

Case Study: Liability for Counter-Damages against Misuse of Patent Infringement Litigation

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Misuse of patent infringement litigation refers to an act of right abuse by a patentee to sue a non-authorized user for infringement of his patent right when he knows or has the reason to know that his patent right is not truly patentable, it is a fake patent right and legitimate only in form. A patentee's patent infringement litigation is an action brought in bad faith when he knows that the patent in suit is fake; his patent infringement litigation instituted when he should know but does not know about his patent right is a fake one is a faulty action. Both such actions are acts of misuse of patent infringement litigation, and the misuse of patent infringement litigation is one form of abuse of the patent right. Where such misuse of patent infringement litigation inflicts economic injury to the accused party, the vexatious accuser should pay him for the damages. Since, normally, it is a patentee who claims damages from another party in patent infringement litigation, the damages for the accused from a patent infringement accuser is known as counter-damages. The liability of a vexatious patent infringement accuser for counter-damages is to cover the other party's economic injury inflicted because of the misuse of patent infringement litigation, including all the reasonable expenses, such as the reasonable attorney's fees the opposite party is forced to pay because of

the misuse of patent infringement litigation. The case of accusing a vexatious accuser and claiming counter-damages from him is a relatively new form of litigation. Around the determination of misused patent infringement litigation and the counter-damages liability, much work has been done on a trial basis in the IP-related judicial practice in China, but there is still room for further exploration and improvement. As a case in point, in recent years in a series of cases involving counter-damages against misuse of patent infringement litigation due to Xu Zanyou's fake patent right (01333737.8) for a design of mattress (bamboo), the courts in Zhejiang, Jiangsu and Shanghai, in their hearings held different views of, and came up with varied decisions on, the similar cases, and from these cases have arisen a serious of issues requiring discussion and examination.

Xu Zanyou used to be the owner of a series of patents for designs of bamboo mattress, including the design patent 01333737.8 for mattress (bamboo). Actually, his design patents were mainly related to bamboo mattress made by arrangement of bamboo strips and cloth-wrapped edges, which were long disclosed, publicly known and used, and very plain. It was a craft handed down from one generation to the next from antiquity. Xu, who was a senior professional

and knew well about the patent law, took advantage of the design patent system under which the design patent was granted only with the formalities examination of an application, applied for, and was granted, a series of fake patent rights for the designs that had been long disclosed, made known, and fallen into the public domain. Besides, he recorded them with the Customs and brought patent infringement litigation in various regions, initiating dozens of misuse of patent infringement litigation around the country. As a result, hundreds of containers of exporting bamboo mattress were detained at the Customs in Shanghai, Hangzhou and Ningbo, a large number of bamboo mattress factories in Anji, Zhejiang Province, were on the verge of bankruptcy because of the Customs seizure, their forced breach of trade contracts concluded with foreign buyers, and the penalty imposed by the courts. As a result, the large bamboo mattress exporting industry in various parts of China collapsed after this one setback. While bringing patent infringement litigation in the courts of the various regions, Xu would also request the Customs and courts to seal up and detain the products; request the courts for temporary injunctions, i.e. for pre-trial prohibition of production and sale and for property preservation. Later, Xu's fake patents for the bamboo mattress were declared invalid by the Patent Reexamination Board (PRB) one after another, including the design patent 01333737.8. Xu filed an application for a patent for this design on 13 June 2001, and was granted the design patent on 6 March 2002. On 18 August 2005, the PRB declared the whole design patent invalid on the basis of the evidence from the Xueqiang Corporation, and; later Xu instituted administrative action and appealed, which were rejected respectively by the Beijing No. 1 Intermediate People's Court and the Beijing Higher People's Court. After that, the accused companies, such as Xueqiang, Baite, Kangbaite and Huaxia sued Xu zanyou in the courts in Hangzhou, Nanjing and Shanghai, claiming counter-damages against his misuse of patent infringement litigation. But the courts in these three regions came up with the same or different rulings after their first-instance or second-instance trial of these cases.

Xueqiang's claim for counter-damages against Xu's misuse of patent infringement litigation was rejected in the trial of two instances.

