Theoretical Basis for the Shift of Judicial Practice on Injunctive Relief for SEPs in China

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I. Introduction

As the first form of civil liability listed in Article 179 under the General Provisions of the China's Civil Code, injunctive relief is mainly applicable to the protection of personality rights and property rights. Intellectual property rights are quasi-property rights, and the most effective remedy for intellectual property infringement is an injunction. Thus, in the past judicial practice, where intellectual property right holders sought both cessation of infringement and damages, the claim for cessation of infringement would be awarded by courts upon the establishment of infringement, on the grounds that fault is not a requirement for injunctive relief for intellectual property infringement. [1] This is called "automatic injunction" among scholars [2] and practitioners [3].

Apart from damages, cessation of infringement is the most direct and effective remedy for patent holders in patent infringement disputes. The theoretical and adjudicative foundation of trial of patent infringement disputes by Chinese judicial authorities had been to award injunctive relief without exception once infringement was found. Under such a model, China's patent system played a positive role as a means to stimulate innovation at the early stage. However, due to new changes such as the development of science and technology and the refinement of the scopes of patent rights, especially the integration of standards and patents, more challenges have been posed to the "automatic injunction". On the one hand, standards achieve their own advancement through the advancement of essential patents, thereby elevating the comprehensive competitiveness of the entire industry; and on the other hand, standards place the patented technologies contained therein at an advantageous position in competition with other similar patented technologies, and the formers have been constantly iterated in the process of standardization through the expanded implementation and promotion thereof, which

2018年第6期。

[51] Justin Hughes, The Philosophy of Intellectual Property, Georgetown University Law Center and Georgetown Law Journal, Vol. 77, p.287-310 (1988).

[52] Robert P. Merges: Justifying Intellectual Property, Harvard University Press, p.161 (2011).

[53] Robert P. Merges, The Trouble with Trolls: Innovation, Rent-Seeking and Patent Law Reform, Berkeley Technology Law Journal, Vol.24, p.1583 (2010).

[54] 同註34。

[55] 參加周螢屏："停止侵權判決中的比例原則"，載《知産財經》，2023年8月21日，https://mp.weixin.qq.com/s/S1YgJr-AEW4TMsa23SIWKw，2024年11月20日訪問。

[56] WIPO Lex：德國專利法（2021年8月30日修改），https://www.wipo.int/wipolex/zh/text/585208，2024年11月20日訪問。

[57] 參見畢文軒："比例原則在知識産權法中的適用"，載《理論探索》2018第6期；朱翔華："歐盟委員會'關於標準必要專利的歐盟方法'對我國的啓示"，載《標準科學》2018年6期；張偉君，張校銓："德國專利法將停止侵害請求權納入'比例原則'限制對我國的啓示"，載《中國專利與商標》2022年第4期。

[58] 參見朱翔華："歐盟委員會'關於標準必要專利的歐盟方法'對我國的啓示"，載《標準科學》2018年6期。

[59] 同註23。

in turn promotes the industrial development.[4] However, since the universality, sociality and publicity of standards contradict with the exclusivity, territoriality and private nature of patents, conflicts arise between standards and patents in the process of integration. This requires us to deal with their conflicts properly, or otherwise the development, innovation and application of new technologies will be impeded. Accordingly, it is urgent, both in theory and in practice, to solve the issues on whether the injunctive relief for standard essential patents (SEPs) shall be awarded, and how to balance the interests of SEP holders, standard implementers and the public. Based thereupon, in view of the evolution of the injunctive remedy for SEPs in practice in China, this article intends to analyze the foundational theories that affect the trial of relevant cases by China's judicial authorities and delve into the reasons and factors underlying the shift of foundational theories in the hope of providing theoretical basis for the improvement of injunctive relief for SEPs in China.

