

Enforcement Practice of Cessation of Infringement in Patent Infringement Disputes and Review from a Judicial Perspective

Tao Guandong and Zhang Lu

In patent infringement cases, patent holders usually file two claims: one is for cessation of infringement, and the other is for compensation for economic losses and reasonable expenses, wherein the latter is a property claim, which is of no difference from traditional property infringement or contract disputes in terms of enforcement. The execution of the former claim, i.e., the effective cessation of infringement, encounters more problems in enforcement practice. In current patent infringement practice, the main body of a civil judgment on patent infringement dispute only limitedly addresses this issue, as it just simply orders an infringer to cease infringement in general terms, without specifying the way of cessation. In a specific case, the enforcement depends on the patent holder and judges of the enforcement division to determine how to cease infringement based on the complaint, the findings of fact and conclusions of law in the judgment, and even further findings after communications with the parties during the enforcement of the judgment. This process undoubtedly determines the specific form of infringement conducted by the infringer once again, which somewhat brings uncertainty to the protection of the legitimate rights and interests of the patent holder and the infringer. This is obviously not what the parties, judicial authorities and the public want.

I. Statutes: Relevant provisions in the Civil Code and the Patent Law

(I). Connotation of provisions involving cessation of infringement in patent infringement disputes

Article 179 of the Civil Code reads that the main forms of civil liability include: (1) cessation of the infringement; ... Article 15 of the Tort Liability Law also sets forth provisions thereon, stipulating that tort liability is mainly borne through: (1) cessation of the infringement; ... It can be seen that Article 15 of the Tort Liability Law is a literal repetition of Article 179 of the Civil Code and does not contain any pertinent content. The concept of "civil" in a broad sense is adopted in Article 15 of the Tort Liability Law, which is a generalized provision on various remedies in civil disputes under the civil law system and cessation of infringement means that the infringed party requires the infringer to cease the ongoing infringement of absolute rights.¹

Cessation of infringement is widely applicable to any occasion where an absolute right is continuously infringed. As long as infringement occurs, the cessation of infringement can be claimed against the infringer. In judicial practice, cessation of infringement and compensation for losses are usually claimed at the same time. Article 23 of the Guidelines on Key Points in Handling Infringement Disputes² issued by Shanghai High People's Court stipulates that "where the claimant requests the court to order the adverse party to bear the liability of cessation of infringement, it shall adduce evidence proving the ultimate fact that infringement is still ongoing".

The infringement of absolute rights is manifested in vari-

ous forms, and the cessation of infringement is also effectuated in different ways. For instance, infringement of reputation by posting articles on line and by publicity at public places can both lead to disputes over the right of reputation. But such infringement can be ceased in different ways. One is to stop posting articles on line, and the other is not to publicize things infringing other's right of reputation at public places.

The Patent Law is at a lower level than the Civil Code and the Tort Liability Law. In jurisprudence, the relevant provision on cessation of infringement in the Patent Law should take precedence. As mentioned above, since the Civil Code and the Tort Liability Law do not specify the specific connotation of cessation of infringement in various fields, various branches of civil law need to elaborate based on actual infringement in respective fields. The ways to cease infringement in disputes over patent infringement shall be stipulated in consideration of the ways to resolve disputes over patent infringement and remedies provided by law enforcement authorities to patentees. Cessation of infringement in disputes over patent infringement is an order given by the court or the patent administration department after the finding of patent infringement in trial or in administrative procedure and is integral to the efforts to safeguard the legitimate rights and interests of the patentees and provide them with actual protection at the judicial level. Without Cessation of infringement, it would be impossible to prevent the infringer from continuous and further infringement, thereby nullifying the legal value of safeguarding the interests of the patentees.

Judicial decision is not only a legal judgment on the infringer's past acts which determines that the infringer has committed infringement, but also a judicial constraint on the infringer's future acts which orders the infringer not to commit infringement any longer. The order of cessation of infringement functions to hold the infringer liable for infringement it committed and to prevent infringement in future; or otherwise, the patentee has no way but to file requests with the court or patent administration department again and again, and the court or patent administration department in turn must judge the infringer's acts repeatedly, thereby rendering the parties and authorities occupied with individual cases. Patentees, courts, patent administration department and even the whole society do not want to see this happen, and it is not the legal value that the patent system is supposed to provide.

