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## CHINA LAW UPDATE

### LEVELING THE PLAYING FIELD: CHINESE COURTS' PRACTICE OF ANTI-SUIT INJUNCTION IN STANDARD ESSENTIAL PATENT AREA

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LEVELING THE PLAYING FIELD:  
CHINESE COURTS' PRACTICE OF ANTI-SUIT INJUNCTION  
IN STANDARD ESSENTIAL PATENT AREA

Wang Jiaqi

I. INTRODUCTION

The newly emerging practices of Chinese courts issuing anti-suit injunctions (“ASIs”) in SEP disputes, as represented by the two cases (*Huawei v. Conversant*, *Xiaomi v. InterDigital*), have reflected a two-fold nature: on the one hand, progressively embracing of law and economics analysis, and on the other, conservatively sustaining the traditional requirements of international comity and jurisdictional sovereignty. The first fold of “substantial” approach hints at the possibility for creating a pro-implementor forum that rebalances the interest and bargaining power between the patentee and the implementor (thus “leveling the playing field”), contributing to the vitality and efficiency of an IP system consisting of diverse international jurisdictions. In the contrast, the second fold of the “formal” approach only plays a role with lessening significance in this potential new order of international SEP litigation.

This note begins in the second section with an overview of the two ASI-issuing decisions, *Huawei v. Conversant* and *Xiaomi v. InterDigital*. In the third section, this note categorizes and compares the two bi-existing approaches reflected in these Chinese courts’ decisions, the first being the substantial one (reflected in the “overlapping subject matter” element and the recognition of jurisdiction) and the second being the formal one (reflected in the “first-to-sue” requirement and the judicial sovereignty argument). The fourth section reviews the arguments regarding patent holders’ inherent bargaining privilege as granted by injunction orders, applies these arguments to the SEP context, and argues for the emergence of more pro-implementor judicial forums to rebalance the asymmetrical negotiation power. It is then evaluated that the “substantial” approach could better suit such need for pro-implementor forums and shall play an important role in future international SEP litigations, negotiations, and judicial innovation.

II. OVERVIEW OF TWO CASES

A. *Huawei v. Conversant* (2019)

1. Overview of Timeline. Nanjing Intermediate People’s Court issued the first ASI granted by a Chinese court<sup>1</sup> in the SEP area. There, on January 5,

<sup>1</sup> Previously, the only practices similar to ASIs were the enforcement order in accordance with Haishi Susong Tebie Chengxu Fa (海事诉讼特别程序法) [Maritime Procedure Law] (promulgated by the Standing Comm. Nat’l People’s Cong., December 25, 1999, effective July. 1, 2000), art. 51 (Chinalawinfo).

2018, Huawei Technologies Co., Ltd. (“Huawei”), a leading Chinese enterprise developing, producing, and distributing mobile terminals including cellphones, sued Conversant Intellectual Property Management Inc. (“Conversant”), a global non-practicing entity possessing a portfolio of patents.

Huawei sought a declaration of its non-infringement of Conversant’s Chinese patents concerning wireless telephony technology standards, and a determination of the FRAND<sup>2</sup> royalty rates of such patents. Three months later, on April 20, 2018, before the Dusseldorf District Court in Germany, Conversant sought an injunction against Huawei for the latter’s infringement on the same European SEPs. The Nanjing judgment was made on September 16, 2019, two months before Conversant appealed to the Supreme People’s Court (“SPC”) in China. On August 27, 2020, the Dusseldorf judgment was made, ordering Huawei to stop infringement.

One day later, the SPC granted an ASI in favor of Huawei, prohibiting Conversant from enforcing the German judgment until the SPC handed down its final decision on this case. Failure to comply with the ASI would result in a penalty.<sup>3</sup> Conversant’s application for reconsideration was rejected on September 11, 2020.<sup>4</sup> On November 2<sup>nd</sup>, 2020, Huawei withdrew its case.<sup>5</sup>

2. The First Decision: (2019) Zui Gao Fa Zhi Min Zhong 732/733/734 (I). In this decision, SPC granted its ASI against Conversant, prohibiting the enforcement of the Dusseldorf first-instance judgment until the SPC’s final decision is made.

The SPC comprehensively considered five factors to determine the issuance of the ASI: impact of the Dusseldorf judgment on Chinese lawsuit, the necessity for an anti-suit injunction, balance of interests between two parties, public interests, and the doctrine of international comity. It concluded that the subjects of these two sets of lawsuits were substantially the same, and the enforcement of the Dusseldorf judgment would deprive the SPC’s upcoming judgment of any meaning, forcing Huawei to irreparably lose market shares unless the excessive price was accepted. Meanwhile, Conversant only had to wait for the release of the SPC decision before applying for enforcing the Dusseldorf first-

<sup>2</sup> Abbreviation for “Friend, Reasonable, And Non-Discriminatory”.

