff requested to destroy the moulds JHL had used to make the infringing products and JHL continued to make and market said products after the plaintiff sued in the court, the court decided to confiscate the moulds JHL used to make the ZL95A and ZL50D series of plate-type heat exchangers.⁵

6. Song Zhian v. Wuxi Furnace Factory, a case of patent infringement involving indirect infringement of patent in technology license

In the present case, the first-instance court, the Nanajing Intermediate People's Court decided that the General Corporation (GC) and the Wuxi Furnace Factory (WFF) were not subjectively intentional in connection with the patent infringement resulting from execution of a technology transfer contract, so they did not infringe the patent right in suit: hence GC was then treated as a third person. The second-instance court, the Jiangsu Higher People's Court, denied the changed treatment, and established that the two defendants had jointly infringed the patent right, and GC was jointly and severally liable.

The plaintiff Song Zhian filed, on 6 August 1993, an application for, and was later granted, the patent ZL93231575.5 for the utility model of layered coal-feeding device of furnace, the independent claim of which was as follows:

A layered coal-feeding device of furnace, wherein it comprises a case having inlet and outlet, near the inlet inside the case was fixed coal feeding means and near the outlet was fixed at least one layer of sieve in an included angle to the horizontal level.

On 16 June 1994, the Beijing General Energy Power Corporation (BGC) applied for and was granted the patent ZL94214484.8 for the utility model of positive rotating coal feeding device. To spread the technology, BGC concluded a technology transfer agreement with the defendant, the Wuxi First Furnace Branch Plant (WFP) to have transferred the technology to the latter and designated it as its plant in the region south of the Yangze River. BGC provided WFP with the set of drawings under the agreement. The technical features of the coal feeding device WFP made according to the technology from BGC included a coal-feeding rolling barrel,

under it was slantly disposed a double-layered comb-toothed vibrating sieve, and above it were fixed beam-shaped flashboard and sectioned oscillating box-shaped flashboard placed in parallel, at one end of the main axis of the coal-feeding rolling barrel there was ratchet and the other end was connected to the power source, the double layered comb-toothed vibrating sieve vibrated around the comb-toothed vibrating sieve driven by the ratchet, detent and vibrating arm, and the sectioned oscillating box-shaped flashboard could move to and fro around the axle pin. The coal-feeding rolling barrel in the coal-feeding device was identical with the coal-feeding means as described in Song's patent, the double-layered comb-toothed vibrating sieve represented an improvement of the feature of "screen of said patent". Besides, said coal-feeding device had the technical features of case, inlet and outlet of said patent. It differed from the patent in the additional ratchet vibration and transmission means.

After accepting the case, the Nanjing Intermediate People's Court asked BGC to participate as a defendant in the case given the fact that WFP said in its defence that the technology it used was transferred to it by BGC, but then asked it to be a third person in the case because the court held that BGC was not subjectively intentional in crying on the patent infringement resulting from execution of the technology licensing contract it concluded with WFP and it did not jointly infringe the patent.

The Nanjing Intermediate People's Court held that as was shown in the comparison of the technical features of the WFP's coal feeding device with the independent claim of Song's patent, except the new technical features of comb-toothed vibrating sieve and transmission means, the technical features, such as the other components, structural location were identical with or similar to the technical features of Song's patent, and These technical features fully covered the technical features of said patent and fell within its extent of protection. While Song Zhian and BGC were granted the patent right, the former's application for patent was prior to the latter's application. The former was a parent patent; the latter a dependent patent. Exploitation of the latter depended on that of the former, and when exploiting its patent, the dependent patentee should be authorised by the parent patentee, or it would infringe the former's patent right. The BGC's technology had fully covered the claims of Song's prior patent; hence its ownership of a lawful patent right did not justify a defence for non-infringement, nor should such a

defence be tenable. WFP's making and marketing the coal-feeding device without authorisation from Song Zhian constituted an infringement of Song's patent. Since the main part of the technology BGC transferred to WFP, under Article 21, paragraph one (3) of the Technology Contract Law of the People's Republic of China, a provision that any technology contract that infringes another person's rights and interests is invalid, this part of said technology should be determined as invalid, and the two parties should not continue to execute the contract. While WFP was not intentional to commit joint infringement with BGC, but it had exploited Song's patent, so it should be partially liable. Since WFP paid the royalties for using the technology under the agreement it concluded with BGC, the BGC should bear the other liability for the infringement of the patent.

The Jiangsu Higher People's Court, upon hearing the case, held that WFP, the appellee, made the coal-feeding device that infringed the patent of Song Zhian, the appellant, and it was liable for ceasing the infringement, making an apology, and compensating for the damages. WFP carried on the infringing act by way of concluding a patent licensing agreement with BGC. Under the provision of Article 148 of the Supreme People's Court's (SPC) Opinions on Several Issues Relating to the Implementation of the General Principles of the Civil Law as of 1988 (tentative) one who aids and abets others in performing an act of infringement is a joint infringer and should be civilly liable, BGC should also be civilly liable. Accordingly, the Jiangsu Higher People's Court held mediation under Article 85 of the Civil Procedure Law of the People's Republic of China, and the three voluntarily reached an agreement that WFP would cease the infringement, apologise to Song Zhian in writing, and compensate for the damages suffered by Song; and BGC was also jointly, civilly liable.