(II). Manifestations of infringement in the Patent Law

Patent right in the sense of the Patent Law does not refer to a single right, but includes three types of right, namely the patent right for an invention, the patent right for a utility model and the patent right for a design. For different types of patents, the cessation of infringement is manifested in different ways.

The Patent Law provides relatively definite remedies for patent infringement. Article 11 thereof stipulates that "after the grant of the patent right for an invention or utility model, except where otherwise provided for in this Law, no entity or individual may, without the permission of the patentee, exploit the patent, that is, 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. After the grant of the patent right for a design, no entity or individual may, without the permission of the patentee, exploit the patent, that is, make, offer to sell, sell or import the product incorporating its or his patented design, for production or business purposes."

It can be seen from the above provision that patent infringement shall be differentiated for different types of patent right. The infringement of a patent right for invention and of a patent right for utility model is different from the infringement of a patent right for design. Among the above-mentioned acts, the acts of making, using and selling are basic concepts, but still have their specific connotations and statutory boundaries under the Patent Law and thus are distinguished from relevant concepts in general social conception.

There are relatively clear legal provisions, judicial interpretations and case handling guidelines for determining infringing acts in disputes over patent infringement. To be specific:

1. Making a product protected by an invention or utility model patent means that the claimed technical solution covering a product is implemented, and the quantity and quality of the products do not affect the determination of the act of making. The following acts shall be considered as making a product protected by an invention or utility model patent: (1) making a patented product by a different manufacturing method, except for a product claim defined by method; (2) participating in the making by, e.g., entrusting another party to make a patented product or labelling the infringing product with an expression like "under supervision";

and (3) assembling parts into a patented product.

2. Making a product protected by a design patent means that the product incorporating the design patent in the pictures or photographs submitted by the patentee with the patent administration department under the State Council at the time of patent application is implemented. In order to define the making of the product protected by a design patent, the first thing to do is define the scope of protection of the design. In some sense, the implementation of the product incorporating the design in the pictures or photographs is the reproduction of the design concept and design elements that the patentee claims for protection.³

3. Using a product protected by an invention or utility model patent refers to the application of the technical function of the claimed technical solution of a product. The patented product has its particular uses, which are usually recited in the claims and further expounded in the description. The product may be single-use or for various purposes, and disposable or reusable. The application of the technical effect of the patented product no matter under what circumstance or in which manner shall be regarded as the use of the patented product.

4. Using a patented method means that every step of the technical solution of the patented method recited in the claims is implemented, and the result of using the method does not affect the determination as to whether patent infringement occurs. A method patent is aimed to protect a technical solution composed of particular steps for accomplishing a certain technical effect or realizing a certain function. The scope of protection of the method patent is the method itself, and the infringer is ordered not to implement any step of the patented method in the enforcement of cessation of infringement.

5. Using a product protected by a design patent refers to the application of the function and technicality of the product incorporating the design. It should be noted that in China's patent law, only the acts of making, offering to sell, selling and importing products protected by a design patent are infringing. Thus, where the products protected by a design patent have certain function or technicality, the patentee has no right to prohibit others from using the design patent in functional or technical ways.

6. Selling a patented product refers to the paid transfer of the ownership of an infringing product, the ownership of a product directly made according to a patented method, or the ownership of a product incorporating a design patent

to a buyer. Offer to sell a patented product means the declaration of will to sell an infringing product through advertisements, displays, on the Internet or in exhibitions.

(III) Ways to enforce the cessation of infringement

There does not exist obstacles in jurisprudence or at laws to cessation of infringement. Without exceptional reasons, judgments will usually order infringers to cease infringement.⁴ The order for cessation of infringement shall satisfy a "four-factor test": (1) the plaintiff must show that it has or would suffer an irreparable injury; (2) compensation for losses as a remedy is inadequate for the injury; (3) the financial status of the parties has been comprehensively assessed; and (4) it would not harm the public interest to grant a cessation of infringement.

The great majority of cases in current judicial practice do not involve issues concerning the public interest. The cessation of infringement will be granted in a dispute over patent infringement unless the patentee does not make such a claim. Although there is no obstacle to cessation of infringement at the ought level, the cessation of infringement is enforced in different ways in judicial practice. Viewed from the statutes, there is no problem with physical cessation of infringement. According to the types of infringement, infringers can be ordered to cease to make, import, offer to sell, sell or use the patented product, shut down manufacturing equipment and production lines, cease to manufacture infringing products or even destroy molds for producing the infringing products in such a way to stop infringement. If the parties reach a settlement agreement on license, that is, the infringer pays royalties to the patentee for the right to use the patented technology, the basis for infringement is eliminated as the authorization is legally obtained. The infringement does not exist anymore and the purpose of cessation of infringement is achieved.