Xu once accused Xueqiang of patent infringement in the Hangzhou City Intermediate People's Court. On 18 March 2004, the Hangzhou Customs detained Xueqiang several containers of bamboo mattress to be exported at the Xu's request on the ground of accused infringement of design patent 01333737.8. On 17 March 2004, the Shanghai Customs did the same on the same ground. On 2 April 2004, Xu brought an action in the Hangzhou Intermediate People's Court, accusing Xueqiang of patent infringement and requesting the court to seal up said containers, and also requesting Xueqiang to put its products in suit off shelf at the commodity fairs held in Shanghai and Guangzhou. After design patent 01333737.8 was declared invalid, in September 2005, Xueqiang brought action in the Hangzhou Intermediate People's Court, requesting the court to rule that Xu pay RMB 2 million yuan in compensation of its economic injury caused because of Xu's misuse of patent infringement litigation.

The Hangzhou Intermediate People's Court rejected Xueqiang's claim in its first-instance ruling on 13 September 2006. The court held that Xu's design patent in suit was granted by the State patent administrative authority. Before it was invalidated, Xu was a lawful rightholder. Because of the patent, Xu's requests were all based on the legitimate right. They were actions Xue took to protect his own lawful rights and interests from infringement. Determination of Xu's actions as invalid or faulty would result in a situation where one would be afraid of ceasing acts of patent infringement for fear of bearing the liability for damages imposed after his patent right was invalidated, which was not conducive to the protection of the patent right. For that reason, Xu's action accused in this case was faultless, and his action to protect his rights was lawful before the design patent in suit was invalidated. Accordingly, the court rejected Xueqiang's counter-damages against the misuse of patent infringement litigation, and Xueqiang, dissatisfied with the ruling, appealed to the Zhejiang Higher People's Court.

The Higher People's Court took the view that Xu's actions of requesting the Customs detention, the court's sealing-up of and Xueqiang's putting off shelf of the accused infringing products were taken within the term of his patent. Under Article 47, paragraph two, of the Chinese Patent Law, "the decision declaring the patent right invalid shall have no retroactive effect on any judgment or ruling of patent infringement which has been pronounced and enforced by the people's court ... ; however, the damages caused to other

persons in bad faith on the part of the patentee shall be compensated.” In the present case, Xueqiang failed to prove the bad faith in which Xu took the above actions, and his actions had been conducted before his design patent in suit was declared invalid; hence, the invalidation decision had no retroactive effect on them. The Higher People’s Court also decided that Xu’s actions taken before the invalidation of the design patent in suit were lawful, so it rejected the appeal and upheld the first-instance ruling.

The Baite Corporation, et al. were winners in the first-instance ruling made in the case of counter-damages against Xu’s misuse of patent infringement litigation

Xu also brought action, on 6 and 19 April 2004 in the Nanjing Intermediate People’s Court, against the Baite and Kangbaite Corporations on the ground of their infringement of the design patent 01333737.8. The Nanjing Intermediate People’s Court made its decisions in the two cases in favour of Xu. The two corporations were unhappy, so they appealed to the Jiangsu Higher People’s Court. During the second-instance trial of the cases, the PRB declared Xu’s whole design patent 01333737.8 invalid under the law, and the second-instance court reversed the first-instance rulings in the cases. After that, Baite and Kangbaite sued, on 14 November 2006, in the Nanjing Intermediate People’s Court, petitioning the court to hold Xu liable for paying damages of RMB two million yuan in compensation of their economic injury caused because of his misuse of patent infringement litigation mainly on these grounds: during the first-instance hearing of the above two cases, the court decided to have frozen Baite and Kangbaite’s bank deposits of RMB 2.7 million yuan or their other assets of the equivalent value at Xu’s request; on 20 April 2004, the court ruled, at Xu’s request for “pre-trial order for the defendants to immediately cease the accused patent infringement acts” with the corresponding surety deposited, that the two companies to immediately cease making and marketing the products identical with or similar to Xu’s design patent 01333737.8, and sealed up, on site, all the 1,110 pieces of the accused infringing products; in 2004, Baite paid \$40,000 to a Hong Kong exporter for breach of an exportation contract because of the lawsuit.

The Nanjing Intermediate People’s Court held that Article 47, paragraph two, of the Patent Law was not applicable to the cases. The “judgment” mentioned therein referred to “patent infringement” judgment. That is, when a people’s court rendered an effective judgment in a patent infringement case after establishment of the patent infringement fol-

lowing trial of the case, the judgement in the case made and enforced did not include the procedural rulings made before in hearing the patent infringement case with respect to property preservation and “pre-trial order for defendant to immediately cease his patent infringement act”; hence Xu’s law basis for the counter-claim by application of this law provision did not conform to the law provisions, so was not accepted.