<sup>3</sup> Conversant Wireless Licensing Co. Ltd. Huawei Technologies Co. Ltd. Queran Buqinhai Zhuanliquan Jiufen Ershen Minshi Caidingshu zhi Yi (康文森无线许可有限公司、华为技术有限公司确认不侵害专利权纠纷二审民事裁定书之一) [Cowenson Wireless Licensing Co., Ltd. v. Huawei Technologies Co., Ltd. (I)], (2019) Zui Gao Fa Zhi Min Zhong 732/733/734 (I) (Sup. People’s Ct. 2020) (Chinalawinfo) (“Huawei (I)”).

<sup>4</sup> Conversant Wireless Licensing Co. Ltd. Huawei Technologies Co. Ltd. Queran Buqinhai Zhuanliquan Jiufen Ershen Minshi Caidingshu zhi Er (康文森无线许可有限公司、华为技术有限公司确认不侵害专利权纠纷二审民事裁定书之二) [Cowenson Wireless Licensing Co., Ltd. v. Huawei Technologies Co., Ltd. (II)], (2019) Zui Gao Fa zhi Min Zhong 732/733/734 (II) (Sup. People’s Ct. 2020) (Chinalawinfo).

<sup>5</sup> Conversant Wireless Licensing Co. Ltd. Huawei Technologies Co. Ltd. Queran Buqinhai Zhuanliquan Jiufen Ershen Minshi Caidingshu zhi San (康文森无线许可有限公司、华为技术有限公司确认不侵害专利权纠纷二审民事裁定书之三) [Cowenson Wireless Licensing Co., Ltd. v. Huawei Technologies Co., Ltd. (III)], (2019) Zui Gao Fa Zhi Min Zhong 732/733/734 (III) (Sup. People’s Ct. 2020) (Chinalawinfo).

instance judgment – the subsequent proceedings were left undisturbed. Additionally, any alleged loss of Conversant's royalties could be compensated economically. No public interests would be endangered by this ASI. Lastly, regarding comity, the Chinese lawsuits were brought first; moreover, the ASI only served for suspending the application by Conversant, yet spelled no derogation for German courts' judicial power.

This ASI was accompanied by a fine of 1,000,000 RMB each day of incompliance.

3. The Second Decision: (2019) Zui Gao Fa Zhi Min Zhong 732/733/734 (II). In this decision, SPC rejected Conversant's application for reconsidering the previous ASI. Aside from reiterating the aforementioned reasons, it responded to several arguments from Conversant:

First, the ASI does not mean to review the contents or deny the effect of the Dusseldorf judgment, but only restricted the individual interests of Conversant. Conversant itself once applied for a similar ASI in a foreign court, contradicting its windswept criticism of ASIs.

Second, the Dusseldorf court's determination of infringement depended upon recognizing the SEPs' royalty rates as FRAND. Though the subject matter – Chinese and European patents – do not precisely overlap, enforcement of the Dusseldorf judgment would compel Huawei into a settlement with the excessive royalty rate, substantially rendering SPC's future judgment meaningless.

Thirdly, absent the ASI, Huawei would suffer from destruction of property, loss of commercial opportunities and economic interests, deprivation of litigation interests, in China as well as in Germany. Proof of possibility of such suffering satisfied the "preponderance of evidence" standard and tallied with common commercial experience. Such damage exceeded the € 2,400,000 guarantee Conversant provided.

Lastly, the ¥1,000,000-per-day fine was justified for each day of non-performance (i.e. after applying for enforcing the Dusseldorf judgment and before withdrawing) would be seen as a deliberate "new" violation of the anti-suit order. SPC also mentioned that the amount of penalty conformed to the large scale of potential damage.

### *B. Xiaomi v. InterDigital (2020)*

1. Overview of Timeline. This case began with Chinese company Xiaomi suing against Indian company InterDigital Inc. before Wuhan Intermediate People's Court in China, requesting a re-determination of the global royalty rates of SEPs owned by InterDigital. Nature of the two parties resemble Huawei and Conversant: Xiaomi as the implementor profits through R&D, manufacture, and distribution of mobile products, InterDigital is a non-practicing entity, and the patents stand in the way of meeting current wireless telephony standards like 3G, 4G, 5G, 802.11 or HEVC.

On June 9, 2020, after 3 years of fruitless o and negotiation, Xiaomi filed the case. This is just one and a half months ahead of InterDigital's lawsuit accusing infringement of its Indian patents on July 29 before the High Court of Delhi at New Delhi, India. The Xiaomi cases developed at a rather fast pace: On September 23<sup>rd</sup>, Wuhan issued the ASI for Xiaomi, ordering InterDigital not to raise any FRAND suit or apply for enforcement of injunction in any country; 12 days later InterDigital requested before the Delhi court an anti-anti-suit injunction of their own and obtained one after another 3 days, which emphasized that Xiaomi was at liberty to pursue its suit before the Wuhan court, yet shall not enforce the anti-suit injunction from China.

Up to now, the two sets of cases still proceed.