II. Evolution of injunctive relief for SEPs in China

Articles 65 and 72.1 of the China's Patent Law (revised in 2020) set forth the permanent injunction and preliminary injunction respectively in patent infringement lawsuits, wherein Article 72.1 is more detailed and specific after the law revision. However, there are no special provisions regarding injunctive relief for SEPs in the newly revised Patent Law. For a long time, accused infringers have often raised non-infringement defenses against patent holders on the grounds of implementing standards in SEP infringement disputes. In order to adapt to the trend of global development and safeguard the legitimate rights and interests of enterprises during development to the maximum extent, the relevant rules on injunctive relief for SEPs have been adjusted several times in China's judicial practice.[5]

In 2008, in the Letter of the Supreme People's Court on the Issue of Whether the Exploitation of a Patent in the Specification for the Design of Ram-Compaction Piles with a Composite Bearing Base, an Industry Standard Issued by the Ministry of Construction, by Chaoyang Xingnuo Company for Design and Construction According to the Standard Constitutes Patent Infringement (No. Minsantazi 4[2008]) (hereinafter referred to as the Reply Letter No. 4)[6], the Supreme People's Court clarified the basic criteria under which the exploitation of SEPs by implementers does not constitute infringement, that is, once a patented technology is incorporated into a standard, it is deemed that the patent holder has granted a license to others to carry out the patent while implementing the standards. In the early times when SEP-related cases were heard by China's judicial authorities, the Reply Letter No. 4 was regarded by some judges as "the sole and only lifeline for dealing with SEP disputes".[7] Some scholars opined that the Reply Letter No. 4 was actually a confirmation of "implied license" for SEPs,[8] which means the SEP holder is deemed to give an implied license to others to practice its patent regardless of whether the SEP holder has fulfilled the disclosure obligation. Such practice is too harsh for patent holders and not conducive to the protection of patent rights. For the sake of limiting the above rationale, the Supreme People's Court released, in 2009, the Interpretation on Several Issues Concerning the Application of Law in the Trial of Disputes over Patent Infringement (Draft for Comments) (hereinafter referred to as the Draft for Comments), wherein Article 20[9] stipulates that only the non-disclosed patent that has been incorporated into the standards can be determined by the courts as the patent for which an implied license to implement has been granted by the patent holder. Although the officially promulgated judicial interpretation did not adopt the aforesaid Article, the Reply Letter No. 4 and the Draft for Comments, which were released with a time gap, reflect, to some extent, that the Supreme People's Court has softened its attitude towards injunctive relief for SEPs.

In 2012, in *Zhang Jingting v. Hengshui Ziyahe Construction Engineering Co., Ltd. and others*, an SEP infringement case[10], the first-instance court expressed its view on whether Ziyahe's implementation of Zhang's SEP without a legal license constituted infringement, holding that the defendant's implementation of the patented technology without the patentee's permission constituted infringement, and granted the plaintiff's claim for cessation of infringement. Being dissatisfied with the judgement, the defendant filed an appeal. Following the rationale of the Reply Letter No. 4, the second-instance court overturned the first-instance judgment, deciding that the patentee's participation in standard formulation and incorporation of a patent into the standard shall be deemed as the patentee's implied license for any exploitation of the patent. The patentee applied for a retrial due to his dissatisfaction with the second-instance judgment. The court of retrial overturned the judg-

ment made by the second-instance court and granted the plaintiff's claim for injunctive relief on the grounds that "the reply of the Supreme People's Court to an individual case cannot function as the direct basis for adjudication". Further, the preamble of the 2006 Code [11], the standard in suit, recites the patented technology and the contact information of the patentee in a clear and identifiable way, which means that the patentee has fulfilled his obligation to disclose the patent. This case confirmed that the SEP holder is entitled to obtain injunctive relief, and meanwhile defined the requirements for the grant of injunctive relief, i.e., the patentee shall incorporate the patent into the standard and fulfill the patent disclosure obligation.

In December 2013, the Standardization Administration of China and the China National Intellectual Property Administration jointly issued the Interim Provisions on the Administration of National Standards Involving Patents (hereinafter referred to as the Administration Provisions), wherein Article 5 [12] stipulates the disclosure obligations on the part of the patentees. Regarding the legal liability, the Administration Provisions, as administrative regulations jointly issued by the above two departments, do not specify legal liability for infringement. [13] However, it is easy to tell from the above practice that the "relevant legal liability" mentioned in the Administrative Provisions means that where the patentee failed to fulfill the disclosure obligation when incorporating his patent into the standard, it shall be deemed that the patentee has granted a license to others to implement the patent, which means that the patentee may lose his right to claim injunctive relief. In addition, the Administration Provisions also set forth clear provisions on the obligation to make a fair, reasonable, and non-discriminatory (FRAND) declaration.