The court also believed that Xu should pay Baite and Kangbaite for their property losses because of his requested property preservation. The Chinese Civil Procedure Law provides for the condition for and scope of property preservation, and, as well, the legal consequences of an undue request: “where the requester is at fault, he or it shall pay to the respondent in compensation of his or its injury caused because of the property preservation.” While the Chinese Civil Procedure Law did not specify the specific circumstances of the faulty property preservation, in the judicial practice, the circumstance where the requester lost in the substantive examination of the case should be determined as one of the circumstances of such faulty requests, which was not only in line with the legislative purpose of the Civil Procedure Law, but also with the doctrine underlying the civil law regarding damages for infringement. If a requester’s claim was not supported, it meant that his request lost the needed basis, so inevitably faulty. When requesting property preservation, the requester should have known about the consequence of being liable for damages, and should bear the possible risk. When requesting property preservation, an interested party should evaluate the litigation risk of whether his claims would be supported by the court, and, as well, weigh upon the legal liability resulting from his faulty request. Only on the basis of this, could he make a cautious decision on whether it would be necessary to request property preservation. Once his request was at fault, and caused injury to the respondent, he should be liable for damages. Accordingly, the fact that Xu’s patent was invalidated and the invalidation resulted in his losing the case was enough to determine that his request for property preservation was faulty; hence Xu should be held liable for damages.

The court also believed that Xu should pay for the property losses inflicted to Baite and Kangbaite because of his request for “pre-trial ruling for the defendants to immediately cease the accused patent right infringement”. Xu requested the court for “pre-trial ruling for the defendants to immediately cease the accused patent right infringement” as the

patentee of the design patent in suit. The request was approved and the ruling was made by the court, and his claims were once supported by the first-instance court. However, his patent was invalidated during the second-instance trial. Under Article 47, paragraph one, of the Chinese Patent Law that “any patent right which has been declared invalid shall be deemed to be non-existent from the beginning”, his request for “pre-trial ruling for the defendants to immediately cease the accused patent right infringement” became baseless, and his litigant claims were rejected by the second-instance court. Accordingly, it should be determined that Xu was “at fault in his request”, and should be liable for the damages resulting from the property losses inflicted to the respondents.

On 12 October 2007, the Nanjing Intermediate People's Court made its first-instance ruling as to the following:

1. Xu pay Baite RMB 19,152.51 yuan, and pay Kangbaite RMB 28,461.76 yuan in compensation of their economic losses caused because of his request for property preservation;

2. Xu pay Baite RMB 330,600 yuan in compensation of the penalties losses for its breach of the contract resulting from his request for “pre-trial ruling for the defendants to immediately cease the accused patent right infringement”; and

3. Xu pay Baite and Kangbaite RMB 122,782 yuan in compensation of their economic losses of the value of their products caused by the long-time sealing-up and detention of the products because of his request for “pre-trial ruling for the defendants to immediately cease the accused patent right infringement”, and pay the interests on the basis of the bank loan.

Huaxia Corporation's counter-damages from Xu against his misuse of patent infringement litigation was not supported in the second-instance trial

Xu also brought action against the Huaxia Corporation for patent infringement in the Shanghai No.2 Intermediate People's Court. At Xu's request, the Shanghai Customs detained 114 boxes of bamboo mattress on 23 May 2005, and the Shanghai No. 2 Intermediate People's Court issued the pre-trial injunction prohibiting Huaxia from selling and exporting the 114 boxes of bamboo mattress on 24 May 2005. On 10 June 2005, Xu formally brought action in the court, re-

questing Xuaxia to immediately cease making, selling and exporting said accused infringing products, and claiming damages of RMB 100,000 yuan. During the first-instance trial of the case, the PRB declared Xu's whole design patent 01333737.8 invalid; hence on 16 August 2006, the Shanghai No.2 Intermediate People's Court decided to allow Xu to withdraw his accusation. In November 2006, Xuaxia sued Xu in the same court, requesting the court to rule that Xu pay it over RMB 100,000 yuan in compensation of its economic losses caused because of his misuse of patent infringement litigation. The Shanghai No. 2 Intermediate People's Court did not accept the request since it was a case not related to an IP right, but one under the general damages jurisdiction, and the amount of the subject matter of the lawsuit was not large enough for the case to be accepted by an intermediate people's court. Therefore, Xuaxia sued in the Zhabei District People's Court in Shanghai.