2. (2020) E 01 Zhi Min Chu 169 (I). Through this decision, InterDigital was ordered to withdraw from or suspend any application of, or application of enforcement of, a temporary or permanent injunction in any country. InterDigital was also asked to refrain from filing any lawsuit concerning FRAND terms of SEPs at issue in any country. Xiaomi's request of "prohibiting any InterDigital's suit in any form in any country" was rejected.

The Wuhan judgment mentioned the bad faith of InterDigital who knowingly started the Indian lawsuit following the Chinese one. Like in Huawei, the substantial impact of the enforcement of a potential Indian injunction on Xiaomi was emphasized. Xiaomi would suffer a severe loss of commercial interests in the Indian market, which InterDigital would not face as a non-practicing entity.

### III. AT THE CROSS OF TWO PATHS: A TWO-FOLD ANALYSIS

#### A. *The Test for Issuing ASI*

The first practices of ASIs in China rely on Article 100 ("behavior preservation", or civil lawsuit injunction) of the PRC Civil Procedure Law. Prior to this practice, behavior preservation traditionally served to prevent the defendant from furthering damage or transferring property. In IP law, specific rules are customized to suspend behaviors continuing or attempting infringement of copyright,<sup>6</sup> patent,<sup>7</sup> or trademark right.<sup>8</sup> Interpreted from their wording,<sup>9</sup> such rules are primarily designed from the perspective of

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<sup>6</sup> Zhuzuoquan Fa (著作权法) [Copyright Law] (promulgated by the Standing Comm. Nat'l People's Cong., September 7, 1990, effective June 1, 1991), art. 50 (Chinalawinfo).

<sup>7</sup> Zhuanli Fa (专利法) [Patent Law] (promulgated by the Standing Comm. Nat'l People's Cong., March 12, 1984, effective April 1, 1985) art. 66 (Chinalawinfo).

<sup>8</sup> Shangbiao Fa (商标法) [Trademark Law] (promulgated by the Standing Comm. Nat'l People's Cong., August 2, 1982, effective March 1, 1983) art. 65 (Chinalawinfo).

<sup>9</sup> Zuigao Renmin Fayuan Guanyu Shencha Zhishichanquan Jiufen Xingwei Baoquan Anjian Shiyong Falü Ruogan Wenti de Guiding (最高人民法院关于审查知识产权纠纷行为保全案件适用法律若干问题的规定) [Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in

protecting IP rights holders, hence lacking the flexibility to encompass cases where the interest of implementors might be endangered by the vexatious enforcement of IP rights. Thus, courts issuing ASIs have resorted to the general behavior preservation rules.

The traditional 4-factor test of behavior preservation in the IP context involves the validity of protected rights, irreparable harm of not issuing the injunction, the balance of interests between two parties, and public interests.<sup>10</sup> Courts' determination of ASI borrows the last three factors, replacing the "validity of right" factor with the "impact of the foreign judgment on Chinese judgment". As reflected in the aforementioned two cases, this test is by nature pro-implementor for its recognition of "irreparable losses" that the implementor may face once the foreign temporary injunction is enforced, and also the tendency of giving less weight to the lost interests suffered by patent holders (especially non-practicing entities). This comparison could be spotted throughout the analysis of all four factors.

Additionally, *Huawei* includes one additional factor "international comity". This doctrine, originally developed in traditional international law and common law, encourages courts of one certain government to voluntarily give up their jurisdiction so as not to cause prejudice to the power or rights of other governments.<sup>11</sup> *Huawei* analyzes it taking into account the time order of lawsuits, interference into foreign jurisdictions, etc. While Chinese law does not explicitly embrace such doctrine, a domestic version of it could be found in Article 35 of PRC Civil Procedure Law, stipulating that cases within the jurisdiction of multiple courts, shall be allocated to the court where the lawsuit is first filed. Consideration of convenience is also reflected in the Judicial Interpretation of Civil Procedure Law.<sup>12</sup>

Meanwhile, *Xiaomi* discusses the intent of the party raising the foreign lawsuit. It shall be noted that merely filing the foreign case may not constitute "bad faith"; however, *Xiaomi* indicated that willfully ignoring the Chinese litigation process (e.g. deliberately refusing to sign the receipt of complaint) should suffice.<sup>13</sup>

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Cases Involving the Review of Act Preservation in Intellectual Property Disputes] (promulgated by Sup. People's Ct. November 26, 2018, effective January 1, 2019) art. 3, 6, 7, 10 (Chinalawinfo).

<sup>10</sup> *Id.*, art. 7.

<sup>11</sup> DAVID MACLEAN, *THE CONFLICT OF LAWS*, 533 (Sweet & Maxwell, 5th ed., 2000).

<sup>12</sup> Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Gongheguo Minshi Susong Fa Xhixing Chengxu Ruogan Wenti de Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》执行程序若干问题的解释) [Interpretation of the Supreme People's Court of Several Issues concerning the Enforcement Procedures in the Application of the Civil Procedure Law of the People's Republic of China] (promulgated by Sup. People's Ct. September 8, 2008, effective December 23, 2020) art. 532 (Chinalawinfo).