In 2015, the former State Administration for Industry and Commerce issued the Provisions on Prohibiting the Abuse of Intellectual Property Rights to Exclude and Restrain Competition, wherein Article 13 [14] requires that operators shall not perform any act to exclude or restrain competition in the standard formulation and implementation processes. This Article is, as a matter of fact, an affirmation of the court's judging rationale in *Huawei v. IDC* [15] in 2013, that is to say, anti-unfair competition means can be applied to restrict the patentee's injunctive relief. Article 53 of the China's Patent Law (revised in 2020) also made a response in this regard, that is to say, the judicial authority can restrict the patentee's right to claim injunctive relief by anti-unfair competition means and the like.

As known from the above content, for the purpose of restricting the patentee's exercise of the right to claim injunctive relief, there have been introduced into the judicial practice and departmental regulations the obligation to disclose an essential patent and the obligation to commit to offer a license on FRAND terms, as well as regulation under anti-unfair competition law. However, under the framework of the patent law, the Reply Letter No. 4 has long acted as the main adjudication basis for judicial authorities. Given that the patent information disclosure system has been preliminarily formed in standard formulating process in China and the above provisions and judicial practices do not conform to China's current actual needs, it is quite essential to explore the injunctive relief for SEPs under the framework of the existing patent law.

In 2016, the Supreme People's Court issued the Interpretation (II) on Several Issues Concerning the Application of Law in the Trial of Disputes over Patent Infringement (hereinafter referred to as the Judicial Interpretation (II)), wherein Article 24 [16] stipulates the basic principles for injunctive relief for SEPs. However, there has been a great controversy over policies on injunctive relief for SEPs in theory and in practice. Thus, Article 24 of the Judicial Interpretation (II) merely defines the types of standards, and provides a catch-all clause that "where any law and administrative regulation set forth provisions on the implementation of patents in standards otherwise, such provisions shall prevail". It is commendable that the provisions of Article 24 of the Judicial Interpretation (II) have played a crucial guiding role in resolving current SEP-related disputes in China. For example, the Supreme People's Court directly cited Article 24 in *Qilu Pharmaceuticals v. Beijing Sihuan Pharmaceuticals*, a dispute over infringement of an invention patent [17].

In 2017, the Beijing High People's Court issued the Guidelines for Patent Infringement Determination (2017) providing more detailed standards for infringement determination, on the basis of the Judicial Interpretation (II). In 2018, the Guangdong High People's Court also issued the Work Guidelines for Trial of SEP Disputes (Trial). Both Guidelines further refine the standards for determining, e.g., "faults", and offer standardized and systematic resolutions for how to apply injunctive relief, which fill in the gaps in the rules for injunctive relief for SEPs in China to a certain extent.

In brief, Chinese judicial authorities have changed their attitudes towards injunctive relief for SEPs from definite ex-

clusion of injunction to conditional, restrictive application. However, due to being void of the system in relation to the right to claim injunctive relief for SEPs at the legislative level, there is no clear consensus on the ways to regulate injunctive relief for SEPs in judicial practice, nor are there unified and mature standards for the application thereof. Further studies on the specific system and relevant principles concerning the right to claim injunctive relief for SEPs in China are still ongoing. [18]

III. Theoretical foundation of the shift of judicial attitudes towards injunctive relief for SEPs in China

The "automatic injunction" theory has long been prevailing in China's judicial practice and injunction is the most effective means of relief for common patent infringement. But the "automatic injunction" theory should not be simply applied to SEPs.