As mentioned above, patentees' claim for cessation of infringement should not be unconditionally granted in all the patent infringement cases. Careful consideration should be given to whether to order cessation of infringement if it may have a great impact on the interests of the parties or the public interest. In this regard, the Supreme People's Court definitely stated that "if the cessation of a relevant act leads to the significant imbalance of interests between the parties, or goes against the public interest, or cannot be actually executed, interests shall be weighed up according to the specific circumstances of the case and cessation of infringement may not be ordered ..."⁵ If in a dispute over pat-

ent infringement, cessation of infringement is not ordered on the grounds of, e.g., the imbalance of interests between the parties or the impact on the public interest, there is no question of enforcement in the subsequent enforcement procedure.

II. Practical malfunction: Obstacles in enforcement procedure

(I) Enforcement of cessation of infringement

When the patentee obtains a favorable judgment granting cessation of infringement, the utmost task is to clarify what has been granted. If the infringer fails to willingly cease infringement and compensate for losses, the patentee can request the court for compulsory enforcement from the date on which the judgment became effective. Different from conventional infringement, patent infringement usually includes multiple types of acts. An infringer may only offer to sell or sell the patented product, or may make and use the same simultaneously. Therefore, the enforcement of cessation of infringement requires comprehensive consideration of various factors such as the parties' claims, case trial, content of judgment and possible changes between the trial and enforcement.

It should be pointed out that although it is usually a civil judgment that the patentee requests to enforce, a civil conciliation document is also a common basis for enforcement. In comparison with the civil judgment, the civil conciliation document is more flexible in terms of content and form. Specifically, the parties often record matters that do not conform to legal provisions or not consist with the actual situation for the sake of conciliation; and the judicial authority usually does not conduct a compliance examination on the agreed content drafted and signed by the parties themselves, but only makes a procedural review due to multiple factors like trial efficiency and the interests of the parties. If the parties perform the agreed items in adherence to the principle of good faith, no legal obstacle will occur in the subsequent execution, no matter how non-standard the conciliation document is. Otherwise, the subsequent enforcement may be difficult in practice.

When a patentee requests for compulsory enforcement in a dispute over patent infringement, he usually needs to submit documents in relation to the enforcement, such as a request for enforcement, an adjudication document (civil judgment or civil conciliation document) serving as the ba-

sis for enforcement, evidence proving that infringement is still ongoing and clues on available property. In the request for enforcement, what is requested to be enforced is generally expressed in two ways: one is to repeat the granted claims in the adjudication document, such as requesting the court for enforcement so as to stop infringement and requiring the infringer to compensate for his economic losses and reasonable expenses; and the other is to enumerate the infringing acts based on the patentee's own needs and request the court to enforce the granted order of cessation of infringement. In the latter case, the patentee often files the request together with the adjudication document and corresponding evidence.

In the current judicial practice concerning enforcement in patent infringement cases, after accepting the case, the enforcement division will make further judgment on the enforcement request for cessation of infringement according to the specific details of the case. As stated above, since patent infringement includes various acts, ways to enforce the cessation of infringement should be differentiated accordingly. Infringement can be divided into the following stages in chronological sequence: making or importing – offering to sell – selling – using. There may be different infringing subjects and dissimilar infringing acts at different stages, and the infringement may be committed by a single party independently or by multiple parties. In the enforcement procedure, infringing acts in different forms vary in terms of the difficulty in finding, the convenience of verification and the ways to stop infringement,⁶ and should be differentiated in the process of enforcement and handled accordingly.

(II) Cessation of infringement at different stages

1. Enforcement practice regarding cessation of infringement caused by making and importing activities

Judging from the chronological sequence of the production of infringing products, making and importing are the foundation for the launch of the infringing products into the market and the infringement of the patentee's legitimate rights and interests, which should be the first concern for the patentee. The cessation of infringement by makers and importers can fundamentally cease the continuation of infringement and prevent patent infringement at the source. Therefore, compulsory enforcement against makers and importers should be of utmost concern to the courts.