<sup>13</sup> *Xiaomi Xingwei Baoquan Shenqing Minshi Caiding Shu* (小米行为保全申请民事裁定书) [Decision on Xiaomi's Application for Behavior Preservation, (2020) E 01 Zhi Min Chu 169 (I) (Wuhan Intermediate People's Ct. 2020) (Chinalawinfo)].

*B. Direction 1: “Substantial” Approach*

From this one perspective of interpreting Chinese practices of SEP ASIs, they are tinted with the light of practicality. The term “substantially” appears repeatedly in the decisions. Tests and rules are applied flexibly, beyond their traditional scope, in a result-oriented approach.

1. Determination of “Overlapping subject matter”. The Wuhan court in *Xiaomi* was requested to set FRAND terms for the SEPs around the globe. It seems therefore justified that InterDigital’s Indian SEP royalty lawsuit constituted an “attempted exclusion of Chinese jurisdiction”. However, the interpretation of *Huawei* demands more flexibility. The SEPs respectively held in China and Germany, despite their focus on the same technical solutions, are rights independent of and distinguished from each other, their royalty rates not necessarily uniform. Nevertheless, when illuminating that the enforcement of the foreign judgment would seriously impact the ongoing litigation in China, the SPC emphasizes that the subject matters of the two parallel disputes “substantially” overlap in *Huawei*.

It is reasoned that the enforcement of the Dusseldorf judgment would force Huawei to accept the royalty rates offered by Conversant, both in Germany and China. The temporary injunction prohibiting producing and selling the infringing products in one country, and the irreparable harm to the implementor resulting therein, would equip the SEP right holder with a leveraging power into the negotiation and settlement process in other countries, detrimentally affecting the SEP implementor’s incentive of continuing the litigation. This is consistent with the common commercial practice that outcomes of (or, even temporary stages in) separate SEP litigations raised in only a couple of countries would subsequently be the basis of negotiations settling down royalty fees for all relevant regions and states.<sup>14</sup> Therefore, the enforcement of one theoretically parallel dispute could, by disproportionately empowering the patentee, call an early end to this litigation process and “substantially” disturb each other.

SPC also mentioned that the acceptance of the licensing terms decided by the Dusseldorf court would also endanger Huawei’s litigation interests of the Chinese lawsuit. Formerly settled FRAND terms, between the same parties regarding the foreign patent from the same family, would be significant references in calculating FRAND terms by following courts from different jurisdictions. Thus, it is crucial that the former FRAND terms are FRAND – that is, recognized in the court’s final decision. However, the enforcement of a temporary injunction would force the implementor to settle with the decided terms before attempting to appeal, and the remedies which the implementor

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<sup>14</sup> Zhong Chun (仲春), *Biaozhun Biyao Zhuanli Quanguo Feilü Caipan Sibian* (标准必要专利全球费率裁判思辨) [Thoughts on Standard Essential Patent Global Rates Determination] 10 ZHISHI CHANQUAN (知识产权) [INTELLECTUAL PROPERTY] 13, 16 (2020).

may have been entitled to in China's FRAND determination would be either (1) surrendered through a forced withdrawal or (2) vacated through the distortion in referencing prices. Consequently, a "substantial" disturbance is established.

2. Recognizing Jurisdiction: Reconciliation with Order 157. In its application for reconsidering the ASI in *Huawei*, one of Conversant's arguments was that the decision contradicted with Order 157 previously issued by SPC in *ZTE v. Conversant*.<sup>15</sup> In that case, ZTE initiated SEP non-infringement and FRAND suit in China *after* Conversant's infringement suit in London concerning global rates of SEPs. SPC rejected Conversant's objection to its jurisdiction and observed, relying on Articles 532 and 533 of the Judicial Interpretation of the PRC Civil Procedure Law, that the ongoing foreign lawsuit, whether with an overlapping subject matter or without, did not bar it from exercising jurisdiction. Turned down both ways in two cases, ZTE argued that the SPC contradicted itself. SPC tried to reconcile the two decisions by clarifying that Order 157 did not touch upon the matter of "disturbing effect on foreign judgments", but only the existence of jurisdiction.

This reasoning implies that "jurisdiction" and "enforcement of a given judgment" are seen as distinct concepts from SPC's perspective: While a court's *jurisdiction* is not necessarily negated even assuming an overlapping between its subject matter of lawsuit with the prior foreign lawsuit, the materially disturbing effect of one lawsuit on the proceeding of another could nevertheless tip the court's scale towards issuing ASIs to bar the foreign *enforcement*. However, an exercise of jurisdiction is futile in substance without its resulting judgment being enforced, especially where an interlocutory injunction is involved. Therefore, SPC managed to substitute the original broad and embracing test of jurisdiction with the specific, pro-implementor test highlighting the substantial allocation of interests between two parties.

### C. Direction 2: Formal Approach

Some of the factors considered by Chinese courts when issuing the ASI are, however, more conservative, focusing on the formal aspects and following the path of traditional rules of international comity.