1. Theoretical foundation of injunctive relief for ordinary patents and SEPs in China

In China, intellectual property legislation largely stems from the actual needs of reform and opening up, and out of utilitarian considerations, the process of formulating the Patent Law has policy trade-offs to some extent. [19] For instance, due to national policies, subject matters such as foods and drugs were once directly excluded from the scope of protection of the patent law. Although the intellectual property legislation in China is prone to utilitarianism, [20] the basic theories of civil law have direct impact on the development of intellectual property in China. On the one hand, from the perspective of the forms of infringement liability, the fundament for assuming civil liability for intellectual property infringement is the civil basic law, in addition to the specific provisions of various special intellectual property laws. The basic logical route is to clarify the attributes and classification of intellectual property rights in the civil rights section, and then locate the corresponding forms of liability in the section concerning civil liabilities for infringement and remedies. On the other hand, special intellectual property laws set forth no specific provisions on the civil liabilities for infringement of intellectual property rights. Let us take the Patent Law as an example. The Patent Law has undergone several revisions, all of which evaded the issues in relation to the civil liabilities for patent infringement. The Patent Law (revised in 2020) only stipulates the measures to cease infringement in the nature of administrative relief in Article 65, and pre-litigation behaviour preservation, property preservation and evidence preservation in Articles 72 and 73. Although the Judicial Interpretation (II) has set forth provisions on cessation of infringement, it does not go deeper and further. It can be seen that, from the perspective of liability, there are neither unified legal provisions nor detailed jurisprudential or practical interpretation for the specific application of injunctive relief for intellectual property infringement. [21] As a result, when hearing patent infringement cases, courts tend to deem patent as a quasi-property right. This is not only the root of civil law theories resulting in the "automatic injunction" in patent infringement cases in China, but also the reason why Chinese courts did not get stuck in the dilemma where there are no laws to abide by and meanwhile scarcely denied injunctive relief in patent infringement cases in the early days.

From the aspect of law inheritance, China's civil law has a strong link with the natural law for the reason that it inherits the civil law theories and schemes of the civil law system. [22] As a result, according to the basic theories of civil law, both parties to an SEP license are equal civil subjects in nature, but the improper application of the FRAND principle and injunctive relief is apt to trigger patent hold-up and patent hold-out, thereby leading to the break-down of the equal relationship between the licensor and the licensee. However, the basic principles of civil law still have a natural advantage in restricting the right to claim injunctive relief for SEPs. Under the current judicial circumstances, the basic principles of civil law, such as the principle of good faith and the principle of prohibiting abuse of rights, play a significant role in resolving SEP-related disputes. For instance, in *Huawei v. Samsung* [23] and *IWNCOMM v. Sony* [24], the first-instance and second-instance courts determined the at-fault parties according to the principle of good faith in the civil law. The application of the principle of good faith by courts demonstrates that the basic principles of civil law serve as the guidance in intellectual property infringement cases, and that in judicial practice, by applying and adhering to the basic principles of civil law, the courts respond to the variation of social situations. At the same time, the value of "balance of interests" has gradually become prominent in the reliefs for SEP infringement. In judicial practice, the rules for applying injunctive relief have begun to change under special situations such as "severe imbalance of inter-

ests between the parties" and "significant losses to the public interest", which is of great theoretical significance in breaking through the "automatic injunction" theory for SEPs.

2. Reasons for the shift of judicial attitudes towards injunctive relief for SEPs in China

In the early judicial practice, Chinese courts took a "one-size-fits-all" approach regardless of whether the infringed patent was an SEP or not. In doing so, cases were heard with lower cost but higher efficiency, and an increasing number of disputes over intellectual property infringement were timely resolved. Of course, it is undeniable that there were particular reasons for adopting the "one-size-fits-all" approach in SEP-related disputes. On the one hand, theoretical research on and practical exploration of injunction in China were insufficient; and on the other hand, the publicity of standards and the strong monopoly of essential patents draw the attention of domestic and foreign scholars to patent hold-up [25] and royalty stacking [26], which affected the attitude of China's judicial authorities in early trials of SEP infringement cases. However, the "one-size-fits-all" judging rationale not only undermined fairness in individual cases, but also damaged the principle of balance of interests that the intellectual property system should adhere to. Therefore, more and more scholars argued over the defects of the "automatic injunction" from the aspects of jurisprudence and economic analysis of law in a bid to provide a theoretical foundation for improved restriction on the right to claim injunctive relief.

