

Identification and Regulation of Abuses of International Interim Injunction in Intellectual Property

—Empirical Analysis Based on Procedural Sanctions Theory

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ABSTRACT

With the wave of new technology revolution sweeping across the world, the institution of the interim injunction in intellectual property (IP) litigation has increasingly become a significant tool for conservative countries to hijack and restrict technology of emerging countries. Furthermore, the situation where the abuse of injunction in IP used by offshore subjects which undermined the national security and the interests of development has become normalized. There are three dimensions to interpret such procedural alienation and abuse from Doctrine of Law, Economics of Law and Sociology of Law, resulting the dilemma of practice in identifying and regulating the abuse which Chinese courts have faced with. In this regard, the existing prohibition procedures should be integrated and optimized based on theory of procedural sanctions. Meanwhile, artificial intelligence and big data technology are fully utilized to build a precise and dynamic identification mechanism for the abuse of the right to apply for injunction, which is complemented by punitive damages, dismissal for failure to exercise discretion, judicial disciplinary and judicial referral systems or other supporting procedural settings to achieve effective regulation of the abuse of injunction in IP.

Keywords: *IP Interim Injunctions, Quasi-substantive proceedings, Obligation of Good Faith, Procedural Sanctions*

1. INTRODUCTION

With new wave of technological revolution marked by bioengineering and network communications etc. sweeping the world, the competition among countries to develop highly sophisticated technologies has become particularly intense driven by the pursuit of scarce resources and economic interests, which placed greater demands on related system to protect IP. However, concurrently, disadvantages of pursuing individual private interests to achieve public interests has become apparent, with the emergence of such phenomena as litigation injunction abuse, transnational "patent rogues" and "trademark brokers". In 2021, the Central Committee of the Communist Party of China promulgated "Outline for the Construction of a Strong IP Country (2021-2035)"[1] stressing protecting IP is the greatest incentive to improve China's economic competence. Xin jinping, General Secretary of the CPC, also pointed out, "Strictly

protect IP while ensuring both public interest and incentives for innovation as well as improve the IP litigation system for prevention from IP abuse." [1] Therefore, protecting IP is inspiring innovation, and in order to maintain our initiative in international struggle, it is inevitable to explore the construction of a new set of IP litigation system in line with our national conditions.

Nevertheless, in recent years, cross-border IP disputes such as the litigation of the US patent giant Interactive Digital against Xiaomi and the issuance of injunctions in the patent dispute between Convince and Huawei, have caused damage to interests of state-owned assets and hindered Chinese competitive strategy, which has forced us to be vigilant about malicious litigation, abuse of injunction and new forms of technological competition. Therefore, with increasing importance attached to innovation achievements, stringent examination of IP and the promotion of rationalization of protection, it is of great practical significance to identify and regulate the abuse of injunctions in IP abroad. The article will study

and discuss the identification and regulation of more influential abuse of injunction in IP litigation in recent years.

Taking the Huawei v. Convience case involving the application of standard-essential patents as an example, the core issue of the rule is to balance the interests of patent owner and the users of the standard. On the one hand, we should encourage innovation through the protection of patents. On the other hand, it is also urgent to avoid patent hijacking to prevent patent owner from utilizing its dominant position to obtain excessive benefits detrimental to the industry and even consumers. The legislature and the judiciary have been striking a balance difficultly in this area. In addition, the high incidence of disputes over essential patents in communications industry standards has also posed a challenge to standard-setting organizations. It is hoped that standard-setting organizations will take on greater responsibility in the process of standard-setting, pay attention to the efficiency of standard-setting while also taking into account the efficiency of standard enforcement, and balance the interests of standard-essential patent owners and standard users. Therefore, it is necessary to research on the identification and regulation of litigation rights of parties in standard-essential patent injunction cases.

2. THE RATIONALE FOR INJUNCTIVE ABUSE IN IP LITIGATION

2.1. Analysis of the basic concept of abuse of injunctions in IP litigation

Injunctions are divided into permanent and interim or interlocutory injunctions. If the author does not state otherwise here, the discussion here is about interim injunctions without inclusion of the permanent one, i.e. injunctions related to the civil preservation proceedings in civil law with temporary state leave disposition system. With regard to the concept of an injunction, it is generally accepted that the basic concept of an injunction is to stop an infringement of an obligee's rights that is being or is about to be committed in the course of IP litigation in a timely manner.[1] It is generally believed that the People's Court has the power to issue a compulsory order prohibiting or restricting the perpetrator from engaging in certain acts upon the application of the parties, which is also a civil measure provided for in China's IP legislation to meet the requirements of the TRIPS Agreement. And whether the application for a temporary injunction is granted or not should be decided in accordance with the provisions of the Civil Procedure Law on the preservation of property. Hence, the following aspects can be considered in analyzing whether to grant: Firstly, the urgency of the situation; secondly, whether there is a possibility of the right holder winning the case; thirdly, whether the right holder faces

irrecoverable damage; fourthly, the balance of interests of the parties; and fifthly, the impact on the public interest.[2] In contrast, the interlocutory injunction in common law, which is an important equitable interim remedy to ensure that the status quo is maintained, usually referred to as "interim injunction" or "interlocutory injunction", in order to maintain the status quo and prevent irreversible damage to the claimant. China's "Patent Law", TRIPS agreement, etc. is in line with the above-mentioned connotation of the injunction.