1. First-to-sue. One typical "formal" factor considered is the filing time order between the lawsuits, which was mentioned in both *Huawei* and *Xiaomi*. However, it remains doubtful where this factor leads. The fact that the lawsuit is first filed in one court does not indicate that the court is the most convenient to handle subsequent litigation, or that it would render judgment most efficient

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<sup>15</sup> Conversant Wireless Licensing Co. Ltd. v. ZTE Co., Ltd. Zhuanli Hetong Jiufen Ershen Minshi Caiding Shu (康文森无线许可有限公司、中兴通讯股份有限公司专利合同纠纷二审民事裁定书) [Conversant Wireless Licensing Co., Ltd. v. ZTE Co., Ltd.], (2019) Zui Gao Fa Zhi Min Xia Zhong 157 (Sup. People's Ct. 2020) (Chinalawinfo).



in allocating the interests. It may, on the contrary, accelerate the “race to the court” between the two parties and discourage the negotiation efforts from early stages.

2. Judicial Sovereignty. Another example is the emphasis on the “non-interference of the foreign judicial sovereignty”. Despite its unshakable status in public international law, the concept of an abstract, formal “sovereignty” in cases involving SEP ASIs is of less substantial significance. The ASI is said to be directed at the individual, not the foreign court whose right to decide its own matters is fully respected and not intruded, in a broad sense. However, the specific party receiving the ASI is nevertheless faced with the penalty from the anti-suit-injunction-issuing country, refrained from applying for enforcement.<sup>16</sup> With this impact being specific and material in each case, to stress that ASIs did not “directly” interfere into the jurisdiction of another country sounds pleasant yet empty.

#### IV. CREATING A PRO-IMPLEMENTOR FORUM

##### A. *Combating the Inherent Privilege for Patentees*

1. Injunction in the Traditional Patent Context. In traditional patent lawsuits, the existence of an enforceable injunction (destroying infringing products, prohibiting further infringement) has been recognized as providing the patentee with great advantages. Patentees owning a small technical component of downstream products can grasp the throat of a large company.<sup>17</sup> Holdup situations create overcharges during negotiations and settlements: the threat of such injunction drives the agreed patent royalty to systematically exceed its value contributed to the downstream product, enabling the right holder to capture an unequal share in the “gains from trade” of this mutually advantageous transaction.<sup>18</sup>

##### 2. SEP with Injunction: Adding Fuel to the Fire.

(i) The erratic essentiality. When applying the analysis to the context of SEPs, the unequal allocation of interests only deteriorates.

One of the most blamed factors in the unfairness and deadweight losses incurred by patent injunctions is the obscurity of certain patents asserted by patent asserting entities (“PAEs”). That the infringed patent usually does not emerge into the knowledge of the implementor, whether by the subsequent

<sup>16</sup> Daniel Tan, *Anti-suit Injunctions and the Vexing Problem of Comity*, 45 VA. J. INT’L L. 283, 291 (2005).

<sup>17</sup> Michael Meurer, James Bessen & Jennifer Ford, *The Private and Social Costs of Patent Trolls*, 34 REGULATION 26 (2012).

<sup>18</sup> See Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991 (2007); Robert Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUMBIA L. REV. 2655 (1994), etc.

modification or deliberate concealment by the patent holder, until the products are already designed or produced (“patent ambush”), plays an important role in the conventional analysis of patent holdup and overcharge.<sup>19</sup> However, though SEPs are less “in ambush” with the disclosure obligation mandated by standard-setting organizations (“SSOs”) and relevant legal rules,<sup>20</sup> the overcharging effect is not alleviated but aggravated.

The essence of the patent ambush is to reduce the implementor’s bargaining power by making the patents less possible or convenient to invent/design around,<sup>21</sup> thus capturing the gap between the real value and the *ex post* value of the patent. The name of SEP itself suggests the inevitability of implementing such patents if standard-conforming products are to be produced. Therefore, in SEP cases, even allowing the negotiations to take place *ex ante*, the implementor does not benefit, for the cost of circumventing remains incalculable. This essentiality is to some extent artificially driven high, instead of attributable to the technical contribution by the SEP right holder. The choice of standard is not necessarily linked with the superiority of one certain technology but with a certain degree of arbitrariness involved. Rather, the prominent value of the SEP arises from the standard-setting process itself, and the interoperability and exclusionary effect generated therein.<sup>22</sup> Thus, from a perspective of fair reward and justifiability, the right holder is not by nature entitled to the entirety of such surplus. This scenario echoes the classic analogy proposed by Nozick when challenging the defect of Locke’s labor-value theory: if a person pours his bottle of ketchup into the sea and stirs it well, can he, therefore, claim ownership of the sea?<sup>23</sup>

Moreover, the unpredictability of the outcome of “standard wars” leaves the implementors in no better position than “inadvertent copiers”, especially those who originally hold competitive patents (which are defeated in the standard war and left unadopted). In the traditional context, prior user rights are reserved for such independent former users to re-adjust the excessive profit-to-cost ratios for the patent holder.<sup>24</sup> It has also been argued that where the information cost for detecting the accurate boundary of a patent claim is too