First of all, theoretical research has further deepened the understanding of the relationship between the "automatic injunction" theory and corrective justice, providing a more refined analysis of the conditions for the application of injunctive relief for patents. Fairness and justice are one of the value goals to be accomplished by reliefs, of which injunctive relief for patents is no exception. Since the goal of injunctive relief for infringement is to enhance social welfare and achieve corrective justice, [27] the issue of corrective justice must be addressed in discussion of injunction for patent infringement. According to the views of Aristotle's ethics, people believed for a long time that corrective justice was naturally linked with morality and ethics. The relationship between corrective justice and tort law has not undergone a new development until Jules Coleman proposed a new corrective justice theory that legal ethics is not necessarily associated with morality. According to Coleman's view on new corrective justice, "corrective justice cannot exist independently of tort law, and the content of corrective justice is determined in the practice of tort law, i.e., corrective justice adjusts human activities through the practice of tort law". [28] As far as patent infringement is concerned, where an actor infringes on other's patent right, it is like imposing his own will on the patentee, thereby leading to unfairness. Where the actor gains benefits and the right holder suffers losses, the tort law should intervene to adjust the imbalance of interests. In other words, when judging whether the goal of justice is achieved in the judgment of a dispute over patent infringement, account shall be taken of whether multiple value demands can be realized by stopping the exploitation of the patent in suit. That is to say, for the purpose of making interests balanced, the infringer is required to return his income derived from infringement to the right holder, and the reliefs, such as damages and cessation of infringement, are no other than specific tools to balance interests in this process. In short, the right to claim injunctive relief serves the purpose of corrective justice, but cessation of infringement is not the goal of corrective justice. In this sense, the "automatic injunction" theory is the misunderstanding of corrective justice.

Second, the introduction of theories of law and economics makes scholars and practitioners further realize that injunctive relief for patent infringement shall not be applied in all situations. In the 1960s and 1970s, scholars represented by Guido Calabresi [29] and Richard Allen Posner [30] proposed a new method for analyzing and reconstructing laws, i.e. the economic analysis of law, which is a view of efficiency based on welfare maximization. Guido Calabresi took tort law as a tool to carry out the economic idea of welfare maximization, and put forward, based on the Coase theorem, two types of rules, namely property rules and liability rules, which protect entitlements. [31] Property rules and liability rules provide an all-round answer to "how to apply injunctive relief" from an economic perspective. Property rules refer to the situation that a party obtains other's entitlement through negotiations before transaction. Liability rules are applied where a party exploits the entitlement of its holder without obtaining a permission in advance, and in such a case, damages, the amount of which is generally be determined by the judicial authority at its discretion, shall be paid to the right holder afterwards. Property rules require that the grant of entitlement should be premised on the payment of consideration. These rules provide an exclusive protection. If a user does not reach an agreement with the patentee on

the consideration paid for the use of rights in advance, such use is equivalent to infringement in law. As such, the right holder can seek for injunctive relief for patent infringement. Liability rules allow for the acquisition of entitlement before payment. These rules are not concerned with providing exclusive relief for the infringement of the original entitlement, rather allowing the judicial authority to use its judicial power to award damages as a remedy to the right holder by such means as value compensation or damage compensation. [32]

Through economic analysis of law, some scholars are of the opinion that although injunctive relief falls within the scope of property rules, the absolute application of injunctive relief is highly likely to cause market failure in consideration of many factors such as the difficulty in the delimitation of intellectual property rights, negotiation costs, transaction barriers, risk attitude on strategic behaviours and social welfare reduction. However, in view of the high uncertainty about intellectual property damages, the court-valuation-based pricing model adopted by the liability rules does not fully conform to the cost and efficiency principle. [33] Therefore, as analyzed from the perspectives of property rules and liability rules, cessation of infringement is the fundament of intellectual property infringement remedies, and damages can only function as a substitute where the statutory conditions are met. The economic analysis of law, once emerged, immediately created a huge impact in academic and judicial circles, and has been applied in judicial practice at home and aboard. The "four-factor test" established by the U.S. Supreme Court is applied when considering whether to award injunctive relief [34], German courts establish the prerequisites for seeking injunctive relief and the "good faith" negotiation rule [35], and Chinese courts decide the injunctive relief under the "balance of interests" doctrine [36], all of which basically overcome the shortcomings resulting from the absolute application of the above two types of entitlement-protecting rules by means of non-mandatory application of cessation of infringement or damages.

Finally, the uncertainty over the delimitation of patent rights and the inherent specialty of SEPs also decide the inevitability of shift of the judicial attitude towards injunctive relief. Since the patent system stimulates inventions by granting property rights, which is premised on the scope of rights clarified in advance, China determined the scope of rights by means of exclusion with prohibitive rules at the beginning of legislation. However, with the advancement of science and technology, the patent system is bound to face the challenge that the scope of rights clarified in advance cannot meet the needs of social development. In comparison with tangible properties, patents, as one type of intangible properties, face the difficulty in delimiting the scope of protection thereof, and patents, especially SEPs, have public attributes, which determines that the application of injunctive relief in disputes over patent infringement is never comparable to that in common disputes over property torts. Moreover, the specialties of SEPs over ordinary patents require that multiple factors should be taken into consideration when awarding injunctive relief. On the one hand, the public nature of standards and the private nature of patents decide that SEPs are more monopolistic than ordinary patents; and on the other hand, views are divided as to the legal nature of FRAND licensing commitment among scholars [37] and practitioners [38], thereby rendering the application of injunctive relief for SEPs more complicated.