In judicial practice, however, stopping the making and importing activities is also the hardest step. The first thing to do is discover the site of production. Although the adjudica-

tion document recites the domicile of the infringer and the infringer will also be required by the court to provide a contact address during the trial, such an address is usually the nominal address for business registration or correspondence address of attorneys-at-law. Even if it is the actual business address, it may not be the place where infringement actually occurs. For case trial, the service of case materials and adjudication documents can be achieved by electronic means such as by mobile phone and email. If all the above means fail to serve the case materials and adjudication documents, the procedure can still proceed by means of publication. However, as for the enforcement procedure, especially the cessation of making the infringing product, it is impossible to achieve the procedural purpose by formal service. Instead, it is required to actually reach the site of infringement to deal with individuals, equipment, molds and system in relation to infringement. This depends on the on-site investigation by the court's enforcement division and meanwhile the basic information such as evidence submitted by the parties and findings of fact during the previous trial.⁷

Although procedurally, in the enforcement procedure, the examination of infringement caused by making a patented product can be based on documentary evidence, and the patentee needs to provide evidence proving the ongoing making act, the defendant who has been sued for infringement and found as an infringer has sufficient time, motivation and means to take corresponding pre-emptive measures when the case has entered into the enforcement procedure, so as to prevent the making activities from being found again. In the enforcement procedure, it is unlikely that the patentee can provide evidence proving the infringer's ongoing infringement, that is to say, the prevention of further making of the infringing product largely relies on the court's enforcement.

It should be noted that even if the manufacturing site can be found, the court's enforcement should not simply rest on the patentee's request, the adjudication document serving as the basis for enforcement and *prima facie* evidence. The compulsory enforcement measures require sufficient evidence. In particular, the cessation of infringement, such as shutting down the production line or destroying the specialized molds for infringing products, will greatly affect the production and business of the judgment defaulter,⁸ and have a direct bearing on the survival and market reputation of the enterprise. Evidence proving that the infringer

is still making the patented product is required and will function as the legal basis for the court to enforce the cessation of infringement.

In comparison with complicated infringement by making the patented product, the act of importing can be easily found and stopped. The patentee can even stop the import of infringing product without the court's help. The patentee can submit the court's civil judgment or civil conciliation document to the customs office, requesting the latter to ban the import of the products that infringes his patent right, thereby achieving the cessation of infringement on his own.⁹

2. Enforcement practice regarding cessation of infringing offer for sale or sale

Offer for sale in current judicial practice usually occurs on the Internet, at exhibitions, in display windows, in advertisements, etc.:

(1) Shopping websites. Except for some infringing subjects with greater economic strength and social influence that have their own corporate websites, the vast majority of enterprises still rely on third-party shopping websites as platforms. Accordingly, the cessation of offer for sale in such cases is easier. The patentee can submit the civil judgment or civil conciliation document issued by the court to the online shopping platform, requiring the latter to stop displaying infringing products and delete the corresponding links. If the adjudication document serving as the basis for execution is not clear, the patentee can request compulsory enforcement with the court, which will communicate with the online platform to order it to perform corresponding legal obligations. In practice, there are not many obstacles for such a way to stop infringement.

(2) Exhibitions. Exhibitions are usually hosted by third parties, especially national competent authorities, which have a strong sense of legal risk control. Moreover, exhibitions are often held at specific times and focus on particular industries. Both patentees and infringers may participate in exhibitions for business purposes. If a product has been determined by the court as infringing, the infringer is less likely to be allowed to continue to participate in exhibitions. Specialized agencies dealing with intellectual property cases can be found at many exhibitions. Once the patentee finds that the infringer continues to participate in the exhibition, he can contact the exhibition organizer to deal with this matter. Even if the exhibition organizer fails to do so for some reason, the patentee can request the court to timely inter-

vene. In judicial practice, there are not many obstacles for such a way to stop infringement due to clear basis for execution, obvious infringing acts and low cost in preventing the infringer from continuing to participate in the exhibition.

(3) Display windows. Display windows can be installed by the infringer not only in his own business venues, but also in shops or public places. If the product has been determined as infringing and the infringer is identified, the infringer generally will not display the infringing product in show windows installed in his own business venues for the sake of mitigating legal risks, or otherwise he may face more severe legal consequence. The way to deal with infringement in display windows in shops or public places is quite similar to that on third-party platforms such as shopping websites and exhibitions.

(4) Advertisements. Media for offer for sale through advertising are of great variety, which comprise traditional ways such as radio, television or billboards, and emerging internet platforms including self-operated websites and third-party websites. These platforms make no distinctions between products being advertised and are easy to find, although the conversion rate of advertising promotion is relatively low.