<sup>19</sup> *Supra* 17; *id.*

<sup>20</sup> See, for example, Zuigao Renmin Fayuan Guanyu Shenli Qinfan Zhuanliquan Jiufen Anjian Yingyong Falü Ruogan Wenti de Jieshi (最高人民法院关于审理侵犯专利权纠纷案件应用法律若干问题的解释(二)) [Interpretation (II) of the Supreme People’s Court on Several Issues concerning the Application of Law in the Trial of Cases involving Patent Right Infringement Disputes] (promulgated by Sup. People’s Ct. January 25, 2016, effective December 23, 2020), art. 24(2) (Chinalawinfo).

<sup>21</sup> John L. Turner, *Input Complementarity, Patent Trolls and Unproductive Entrepreneurship*, available at <https://ssrn.com/abstract=1916798> or <http://dx.doi.org/10.2139/ssrn.1916798> (2017); Markus Reitzig, Joachim Henkel, Christopher Heath, *On sharks, trolls, and their patent prey — Unrealistic damage awards and firms’ strategies of “being infringed”*, 36 RESEARCH POLY 134 (2007).

<sup>22</sup> Richard H. Stern, *Who Should Own the Benefits of Standardization?*, 19 MINN. J. L. 108 (2018).

<sup>23</sup> Robert Nozick, *Wu Zhengfu, Guojia yu Wutobang* (无政府，国家与乌托邦) [Anarchy, State and Utopia] 209 (2008).

<sup>24</sup> Carl Shapiro, *Prior User Rights*, 96 INTELLECTUAL PROPERTY, LITIGATION, AND INNOVATION 92, 95 (2006).

high, injunctions shall be exempted (operated through a “good-faith user defense”).<sup>25</sup> “Advertent copiers” or “good-faith users”, in their very broad sense, could refer to parties that yield away part of their individual interests so that a public mechanism generating positive externalities could exist. Patent systems offer rewards to compensate for their compromise. In the case of SEPs, the sacrifice made by implementors (including competitive patent right holders) is their becoming prospective licensees in a dangerously monopolized market; the overall efficient outcome is the network effect and interoperability among the whole industry. To subject infringing implementors to a more severe penalty like injunctions would therefore worsen the “standard war” as an all-or-nothing match, and inefficiently increasing the costs for innovation (with diverse approaches and ends) and investment (in downstream commercialization and production).

(ii) Rule of property-etic liability. The judicial step-in of determining FRAND terms concerning SEPs also does not help.

Disregarding transaction costs, the difference between the injunctive relief (property rule) and the damage remedy (liability rule) is that in the latter scenario, the distribution of the “gains from trade” (or, the loss from a collision) is more independent of the relative bargaining powers of the two parties.<sup>26</sup> Analogous to the compulsory licensing rules for ordinary patents, determination of FRAND terms for SEPs could be recognized as an exception of liability rule to the general property rule employed in the IP realm.

However, the specter of injunction still haunts over this liability rule. First, seeking court-decided royalty rates involves much uncertainty and difficulty, which drives both parties more eager to settle things down on their own. The process of calculation has great room for discretion. For example, when deciding the number of the patents of the same family, the court in *Unwired Planet v. Huawei* simply used the average number of the respective data provided by each side, an “almost cavalier” method.<sup>27</sup> Results also show depart greatly from each other: the rates decided by Dusseldorf are 18.3 times the rates decided by Nanjing.<sup>28</sup> Such uncertainties and arbitrariness resulted not from, as indicated in *Xiaomi* judgment in India, the malicious speculation towards the Indian court’s intention or capability;<sup>29</sup> rather, they arise from the inherent uncertainties in FRAND terms determinations. When Judge Birss stated that “[t]he only coercion in that case would be to enter into a licence on FRAND

<sup>25</sup> Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L. REV. 1742, 1818 (2007).

<sup>26</sup> A. Mitchell Polinsky, *Resolving Nuisance Disputes: the Simple Economics of Injunctive and Damage Remedies*, 32 STANFORD L. REV. 1075 (1980).

<sup>27</sup> *Unwired Planet International Ltd. v. Huawei Technologies Co. Ltd.*, [2017] EWHC 711 (Pat).

<sup>28</sup> *Huawei (I)*.

<sup>29</sup> *InterDigital Technology Corporation & Ors. V. Xiaomi Corporation & Ors.*, I.A. 8772/2020 in CS (COMM)295/2020, 43 (“the defendants cannot seek to obtain a pre-emptive protection, against a hypothetical arbitrary fixation of provisional FRAND rates, by this Court”).

terms”,<sup>30</sup> granting the injunction for the patent holder Unwired Planet, it may not have come across the Judge’s mind that a license on FRAND terms with unpredictable terms may nevertheless constitute a part of the coercion towards the infringer/implementor – without strengthening his bargaining power, it helps highlight the importance and indispensability of the negotiation periods where he lives at the mercy of the patent owner.