Furthermore, with the rapid development of social economy and technology, subject matters protected by intellectual property rights have been constantly climbing up in number and greatly increasing in types and are faced with gradually lenient requirements. Accordingly, the effect of intellectual property rights has been expanding in terms of time, space, applicable acts or content of rights. Moreover, China's policy of "comprehensively strengthening intellectual property protection" [39] may not only set barriers for others to entry into related fields and participate in market competition, but also lead to illegal intrusion into or serious occupation of other rights and public space. Such a strong - expansion and strong - protection tendency may cause uneasiness to the public and increase the uncertainty in intellectual property protection. [40] For the sake of alleviating the current situations, judicial authorities have begun to introduce factors, such as the principles of balance of interests and proportionality, in the trial of patent-related cases. For instance, "adherence to the principle of balance of interests" is one of the guiding notions for drafting the Judicial Interpretation (II) [41]. Subsequently, judges stated that the principle of proportionality for intellectual property protection shall be followed in the field of patent rights, which means the scope and strength of protection of patent rights shall be reasonably determined according to the innovation level thereof in a bid to make the innovation of patents commensurate with the contribution they make. [42]

To sum up, the stance on injunctive relief has evolved from the absolute, definite and automatic application to al-

ternative application under special circumstances. During the evolution, although the judicial attitudes towards the injunctive relief for ordinary patents and SEPs are changed oppositely, the underlying theories behind the change are consistent, that is, making a refined balance of interests and calculation based on the principle of proportionality instead of simply automatic awarding or not awarding injunction. Such a change in judicial attitudes is impossible without the continuous accumulation of judicial practical experience and constant improvement in judicial capacity, and enriched academic theories.

IV. Factors affecting the shift of judicial attitudes towards injunctive relief for SEPs in China

The shift of judicial attitudes of Chinese judicial authorities towards injunctive relief for SEPs embodies an ever-changing and updating process of fundamental theories, and also reflects the basic role of the principle of balance of interests in constructing the claim for injunctive relief for SEPs, as well as the "invisible" role of the principle of proportionality on injunctive relief for SEPs in judicial and legislative processes.

1. The basic construction role of the principle of balance of interests

It has been recognized in the intellectual property academic circle that the principle of balance of interests, as a vital principle in legislation and judicial practice, plays an important guiding role in improving the intellectual property legal system. Professor Wu Handong said that "adhering to the principle of balance of interests as always is the basic spirit of modern intellectual property law". [43] Professor Feng Xiaoqing insisted that "intellectual property law is a law based on the balance of interests, which in turn constitutes the cornerstone of intellectual property law". [44] On the one hand, the basic connotation of the principle of balance of interests in intellectual property law places emphasis on its relationship with the protection of private rights, i.e., the protection of private rights acts as the prerequisite and the balance of interests serves as the constraint mechanism; and on the other hand, said basic connotation enables the principle of balance of interests to exert its function throughout the overall interpretation and application processes of intellectual property law. [45] Likewise, for patents which clearly own the dual attributes of private rights and public interests, the balance of interests is extremely crucial for determining the scope of protection thereof. And in disputes over infringement of SEPs, courts will surely take into consideration the fundamental role of the principle of balance of interests when awarding injunctive relief, so as to balance the rights and obligations of both parties to the SEP license, and to balance the interests of the SEP holders and the public.

First, as regards the interests of the SEP holders and standard implementers, intellectual property laws have made policy judgements on and institutional arrangements for the balance of interests between the parties at the beginning of legislation. However, the complexity of actual conditions decides that the application of injunctive relief shall be restricted to a certain extent where it goes against fairness and justice. [46] In judicial practice, when deciding whether to grant injunctive relief, courts must weigh up the interests between the patent holders and implementers. For instance, in *IWNCOMM v. Sony* [47] in 2017, regarding the civil liability of Sony (patent implementer) for infringement, the second-instance court took the faults of both parties in the process of negotiations as the basis for determination. The finding of faults and the degree thereof based on the facts of the case is actually to balance the interests of the parties at the discretion of judicial authorities.