In comparison with offer for sale, sale can be made in more varied ways, either on line, e.g., on a self-operated website or a third-party E-commerce platform, or off line at, e.g., a production and business venue, shopping mall or other venue that provides production and business services. In current judicial practice concerning disputes over patent infringement, both patented products and infringing products are sold on line under most circumstances due to factors such as operation costs, convenience, commercial efficiency and market influence. Patentees often discover infringement on the Internet as well. Heavy machinery and equipment, because of their characteristics, are usually sold off line by commercial negotiations, at exhibitions, on self-operated websites, through advertisements, etc.

Unlike the trial procedures of disputes over patent infringement, findings of fact in the enforcement procedure are based on the facts ascertained in the trial and the evidence submitted by the patentee in the enforcement procedure. The differences between the two procedures lie in that it is more flexible in evidence evaluation and factual finding in the enforcement procedure, and the decision to enforce cessation of infringement can only be made through communications, exchange of written documents

or phone calls in most cases. This is due to the enforcement efficiency, as well as the difficulty in restraining selling acts. Even if the patentee or the court finds that the infringer is still selling infringing products, the only thing to do is inform the infringer of his legal obligations and require him to undertake not to sell infringing products any more.

3. Cessation of infringing use

Among the three patent types, a design patent is granted because of aesthetic appearance, whereas an invention or utility model patent is granted because of technical and functional features, namely, use value. The enforcement of cessation of infringing use is a hard nut to crack in judicial practice.

Patents characterized by use features include method patents and product patents. The implementation of a method patent is in close association with production lines and the operation of technicians, and the observable final result of the implementation is the embodiment of a certain technical effect. The implementation of a product patent is to use the infringing product to achieve the technical effect of the patented technology by making use of its technical and functional features. The difficulties in cessation of infringing use are mainly embodied in the following three aspects:

First, technical identification of infringement. When the case enters the enforcement procedure, the court lacks adequate technical knowledge to identify whether the infringer has committed infringement, which is especially true for complicated patented technologies in chemistry, chips, electronics, etc. Even if the infringer exploits the infringing technology on site, the court may not be able to restrain the exploitation due to its limits on professional knowledge.

Second, discovery of infringement. Regardless of whether a method or a product patent is involved, the raw materials, tools, equipment, personnel, infringing products, etc. are all at the infringer's venue or the venue under the infringer's control. The patentee or the court cannot discover whether the infringer commits infringement by use in a timely manner.

Third, lack of support. Different from the Copyright Law and the Trademark Law, for the cessation of infringing use, the Patent Law itself does not specify any means, such as confiscating infringing products and specialized tools or destroying the infringing products. These measures fall within the category of hazard elimination in the sense of civil law,¹⁰ and are not applicable under the Patent Law. This trait of the Patent Law is related to the characteristics of the patent-

ed technologies themselves on the grounds that infringing products usually have higher economic value, and confiscation and destruction may result in the imbalance of economic interests. Therefore, the Patent Law is prudent towards these measures.

(III) Extension of cessation of infringement: Disposal of infringing products

Another issue that is closely related to sale is the disposal of infringing products for the sake of cessation of infringement. The infringing products in stock are the basis for infringer's further infringing sale, and the cessation of infringing sale is closely connected with the cessation of infringing manufacture. If the infringing products are sold by the manufacturer, the disposal of means of production, such as the manufacturing equipment, production lines and molds, will be involved. If the manufacturer is also the seller or the infringing products are sold by a separate seller, the disposal of infringing products in stock will be involved.

The patentee is required to provide sufficient evidence proving that the infringer has infringing products in stock. However, in the trial of patent infringement, patentees often cannot provide sufficient evidence to prove that infringers have infringing products in stock. "The plaintiff failed to provide the court with evidence proving any details of the alleged semi-finished products and molds nor their storage location, which makes its claim unclear. Hence, the court rejects the claim of the plaintiff."¹¹ Or the court grants the plaintiff's claim in general terms like this: "if there are infringing products in stock, the defendant must destroy them. The defendant should also delete anything that is related to the infringing products in this case from marketing materials. All of the above means fall within the scope of civil liability for cessation of infringement."¹²

The major reason for not granting the patentee's claim or using general terms is that the patentee cannot provide sufficient evidence to support such a claim.