The Zhabei District People's Court, on the whole, referred to and followed the route of hearing by the Hangzhou Intermediate People's Court, using mostly the same or similar relevant wording in its ruling. The court also believed that Xu had been legitimately granted the design patent in suit from the State patent administrative authority. Before the design patent was declared invalid, he was the lawful holder of the right in said patent. Besides, his actions to request for the detention, accusation and pre-trial injunction in connection with Huaxia's accused infringing goods were based on the legitimate right. They were actions Xu had taken to protect his lawful IP right from infringement, which were not contrary to the law. Accordingly, the court rejected Huaxia's claim for the counter-damages against Xu's misuse of patent infringement litigation. Dissatisfied with the first-instance ruling, Xuaxia appealed the case to the Shanghai No.2 Intermediate People's Court. The second-instance court rendered the second-instance ruling, on 26 February 2008, to have rejected the appeal and upheld the first-instance ruling mainly on the grounds that Xu had been granted the design patent before requesting the Customs for automatic protection and bringing the patent infringement litigation; hence, in form, his said actions were based on a lawful right then. Next, Xu withdrew the patent infringement litigation from the court right after the PRB declared his patent right invalid on 18 August 2005. This being the case, it might be determined that Xu requested, on his own, the withdrawal from the court when he learned that his patent right was invalidated. In addition, Xu brought an administrative action due to divided views after

the PRB invalidated the patent in suit upon documents comparison, and the court finally decided to have upheld the patent invalidation decision. Therefore, it was impossible to assume that Xu himself clearly knew that the patent in suit was a known, disclosed common technology.

Discussion on several issues relating to counter-damages against misuse of patent infringement litigation

The three cases discussed here are cases involving counter-damages by the plaintiffs who were the victims, i.e. the defendants of the former patent infringement lawsuits where Xu misused the patent infringement litigation after Xu's fake patent right (No.01333737.8) for a design of mattress (bamboo) was invalidated. These three cases are just part of the various cases of counter-damages against misuse of patent infringement litigation. This article will be discussing the following issues as shown in the three cases.

1. Jurisdiction over cases involving counter-damages against misuse of patent infringement litigation and cause of action therefore.

As for the jurisdiction over cases involving counter-damages against misuse of patent infringement litigation and cause of action therefor, there are no express relevant provisions set forth so far, and the practice is divided as to what courts have the jurisdiction over them. When a lawsuit is instituted for counter-damages against misuse of patent infringement litigation, a former patent infringement case generally exists in one of the four states as follows:

- 1) it is still being heard by a first-instance court;
- 2) it has been closed, with the lawsuit withdrawn;
- 3) a first-instance ruling has been made in the case, but it is pending in its second-instance hearing; and
- 4) it is closed.

For example, the case for counter-damages by Huaxia against Xu's misuse of patent infringement litigation is in the first state. However, the Shanghai No.2 Intermediate People's Court, the court that heard Xu v. Huaxia, held that the case did not involve an IP right, and it should be under a property damages jurisdiction; and by the amount of the involved subject matter, it should be accepted by the Zhabei District People's Court in Shanghai. As a result, the judge of the Zhabei District Court who heard the case knew nothing about the IP rights and the fact of the former patent infringement, and had to take extra pains without much success in his trial of the case. After the case was appealed to the Shanghai No.2 Intermediate People's Court, it was heard by the civil tribunal, not by the IP tribunal; hence the same situ-

ation with the Zhabei District Court arose again. The practice of the Nanjing Intermediate People's Court was just opposite. Let's look at how the court dealt with the Tongfa Corporation v. Yuan Lizhong, also a case of counter-damages against misuse of patent infringement litigation. In the case, Yuan Lizhong applied for, and was granted, a patent right for the utility model of "fire-fighting ball value", which related to the technical information long disclosed in the State Standards. He sued Tongfa Corporation for patent infringement on the basis of the granted patent right for utility model. During the procedure, the patent right for the utility model of "fire-fighting ball value" was invalidated, and then Tongfa sued in said court, claiming for counter-damages from Yuan Lizhong. Upon hearing the case, the court held that the claim for the damages was an independent litigant claim, but it was closely related to the case of misuse of patent infringement litigation and inseparable from the treatment of the present case; hence it decided to hear the two cases together. Therefore, when Yuan Lizhong requested the court for withdrawal the misused patent infringement litigation against Tongfa, the court believed that given that Tongfa claimed for damages against Yuan's misuse of patent infringement litigation, Yuan Lizhong should not be allowed to withdraw his accusation before the claim for damages was reviewed and a decision made. In the end, the court made its ruling on the two cases together as to the following:

- 1) Yuan Lizhong's all litigant claims against Fatong, at al. be rejected; and
- 2) Yuan Lizhong pay Tongfa RMB 21,500 yuan in compensation of its economic losses, and bear all the litigation expenses.

For this writer, something is worth learning in the Nanjing Intermediate People's Court's practice. Cases of counter-damages against misuse of patent infringement litigation should be accepted by the first-instance court that has heard the case so that the former IP tribunal, or better the former judge could hear the case.

If it is in the state (1), i.e. the patent infringement case is being heard in the first-instance, the two cases relating to patent infringement and counter-damages for misuse of patent infringement litigation may be heard together; if it is in state (2), (3) or (4), the case may be separately heard.

For this writer, litigation for counter-damages against misuse of patent infringement litigation involves an independent litigant claim; the cause of such litigation should "be put in the cases under" the heading of patent infringement litiga-

tion for these reasons:

First, under the latest Provisions on Causes of Civil Action issued by the Chinese courts on 3 March 2008, the cause of action for counter-damages against misuse of patent infringement litigation is not compatible with any of those of the current category of the causes of civil actions.

Second, litigation for counter-damages against misuse of patent infringement litigation is derived from patent infringement litigation. Before a category of cause of action compatible with it is determined, it is best to put it in the category of cases under the heading of patent infringement litigation.

Third, the experience may be learned from the cause of action for “declaratory judgment”, which has also been derived from patent infringement litigation, when compatible cause of action was absent, cases for “declaratory judgment” were put in the cases under the heading of patent infringement litigation until a cause of action for “declaratory judgment” was added to the newly-issued Provisions on Causes of Civil Action.

2. Liability for counter-damages against misuse of patent infringement litigation after one applies, in bad faith, for and is granted a fake patent relating to a known technology

It should be emphasised that it may be reasonably assumed that Xu Zanyou, as a senior professional in the relevant art who knew well about the patent law, knew about the existence and disclosure of bamboo mattress products different, in name, from and substantially identical with the mattress (bamboo) when he applied for the design patent 01333737.8 as the Patent Law had been in force for seven years then; Xu had applied for several patents. The design patent 01333737.8 relating to bamboo mattress made by arrangement of bamboo strips and cloth-wrapped edges, a craft handed down from one generation to the next from antiquity was indeed a bamboo mattress or “tatami”. For that reason, Xu should fully know that the application for the design patent 01333737.8 did not possess novelty, and was not patentable. But he applied for it with a purpose and in bad faith, taking advantage of the system for the design patent grant without examining the application as to substance in China by filing an application for the design patent relating to what had been disclosed since antiquity, and bringing misused patent infringement litigation after being granted the fake patent right relating to the known technology. Xu may be held to have the subjective intent to act in bad faith. And his act of application for the patent right per se

may be determined as one in bad faith; he then had used the patent obtained in bad faith in the misused patent infringement litigation. Such acts of patent application in bad faith and misuse of patent infringement litigation are acts of double misuse of patent infringement litigation, which is not only more serious than an act of faulty misuse of patent infringement litigation one brought which one should, but does not, know about the known technology, but also more serious than acts of misuse of patent infringement litigation brought in bad faith only. He should be even more liable for counter-damages.

As for whether the party’s misuses patent infringement litigation in bad faith or not, where the patented technology or circumstances are complicated, whether the party of misuses patent infringement litigation is in bad faith should be proved with comprehensive appraisal and sufficient evidence; with respect to simple patented technology or circumstances, the judge may find the simple evidence, common sense, or analysis of reasons sufficient to determine whether the party has misused patent infringement litigation in bad faith. Xu’s application in bad faith for the design patent 01333737.8 and litigation in bad faith are in the latter circumstance.