Second, regarding the balance between private interests and the public interest, "the desire to allow the fullest scope to the assertion of individual rights may have to be balanced against arguments appealing to the common good and public advantage", as said by Bodenheimer. [48] In comparison with ordinary patents, SEPs demonstrate more public attributes. If strict restrictions are imposed on the exploitation of SEPs, it will affect the satisfaction of public's demand for SEP products to a certain extent. For this reason, it is necessary to weigh up the private interests of SEP holders and the public interest in order to avoid unnecessary conflicts. At the current stage, the SEP holders are allowed to restrain others from exploiting their patents mainly because of the long-term interests of the public. To weigh up between the interests of SEP holders and the public interest is as a matter of fact a compromise between the current public interest and the future public interest. Thus, in judicial practice, the courts tend to assess long-term public interest and far-reaching implications. However, the uncertainty of the future also compels the court to conduct a correlative evaluation between whether to restrict the right to

claim for injunctive relief and the present harm caused to the public interest. For instance, in *Hu Xiaoquan and Zhu Jiangrong v. Shandong Huinuo Pharmaceuticals*, a dispute over invention patent infringement [49], the first-instance court clarified its view on whether Huinuo Pharmaceuticals should stop infringing acts immediately, stating that "in this case, Huinuo Parmaceuticals is the only domestic enterprise manufacturing the drugs in suit. If Huinuo Parmaceuticals is ordered to stop utilizing the detection technology of the invention patent in suit, thereby being unable to produce and sell the disputed drugs, it will inevitably engender substantial detriment to the health of a vast number of patients in related field and gravely undermine the public interest". It can be seen that in SEP-related disputes, judicial authorities give greater weight to and protect the public interest behind the standards when private interests are in conflict with the public interest.

Concerning how to deal with the conflict between the above two types of interests, this article holds that when weighing up the interests between the parties to an SEP license, the court shall first identify the party that truly violates fairness and justice by means of fault determination under the principle of good faith, and then decide whether injunctive relief can be granted. When weighing up the private interests and the public interest, the principle of efficiency is also a factor to be taken into account in the application of injunctive relief. How to make a trade-off between fairness and efficiency requires case-by-case analysis in the context of policies. In judicial practice, the greatest advantage of the principle of balance of interests is that judicial authorities can make judgments that are in line with both the legislative intent and the requirements of legal interpretation based on specific case facts and foreseeable social value orientation. However, it is difficult to directly apply the principle of balance of interests in judicial practice due to its abstractness and generality. In contrast, a logical hierarchy exists in the application of the principle of proportionality in judicial practice. Through the process from factual determination to value assessment which proceeds from easy to difficult, the relatively complex and abstract legal acts can be simplified and concretized, [50] and the application of the principle of proportionality in judicial practice can also solve the problem that the principle of balance of interests cannot be directly applied in judicial practice.

2. "Invisible" role of the principle of proportionality

The principle of proportionality was originally a fundamental principle in administrative law. With the continuous deepening of the academic understanding of the proportional return in intellectual property law, the principle of proportionality has been gradually introduced into the field of intellectual property law. Justin Hughes proposed taking the concept of "proportional contributions" in patent law as the "value-added justification" in intellectual property law. [51] The principle of proportionality in intellectual property law means that the scope of an intellectual property right should be proportional to the value or importance of achievements protected thereby. For some years, the United States Court of Appeals for the Federal Circuit had a rule guaranteeing that a patent owner who had won a patent infringement lawsuit could get a permanent injunction against the infringer. [52] However, Professor Merges deemed that when applied blindly, this rule sometimes gives patentees enormous bargaining leverage, especially where the infringer would suffer huge economic losses if the injunction means shutting down a profitable product line. When large sunk costs and a mechanical application of the injunction rule are combined, a patent on a minor component of a complex product can generate immense, and immensely disproportionate, leverage. [53] For instance, the principle of proportionality underlies the rationale of the eBay case [54]. In this case, the Supreme Court directed the lower courts to reject the "automatic injunction" rule and replaced it with a test based on the traditions of equitable remedies in patent infringement cases. Moreover, in recent years, with the development of intelligent connected vehicles, Germany, which takes automobile manufacturing as a pillar industry, has started to take the principle of proportionality into consideration in judgments ordering cessation of infringement. [55] In June 2021, the German Federal Assembly passed a bill to amend the German Patent Act, wherein Section 139(1) stipulates that the right to sue a party for cessation and desistance is ruled out if asserting it would, based on the particular circumstances of the individual case and the principle of good faith, lead to disproportionate, unjustified hardship for the infringer or third parties which is not justified by the exclusive right. In such cases, the aggrieved party is to be granted reasonable monetary compensation. The claim for compensation remains unaffected thereby. [56]