III. Path optimization: Coordination between statutes, adjudication documents and practice

(I) Clarification of basis of enforcement

The initiation of the enforcement procedure must meet the statutory conditions. The Provisions of the Supreme People's Court on Several Issues Concerning the Enforcement

Work of the People's Court (Trial) set forth an explicit provision on the acceptance of enforcement cases, requiring that the subject matter of enforcement should be definite, which means "the adjudication document to be enforced shall contain a claim for payment or performance, and the subject matter of enforcement and the party subject to enforcement shall be definite".¹³ In the practice of enforcing cessation of infringement of patents, a common problem is that the basis of enforcement is unclear, which is embodied in two aspects: on the one hand, due to the specialization and division of labor, the enforcement division understands the basis of enforcement differently from the patentee and the trial division; and on the other hand, the difficulties are caused by the basis of enforcement, namely the civil judgment or the civil conciliation document, which means the difficulties can be traced back to the time when the adjudication document was made. For instance, in an enforcement case, the patentee requests the court to forbid the infringer to launch the product in suit into the market for sale and for export. The model of the product in suit was not specified in the civil conciliation document, and several types of products were sued in the trial procedure. Although it is possible to determine the specific product model by reviewing the trial process, it is really hard for the enforcement division and other relevant personnel to determine the specific subject matter of the cessation of infringement for the reason that they do not participate in the case trial and have no idea about the details of the products.

Clarity is a necessary condition, rather than a sufficient condition, for an effective legal document to serve as a basis of execution. In the enforcement of a specific case, judgment should be made according to the rules on enforcement. It should be noted that the authority which issues the basis of enforcement is governed by the rules on enforcement. By placing importance on the clarity of effective legal documents, the authorities which issue adjudication documents are pushed to improve the document drafting quality, ensuring that the legitimate rights and interests of the patentees can be duly protected and preventing the situation that the patentees' claims cannot be effectively enforced due to the authorities' fault.¹⁴ As for the contents specified in an adjudication document, the enforcement division can interpret them in the following ways so as to clarify specific items granted under the cessation of infringement:

First, examination is conducted in view of all the facts of the case. In theory, the patentee's request for compulso-

ry enforcement should be in compliance with the adjudication document to be enforced. However, in practice, the request includes claims that should not be granted. Hence, the enforcement division should clarify, in the enforcement procedure, the basis of enforcement in consideration of the complaint, trial transcript and documents on which the enforcement is based.

Second, the scope of enforcement shall be determined after communications with various parties. During the enforcement procedure, the enforcement division needs to communicate with the parties concerned, as well as the trial judges, in a bid to further clarify what needs to be enforced. In the enforcement process, efforts shall be made to ascertain the infringing acts to be stopped, forms of infringement, storage location of the infringing products, specialized molds, etc., and to communicate with various parties so as to find out the place of infringement, the location of the equipment and materials related to the infringing product, and with cooperating agencies and authorities.

(II) Optimization of adjudication documents

For the common bases of enforcement, in the case of arbitration awards and enforceable notarized debt instrument, it is not rare that what is to be enforced is unclear. Of course, disputes over patent infringement are not arbitrable, and the adjudication documents serving as the basis of enforcement are usually made by courts. Regarding the courts' adjudication documents, "a conciliation document is more likely to contain unclear contents to be enforced than a judgment or a ruling, which is caused by the generation mechanisms for these documents, i.e., the main body of the judgment or a ruling is drafted by a judge whereas that of a conciliation document is drafted based on the agreement of the parties. Although the conciliation document is also subject to the judge's review, emphasis is usually placed on the willingness of the parties and non-violation of mandatory provisions of laws. No sufficient attention is paid to the enforceability of the conciliation document, which is a mistake more likely to be made by young judges."¹⁵ As for civil judgments and civil conciliation documents taken as the basis of enforcement, the drafting quality of adjudication documents shall be enhanced. Especially, more attention shall be paid to the contents that affect the rights and interests of the parties such as the findings of fact in relation to the infringement, forms of infringing acts, determination of infringing acts, and the main body of judgments, such that no undue problems will be left to the par-

ties or the enforcement division.¹⁶

Regarding the adjudication documents serving as the basis of enforcement, it is necessary to, on the one hand, improve their quality, strengthen the review of the contents to be enforced, and specify the order of cessation of infringement in the civil judgments, and on the other hand, adjust the structure of adjudication documents to separately specify and highlight the contents to be enforced so as to make them more distinguishable, in such a way to provide convenience for the parties and the enforcement division.