Conclusion

To date, the courts throughout China hear cases of indirect infringement of patent under the General Principles of the Civil Law and other relevant law provisions. In practice, acts of making and selling key components, parts or moulds that are used only in a patented product, or machinery or intermediate raw material specially used for exploiting a patented process are all determined as acts of indirect/contributory infringement of patent. Since the Chinese Patent Law does not set forth express provisions for the constitution of and liability fixation on acts of indirect infringement of

patent, and the SPC does not give its specific directives on the issue of judgement of indirect infringement of patent, it is rather difficult for these courts following the statutory laws to observe the specific provisions in imposition of civil liability on indirect/contributory infringement of patent. This may explain why cases of indirect infringement of patent are under jurisdiction of a few courts despite the fact that more than 50 Intermediate People's Courts and over 30 Higher People's Courts in China have the jurisdiction over case of patent infringement. ■

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¹ See Shanghai No. 1 Intermediate People's Court Intellectual Property Judgement No. Fuyizhongminwu (zhi)chudizi 212/2003.

² For the article on the issue of infringement of the patent right for "magnetic-mirror direct current electric arc furnace, visit <http://www.cn-falv.com/a/anli38/9426.html>.

³ See Jiangsu Higher People's Court's Civil Judgement No. Sumin-sanzhongzi 014/2005.

⁴ See Nanjing Intermediate People's Court's Civil Judgement No. Ning-minsanchuzi 245/2003.

⁵ See Shanghai No. 2 Intermediate People's Court Civil Judgement No. Fuerzhongminwu (zhi)chudizi 156/2005.

⁶ See the SPC Gazette, 1999, No.1.

Chinese Judges Reaffirm Experimental Use Exemption of Clinical Trials from Patent Infringement

Recently, the Beijing No. 2 Intermediate People's Court has published its Civil Judgements Nos. Erzhongminchuzi 13419-13423/2007, in which it is decided that use of another party's patent without license by the patentee for the purpose of regulatory registration of a new drug does not constitute an infringement of said patent. This decision represents a reaffirmation of the court's view presented in Pp58-59 Sankyo Co., Ltd. v. Wansheng (See the China Patents & Trademarks, 2007, No.2).

The Eli Lilly and Company was the plaintiff of the above five cases, and Beijing Ganli Drug Co., Ltd. is the defendant. The plaintiff exercised its patent rights in the five processes for preparing insulin-analog and for the preparation in these cases, arguing that the defendant's acts to apply to the State Food and Drug Administration (SFDA) for approval of the clinic trial of a "recombinant lispro insulin" and "biphasic recombinant lispro insulin injection 75/25" and of making recombinant lispro insulin injection and advertise on the internet its drug by the name "Suxiulin" (with the active element of lispro insulin) constituted an imminent infringement of its patent rights and an act of offering the drug for sale. The defendant argued that its accused acts were not acts

of exploiting another party's patent as mentioned in the Patent Law, and it acted for the purpose of administrative examination and approval of the drug. According to the common practice, use of another party's patent for the purpose of administrative examination and approval of the drug was not deemed to be an infringement or imminent infringement.

The court made it clear in the Judgements that the law protected the patent right and the plaintiff's invention patents should be protected under the Chinese Patent Law. However, the court did not substantively judge on whether the accused substance fell within the scope of protection of the patent rights, nor conduct a technical appraisal to ascertain whether the accused technology was identical with or similar to the patented technologies. Its judgement mainly based on the determination of the character of the acts of carrying on the clinic trial and making the drugs during the regulatory examination and approval of a new drug.

The court believed that according to the available evidence, the "recombinant lispro insulin" and "biphasic recombinant lispro insulin injection 75/25" for which the patentee accused the defendant of the infringement were still in the phase of administrative examination and approval for the registration of drug, and were not ready to market. While the defendant performed the acts of carrying on the clinic trial and applying for the approval for production, it did so to meet the needs for the administrative examination and approval of the drug by the

relevant State authorities to test the safety and effectiveness of the drugs in suit it made. Although the defendant was granted the regulatory approval for the drug "recombinant lispro insulin injection", and said drug was ready to market, the plaintiff failed to adduce evidence to prove that the defendant had made and marketed said drug. Accordingly, the defendant's act of making the drug in suit was not directly for the purpose of marketing it, so it was not an act of exploiting another party's patent for business purposes as mentioned in the Patent Law.

As regards the defendant's advertisement of the drug "Suxiulin" on the internet, the court held that it should not be determined that it had used any product obtained directly with the patented processes of the plaintiff in the drug it advertised. Besides, the available evidence did not show that the defendant had actually made and marketed the drug. Accordingly, the plaintiff's claims that the defendant's acts constituted an imminent infringement or an act of offering for sale were not supported by the court for lack of sufficient evidence.

Now an interested party has appealed to the Beijing Higher People's Court, and the Judgements are yet to take effect. Anyway, the judicial view presented in these Judgements will have a far-reaching impact on the clinic trial, examination and approval of new drugs in China. ■

(Wu Yuhe)