In recent years, some scholars have shown positive and affirmative attitudes towards the incorporation of the principle of proportionality into the China's patent law through future revision. [57] At present, the principle of propor-

tionality has been implicitly applied, though not explicitly stipulated, in China's intellectual property legislation and judicature. In disputes over SEP infringement, when evaluating the effect of injunctive relief, courts generally insist that injunctive relief should be effective, satisfy the principle of proportionality and the requirement of deterrence. Given that injunction may have a broad impact on enterprises, consumers and the public interest especially in the context of the digital economy, the principle of proportionality shall be given careful consideration on a case-by-case basis. [58] For instance, in *Huawei v. Samsung* [59], when deciding whether to grant injunctive relief to Huawei, the court took into account the good faith of the parties from both procedural and substantial aspects. In view of the specialty of SEPs, which, among other things, involves the public interest, although the court granted injunctive relief to Huawei, it ordered that cessation of infringement may not be enforced immediately in a bid to provide both parties with an opportunity to return to the negotiating table. This judgment met the requirements of the appropriateness and necessity of the principle of proportionality on the premise of an effective injunctive relief. Furthermore, the gist of Case No. 27 of the Judgment Essentials (2022) Released by IP Court of the Supreme People's Court indicates that "in a dispute over SEP infringement, injunctive relief can be awarded with additional conditions according to the specific details of the case. For instance, when ordering the SEP implementer to stop infringement, the court can also grant the SEP implementer a reasonable grace period for amending his or its technical solution, or clarify his or its obligation for cessation of infringement until the actual payment of sufficient damages or royalties in line with the FRAND principle." It can be seen that in judicial practice, there is a tendency that the "invisible" role of the principle of proportionality has become obvious.

Conclusion

To sum up, although in China, the judicial attitudes towards injunctive relief for ordinary patents and SEPs are shifted in a completely different direction, they are under the same guiding notion, i.e., to achieve judicial confidence in pursuit of the balance of interests in individual cases. As for the underlying reasons, it would not be hard to find that on the one hand, the shift of China's judicial attitudes towards injunctive relief is an inevitable result of the continuous deepening of academic theoretical research by scholars, as well as the requirements of intellectual property for expansion and development, especially the inherent specialty of SEPs. The enrichment and evolution of academic theoretical research have nourished and supported the transformation of judicial notions; the transformation of judicial notions in turn has prompted judicial authorities to attempt to apply new adjudicative rules in individual cases; and in the end, the accumulated adjudicative rules have been confirmed by judicial documents. On the other hand, in the trial of individual cases, the judicial authorities have also fully demonstrated the confidence in judicial trials, that is, to fully and reasonably bring the positive role of discretionary power into full play so as to achieve the balance of interests in individual cases. Meanwhile, efforts have been made to better deal with a number of disputes over SEP infringement with Chinese characteristics by means of, e.g., the principle of balance of interests and the principle of proportionality, which provide adjudication rules that can serve as reference for the trial of SEP cases at home and aboard, and fully demonstrate China's judicial attitudes towards constant innovation and judicial confidence underlying each case and each judicial document. ■

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China and Brazil Extend PPH Pilot Program

Recently, the China National Intellectual Property Administration (CNIPA) and the National Institute of Industrial Property (INPI) have jointly decided to extend the CNIPA-INPI Patent Prosecution Highway (PPH) pilot program starting from 1 January 2025.

According to information released by INPI, its PPH program will enter a new phase starting from 1 January 2025. The restriction that previously allowed each applicant to submit only one application per week will be lifted. Since the first quarter of 2025, INPI will not accept PPH applications under IPC classification H04. The accepted technical fields will be reassessed quarterly.

Since the initiation of the first PPH program in November 2011, the CNIPA has built PPH ties with 33 national or regional patent examination authorities, covering 84 countries.

Source: CNIPA