Nowadays, in disputes over patent infringement, facts in relation to the infringement are recited in various parts of a judgement, including the claims, facts and grounds of the patentee, findings of fact, findings of law and main body of the court judgment, etc. It is of necessity to read and search in multiple sections during the enforcement procedure so as to determine the specific infringing acts and the corresponding infringers, forms of infringement, models of the infringing product, and the like. Some civil judgments even do not indicate the specific product model. For instance, in a dispute over infringement of a utility model patent between an electronics company and a supermarket, the patentee only generally mentioned a selfie stick sold by the infringer in the section of facts and grounds of the judgment, and the infringing product, which was not further specified later in the sections of findings of fact and conclusions of law, can only be identified after reviewing the entire file of this case. Such problems have undoubtedly rendered the enforcement difficult. The contents related to cessation of infringement are not clearly presented in civil judgments or civil conciliation documents, so it is necessary to optimize and adjust the civil judgments on disputes over patent infringement, which can be accomplished through communication and coordination among divisions within a court.

At present, the civil judgment for a dispute over patent infringement generally includes three sections: first, the patentee's claims, facts and grounds, the infringer's defense, evidence submitted by the parties, and court's examination and evaluation of the evidence; second, the court's findings of fact, which will specify the infringing acts and products; and third, the court's decision on the civil liability borne by the parties, the infringer's defense, the assumption of liability that the parties shall bear, etc. The basis of enforcement is generally recited in the section of civil liability. Currently, the civil judgment for the dispute over patent infringement does not expound those contents, but roughly

determines that the infringer committed infringement. Such an arrangement not only imposes a burden on the enforcement division because it must review the entire file to retrieve relevant information in the subsequent procedure, but also adds a burden on the patentee and the infringer. Especially in some patent infringement cases where the infringers have limited knowledge in professional technologies and law, they do not know what obligations they should perform and what acts are prohibited by the adjudication documents if the courts do not point them out clearly. Thus, in the civil judgments on the disputes over patent infringement, the court should elaborate these contents. In the section of the civil liability determination, items such as the specific forms of infringement committed by the infringer, the specific infringing products that infringe on the patent right, whether specialized molds are used, what kind of specialized molds are used, whether there are infringing products in stock, etc. should be indicated in detail, so as to facilitate the subsequent execution by the patentee and infringer, and work of the enforcement division.

(III) Technical support

The current mechanism for hearing technical issues in the trial of the disputes over patent infringement is relatively mature, and relevant courts have established the mechanism for ascertaining technical facts in various ways.¹⁷ The technical investigators from the courts, consulting experts, external experts, expert jurors, etc. have played a vital role in such steps as the seizure of infringing products and the findings of technology-related fact in the trial. However, there is no similar mechanism in the enforcement procedure. Even if the enforcement division can clarify relevant information by meeting with the parties, communicating with the trial judges and contacting technical investigators and experts individually, there still exist some drawbacks: on the one hand, the information acquired through communications with the parties lacks objectivity and fairness due to their respective stances; and on the other hand, there is no mechanism for contacting technical professionals, and such contacts depend on the time schedule and willingness of the experts and lack financial support. The enforcement of a specific case is of great uncertainty as the communication largely relies on the personal connection between the enforcer and the technical experts.

Regarding the current mechanism for the findings of technical fact within the court, the enforcement division can resort to the internal technical investigators. But for the rea-

sons of, e.g., personnel arrangement and technical limitations of the court, a case to be enforced may not fall within the technical field that the technical investigator is specialized in, and thus, an external technical expert may still be in need. Whether the cessation of infringement can be achieved smoothly and how effective it is have a direct bearing on whether the legitimate rights and interests of the patentee can be actually protected. In the current enforcement practice, the issues that require multilateral collaboration in the early stage, especially the support from technical investigators and technical experts, are left to the enforcement division without providing any corresponding professional and technical resource and support, which is definitely unfavorable for the protection of the legitimate rights and interests of the patentees.

Hence, it is suggested to set up a technical support system for the enforcement procedure as soon as possible. While giving full play to the internal technical investigators, we shall try utmost to share current technical resources and invite external professional and technical experts for help in such a way to establish a sharing mechanism, and provide necessary coordination mechanism and financial resource in hope of forming a systematic, long-term and sustainable technical support mechanism, thereby truly safeguarding the legitimate rights and interests of the patentees.