Second, even court-made decisions are not rid of the impact of negotiation. “Reasonable royalties” are determined in courts’ efforts to mimic the market; their reliance on the common industrial license rates, which are decided under the shadow of threats of injunction and holdup, thus reflects a “degree of circularity”.<sup>31</sup> Specifically, in the SEP context, courts commonly calculate the terms based on top-down or comparable licensing agreement approaches. In comparing relevant licenses, agreements made after the adoption of the standard were frequently referred to.<sup>32</sup> Despite certain US courts’ emphasis on rebuilding an *ex ante* negotiation between parties prior to the adoption of the standard,<sup>33</sup> this re-construction is difficult. For example, the calculation of the accurate incremental value of the patent over the next-best alternative is recognized as “hard to implement”, lacking “real world applicability”.<sup>34</sup> Meanwhile, in the top-down calculation, the determination of a benchmark royalty rate sometimes has to resort to self-declarations within the industry.<sup>35</sup>

(iii) Intense participation of NPEs. SEPs particularly attract PAEs.<sup>36</sup> Only 28% of the patentees in wireless technology patent lawsuits, which constitute the largest proportion of SEP assertion events, are practicing manufacturers.<sup>37</sup> The disparity of bargaining power between the two parties is thus widened. The overwhelmingly threatening weapons of the patentee – the trumping injunction

<sup>30</sup> *Unwired Planet International Ltd. v. Huawei Technologies Co. Ltd.*, [2017] EWHC 711 (Pat), para. 167.

<sup>31</sup> *Supra* 18, Lemley & Shapiro.

<sup>32</sup> *Unwired Planet International Ltd. v. Huawei Technologies Co. Ltd.*, [2017] EWHC 711 (Pat).

<sup>33</sup> *Apple v. Motorola*, 869 F.Supp.2d 901, 913 (2012) (“There is another decisive objection to Motorola’s damages claim. The proper method of computing a FRAND royalty starts with what the cost to the licensee would have been of obtaining, just before the patented invention was declared essential to compliance with the industry standard, a license for the function performed by the patent. That cost would be a measure of the value of the patent qua patent. But once a patent becomes essential to a standard, the patentee’s bargaining power surges because a prospective licensee has no alternative to licensing the patent; he is at the patentee’s mercy. The purpose of the FRAND requirements, the validity of which Motorola doesn’t question, is to confine the patentee’s royalty demand to the value conferred by the patent itself as distinct from the additional value — the hold-up value — conferred by the patent’s being designated as standard-essential.”; *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1325 (Fed. Cir. 2009), “as best as possible, to recreate the ex ante licensing negotiation scenario and to describe the resulting agreement.”).

<sup>34</sup> *Microsoft v. Motorola*, Case No.C10-1823JLR, para. 79.

<sup>35</sup> *TCL Communications v. Ericsson*, C.A. No. 14-CV-341 (C.D. Cal. 2017).

<sup>36</sup> Jorge L. Contreras, *Assertion of Standards-Essential Patents by Non-Practicing Entities*, PATENT ASSERTION ENTITIES AND COMPETITION POLICY 5 (2016).

<sup>37</sup> Federal Trade Commission, *Patent Assertion Entity Activity: An FTC Study*, available at <https://www.ftc.gov/reports/patent-assertion-entity-activity-ftc-study>, p. 106.

accompanied with the uncertain FRAND terms, may subject the implementor to lost commercial opportunities, destruction of products, or following un-FRAND terms around the globe. The cost for assessing and recovering such damages would be prohibitively high.

In the meantime, the patentee could wait. Being the mere holder of a SEP right, he does not face increasing competition (and accordingly the loss of the precious market monopoly time), because (1) he does not practice, and (2) the technology embodied in the SEP is from the very first start intended to be widely applied in the industry, or else the benefits of standardization would be futile. Any losses suffered by the non-practicing right holder remain feasible through an *ex post* calculation as long as the number of sold products and the licensing terms are settled.

### *B. Need for a Pro-Implementor Forum*

1. Rebalancing the Interests between Patentee and (Potential) Licensee. Compared with the injunction-issuing court, the ASI-issuing court plays the role to mitigate the systematic bargaining advantage that might be granted to the SEP right holder during the negotiation process. The existence of penalties and a set of potentially lower FRAND royalty rates, favorable to the implementor, could restore the bargaining positions of the two parties and contribute to a more leveled negotiation process. The postponement of the injunction would win time for fair negotiation between parties.