A granted right for a design patent knowingly and intentionally applied for in bad faith per se is not based on any legitimate right, and its formal legitimacy can not cover up its substantive illegitimacy. Just as the property one steals is not based on legitimate right, the granted patent, though in one’s possession, will not show his lawful ownership of it. Therefore, it is difficult for the view to be tenable that “the act of detention, accusation, and request for injunction in connection with Xuaxia’s accused infringing goods on the basis of said patent right is based on legitimate right” regardless of whether the patent application and litigation are in bad faith or not.

3. Anyone who is at fault in requesting and using special litigant means, such as the temporary injunction and property protection, should be liable for counter-damages

In misuse of patent infringement litigation, any holder of the right in a fake patent who is at fault in his request filed with the court for seal-up, detention, temporary injunction, and property protection, and inflicts injury to the other party should be liable for counter-damages. As mentioned above, measures, such as pre-trial or interlocutory temporary injunction or pre-trial or interlocutory property preservation, are special procedural means that may or may not be requested

or used. If these special means a court decides to take at the request of a holder of the right in a fake patent inflicts injury to an opposite party, whether he is in bad faith or negligent, intentional or at fault, should be held liable for counter-damages, which is a judicial practice in China, and a common international practice. For instance, Article 48, paragraph one, of the TRIPS Agreement provides that “the judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse. The judicial authorities shall also have the authority to order the applicant to pay the defendant expenses, which may include appropriate attorney’s fees”; and Article 50, paragraph seven provides that: “where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.”

The SPC required, at the Second Meeting on the Chinese Courts Work on the Trial of IP-related Cases held on 19 February 2008, that the courts of various levels duly review the condition for the application of the pre-trial cessation of infringement; be properly stringent in following the standards for the determination of possible infringement; enhance remedies for the victims of faulty requests for pre-trial temporary measures. Where a requester fails to sue within the statutory time limit or is at fault in filing request for such a measure and the victim brings action for damages, the lawsuit should be accepted under law, and decision made on full compensation he deserves. Recently, the SPC has reiterated, in its plan of future IP work, that the courts should be proactive and cautious in applying the temporary measures under law, properly stringent in following the standards for the determination of possible infringement, and prevent interested parties from abuse of them.

4. Procedural rulings are not covered in Article 47, paragraph two, of the Chinese Patent Law in cases for counter-damages.

Article 47, paragraph two, of the Chinese Patent Law provides that “the decision declaring the patent right invalid shall have no retroactive effect on any judgment or ruling of

patent infringement which has been pronounced and enforced by the people’s court … ; however, the damages caused to other persons in bad faith on the part of the patentee shall be compensated.” Controversy exists in the judicial practice on whether said law provision is applicable to cases of counter-damages against misuse of patent infringement litigation. As discussed above, the ruling made by the Zhejiang Higher People’s Court clearly shows that it is applicable. The court emphasised in its second-instance ruling that: “Xueqiang failed to prove the bad faith in which Xue took the actions, and he did them before his design patent in suit was declared invalid; hence, the invalidation decision had no retroactive effect on them.” By contrast, the ruling made by the Nanjing Intermediate People’s Court clearly shows the opposite since the court stated in its first-instance ruling that the provision of Article 47, paragraph two, of the Chinese Patent Law did not apply to this case. The “judgment” and “ruling” mentioned in the provision refer to “patent infringement” judgment and ruling. That is, where a court makes an effective judgment establishing the constitution of an infringement upon substantive hearing a case of patent infringement, the infringement rulings made and enforced do not include the procedural rulings on pre-trial or litigant property preservation or on “pre-trial order for a defendant to immediately cease his act of an accused patent infringement”.

This writer supports the latter analysis, Article 47, paragraph two, of the Chinese Patent Law provides that: “the decision declaring the patent right invalid shall have no retroactive effect on any judgment or ruling of patent infringement which has been pronounced and enforced by the people’s court … ; however, the damages caused to other persons in bad faith on the part of the patentee shall be compensated.” Here the “judgment or ruling of patent infringement which has been pronounced and enforced by the people’s court” only corresponds to substantive judgment and ruling on patent infringement, but does not include procedural judgments or rulings on sealing-up, detention, temporary injunction and property preservation. In other words, in cases for counter-damages, the procedural rulings are not covered in Article 47, paragraph two, of the Chinese Patent Law. ■

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