Conclusion

China's patent system has been implemented for almost four decades. Theoretical research on patent trial is relatively adequate. At the ought level, the legitimate rights and interests of the patentees have been effectively protected, and provided with all-round legal, institutional and technical support in such aspects as preservation, trial and fact-finding. However, at the enforcement level, especially the enforcement of cessation of infringement, less attention has been paid to whether the legitimate rights and interests of the patentees have been successfully safeguarded, and the effect of enforcement also needs to be enhanced to a large extent.

This may result from several reasons: first, the patentees lay less importance to the enforcement of cessation of infringement, and are prone to pursuing the execution of property; second, enforcement is highly difficult as a great deal of time and effort are required in locating the place of infringement, and finding infringing products, infringing

products in stock, specialized molds and the like; third, adjudication documents are ambiguous, specifically, the civil judgment or the civil conciliation document that serves as the basis of enforcement often fails to clarify the items to be enforced due to poor drafting skills or because points of attention are elsewhere, and fourth, there lacks adequate technical support, that is, since disputes over patent infringement involve technical issues, the enforcement division can hardly solve the technical problems on its own, and the coordination mechanism has not yet been well-established.

The resolution to these problems lies in, on the one hand, the sound system and mechanism, and the strengthened coordination between the courts and other entities, and, on the other hand, the trial and enforcement divisions need to pay more attention to relevant issues at a higher level and adjust working schemes so as to provide higher-quality basis for the enforcement of cessation of patent infringement. In this sense, the effect of the enforcement of cessation of infringement can be improved so as to fundamentally cease infringing acts such as making, selling or using infringing products, especially the making act which is the most severe infringing act for patentees. These all contribute to the effective protection of the legitimate rights and interests of patentees and the prevention of infringement of the patentee's legitimate rights and interests at the very beginning, thereby achieving a closed-loop resolution of disputes over patent infringement in legal and social senses. ■

The authors' affiliation: Shanghai No. 3 Intermediate People's Court

¹ Cheng Xiao (2016). *Tort Liability Law* (p. 656). Law Press•China.

² No. Hugaofaminyi 1[2005] issued by Shanghai High People's Court.

³ The Intellectual Property Division of Beijing High People's Court (compiler) (2014). *Understanding and Application of Guidelines for Patent Infringement Determination* (p. 389). China Legal Publishing House.

⁴ Wen Xikai (2012). Exploration on the application of "order for cessation of infringement" in the intellectual property laws. *Intellectual Property*, 4, 26.

⁵ Opinions of the Supreme People's Court on Several Issues Concerning Intellectual Property Trial Serving the Overall Objective under the Current Economic Situation [No. Fa-fa 23/2009], issued on 21 April 2009.

⁶ Zhang Ling (2011). Civil liability of cessation of infringement: What does it mean and how will it be improved in patent infringement lawsuits. *The Jurist*, 4, 11.

⁷ Chen Wu (2011). Uncertainty of rights and limitations on the right to claim cessation of infringement. *Peking University Law Journal*, 2, 359.

⁸ Lv Na (2009). Disposal of infringing articles in intellectual property infringement lawsuits. *People's Judicature•Application*, 9, 83.

⁹ Mao Ronghua and Wang Jia (2003). Procedural linkup between customs protection measures and interim measures in disputes over patent infringement. *Intellectual Property*, 6, 35.

¹⁰ Xu Lixin (editor-in-chief) (2005). *Patent Case Study* (p. 8). Law Press•China.

¹¹ The Civil Judgment No. Hu73minchu 54/2019.

¹² The Civil Judgment No. Hu73minchu 242/2018.

¹³ Article 16(3) of the Provisions of the Supreme People's Court on Several Issues Concerning the Enforcement Work of the People's Court (Trial).

¹⁴ Jiang Bixin and Liu Guixiang (editors-in-chief) (2019). *Unified Understanding and Application of Latest Judicial Interpretations on Enforcement of the Supreme People's Court* (p. 9). China Legal Publishing House.

¹⁵ See supra note 4.

¹⁶ Guan Rongqi and Liu Shaohua (2020). Application of measures for preserving patent infringing acts – "Motor vehicle wiper" invention patent infringement case. *China Invention & Patent*, 12, 124.

¹⁷ Li Shulan, Chen Huizhen and Ling Zongliang. Functional position and system coordination of technical investigators in intellectual property trial – On the construction of the "four-in-one" system for investigating and finding technical facts. *Proceedings of the 2015 Annual Conference of the China Intellectual Property Law Association*.