2. Reconstructing the Global Map of Jurisdiction: A World-wide Buffet. Different courts may adopt different tests for issuing injunctions, determining FRAND terms, or granting ASIs. This results from the inherent diversity of having a variety of courts scattered around the world: judicial forums are inevitably affected by the local preferences for distributing resources prevailing in their region, and the participating role in international transactions played by their state. National protectionism, in the minimum sense, cannot be eradicated. WTO Agreements including TRIPS are designed to leave states breathing room for deciding their own “best” solution instead of a strictly consistent one, only setting a minimum standard for protective scope and strength.<sup>38</sup>

When courts display diverse rules and tendencies in resolving same or closely related disputes, an interaction emerges between the forums to be chosen and the parties seeking litigation (“forum shopping”). On a domestic level, the attraction to one particular side of litigants (“forum selling”), whether intentional or not, has been accused of encouraging a “race to the bottom” concerning biased judgments and inconsistencies across the country.<sup>39</sup> However, in a global sense, and especially in the SEP context, such competition

<sup>38</sup> John F. Duffy, *Harmony and Diversity in Global Patent Law*, 17 BERK. TECH. L. J. 685, 704-706 (2002).

<sup>39</sup> Daniel Klerman, Greg Reilly, *Forum Selling: Where to file your patent case*, 89 S. CAL. L. REV. 241 (2016).

between courts has its value. Consistency is not the ultimate goal in international law – “uniformity has its costs.”<sup>40</sup> Instead, inter-jurisdictional competition contributes to check and balance and breeds innovation of judicial employments.<sup>41</sup> The evolving pro-implementor and pro-patentee forums may, through fronting and balancing each other, combine to create a new SEP dispute resolution world map thriving with vitality. Taking into account the ceiling and the ground of the royalty rates previously decided, negotiations could proceed in a leveled playfield.

One indication of this trend beginning to surface may be the *Samsung v. Ericsson* case, where Samsung as the implementor of Ericsson’s SEPs filed a lawsuit in Wuhan, China, and obtained an ASI on December 25, 2020.<sup>42</sup> The Chinese substantial approach of determining ASIs has its distinct features as to functioning as a relatively pro-implementor forum, which would be elaborated below.

3. Re-evaluating China’s Two-fold Approach. As discussed in previous sections, Chinese courts’ determination of issuing ASIs could be separated into two-fold approaches: the substantial one and the formal one.

The substantial approach can offset the patentee’s advantages for it captures the irreparable nature of the damage suffered by the implementor once an injunction is issued. Using the language “...substantially disturbance of this Court’s proceedings”, it circumvents the conceptual barriers of “first-to-sue” or “overlapping subject matter”, among others, as required by the formal approach, and acknowledges the potential danger posed by the injunction towards the implementor. It shall be specifically mentioned that in evaluating the factor “balance of interests between the two parties”, Chinese courts’ attitude, favoring the practicing implementor, directly contrasts the Delhi judgment, which emphasizes that an ASI would “completely forecloses the plaintiff’s right to agitate the issue of infringement of the suit patents”, leaving InterDigital “with no remedy to restrain infringement of the suit patents, in the interregnum”. As analyzed above, losing the “interregnum” affects the implementor more than it does the non-practicing patentee. Granting the breathing time to the implementor, the Chinese substantial approach, therefore, manages to rebalance the bargaining positions of the two parties.

The formal approach, however, is less meaningful, if not detrimental, in reaching the fairest and efficient determination of royalty fees. Unlike suggested by certain articles calling for complete elimination of diversity between foreign courts,<sup>43</sup> the requirements of “dispositive”, “uniformity” and

<sup>40</sup> *Supra* 38, at 686.

<sup>41</sup> *Id.*, at 720.

<sup>42</sup> News/other sources (since official document is not yet released), for example: <https://casetext.com/case/ericsson-inc-v-samsung-elecs-co>.

<sup>43</sup> Eli Greenbaum, *No Forum to Rule Them All: Comity and Conflict in Transnational Frand Disputes*, 94 Wash. L. REV. 1085 (2019).

“economizing the judicial costs” between domestic courts are not the most desired value in inter-jurisdictional litigations on an international level. Instead, the “inconsistency” between judgments may promote fair negotiations. The traditional elements including, for example, “first to sue”, do not necessarily affect the restoration of bargaining power or the re-distribution of interests between parties, and should be abandoned or allocated with less weight in later judicial decisions.

## V. CONCLUSION

After reviewing and analyzing the recent Chinese ASI-issuing practices, this note recognizes the “substantial approach” reflected in such cases as a chance to re-balance the global SEP litigation and negotiation process. This note seeks to provide a Chinese perspective of viewing international patent disputes, as well as the international IP system, from a diverse and dynamic angle. It is by no means within the author’s intent to argue for the “incomparable” advantages of the Chinese system; this note only attempts to prove multijurisdictional lawsuits could offset the impact of one another and press the parties to negotiate on level ground, and the relatively pro-implementor approach as exercised by Chinese courts, among this diverse world-wide buffet, may also deserve a plate of its own.

Further discussions may be focused on (i) the more detailed differences between an anti-enforcement injunction and an ASI; and (ii) the existence of anti-anti-suit injunctions (for example the one granted by the Delhi court), and whether the threatening requirements and penalties imposed by different courts could drive the parties to reach agreement *ex ante* for the sake of economy.