2.2. Identifying the basic nature of injunctions in IP litigation

With regard to the nature of the prohibition of conduct protection, the academic community is usually divided into theories of substantive rights and theories of the procedural rights. The substantive rights doctrine holds that, in the mainstream countries and jurisdictions of civil law and common law, domestic substantive law of IP basically provides for the substantive content of a party's right to apply for the preservation of conduct, which is the substantive law's basis for the injunction. Accordingly, Some scholars, especially those expert in law of IP, are of the view that the mode of relief under system of injunction for the preservation of conduct in IP litigation should be understood as belonging to a kind of claim in substantive law. That is to say, the applicant's application to the people's court for an injunction for the preservation of conduct in IP litigation is only a kind of claim against the infringer after a particular type of right of its IP has been infringed. The purpose is to secure or restore the integrity of the right.[3]

Meanwhile, other scholars in civil procedural law, hold different views of this, believing that the basis of a claim for an injunction in IP litigation should be regarded as a procedural right to relief, i.e. a "civil right of action" in the broad sense.[3] The main basis and rationale for this is that the basis of the right to seek injunctions is more commonly found in civil procedure law. Although Chinese laws of trademark, copyright, patent and other parts of IP have principled provisions for the so-called "cessation of infringement of IP rights" system, it is important to examine the source and process of the emergence and development of the system, rather than its mechanical and rigid application. The author holds that, in fact, in the process of formulating the above-mentioned sectoral laws in IP, the main reference were the relevant requirements in the TRIPS Agreement, in order to meet the criteria for China's accession to WTO and to fulfil its commitments. Thus, in the sectoral law, legislators have incorporated relevant institutions in cessation of infringement of IP in TRIPS Agreement, which is the origin of "claim in substantive law" for the injunction in IP in our country.

However, after the addition of the conduct preservation system to China's civil procedure law,

especially as the system has been widely used in various civil litigation disputes, including IP litigation, it is no longer appropriate to understand the right to apply for an injunction in IP litigation as a claim in substantive law. The various norms of the injunction in IP litigation should be scientifically analysed and constructed from the perspective of procedural law, especially the system's improvement of the mechanism for identifying and regulating abusive conduct. It should implement the basic principles of procedural justice and uphold the basic methods and principles of procedural sanctions.

3. ANALYSIS OF THE ESSENCE FOR THE WIDESPREAD ABUSE OF INJUNCTIONS IN IP LITIGATION

The premise of the study on the identification and regulation of such abuse is to deeply analyse the fundamental reasons why injunctions are abused and alienated from different theoretical levels. Only by understanding the underlying causes of abuse can we construct a targeted scientific study on the identification and regulation of IP litigation injunction abuse at both the theoretical and practical levels. The author considers that, such abuse is not simply an object of litigation jurisprudence, but also an economic and social phenomenon based on competition policy. Thus, an understanding of the underlying causes of injunctive abuse should be developed from a doctrinal study at the level of existing institutional norms, while taking into account the research perspectives of the economics of law and the sociology of litigation.

3.1. Disguised connivance to abuse of existing procedures of prohibition

In China's current civil procedure standard system, the procedural law system basis for the system of injunction in IP litigation mainly includes the provisions on conduct preservation in the civil procedure law and from corresponding judicial interpretation formulated by the Supreme People's court.[6] In other words, the civil procedure law and its interpretation belong to the framework and general provisions on the preservation of IP litigation. Based on the principle that special law takes precedence over general law, the current interpretation of conduct preservation is the main institutional support in the trial procedure of injunction in IP litigation. However, from the perspective of legal dogma, it can be found that at present, China's interpretation of conduct preservation only contains 21 articles and the provisions on injunction in IP litigation are careless. There are many non-standard and incomplete institutional loopholes. Although the Supreme Court has also issued several guiding cases of injunction procedures such as conduct preservation, it is far from enough to make up for procedural loopholes. The above loopholes together constitute the fundamental institutional motivation for the alienation of system of

injunction in IP litigation. For example, the definition of "exigent circumstances" and the review factors for the adoption of an injunction are unclear and the provisions on the stability of IP are too narrow, resulting in more space for abuse of rights by applicants for injunctions in IP lawsuits. The current system of IPR injunctions is therefore a direct result of the abuse of injunctions in IP litigation.

3.2. Rational choice based on "cost-benefit" analysis

Any litigation action or strategy undertaken by a participant driven by limited economic rationality is a reasonable act that is measured by a "cost-benefit" analysis and calculated with non-emotional precision to maximize its own interests.[9] According to Posner, the "cost-benefit" analysis is a central element in determining the behaviour of a rational economic person when deciding. From the perspectives of game theory and systems theory, civil litigation, in particular IP litigation, the parties are oppositional, interactive and strategic in nature, and their choice of procedure is the result of a game between the participants in the litigation based on the advantages of information and comparative strength.[8] Accordingly, in the context of civil litigation law, the "cost-benefit" analysis conducted by participants refers to the precise measurement of the amount of costs and benefits in civil litigation activities,[7] hoping to minimize the cost and input of litigation and obtain maximum benefit output through litigation process, including the gains of substantive rights and procedural advantages. Hence the essence of abuse lies in that motivations for abusing exists when benefits from abuse outweigh the cost. Due to the lack of effective procedures to identify and regulate the abuse of injunction, the negative cost of non-compliance of conductor is minimal, much less than the benefit to the abuser. As a rational economic person, a participant in a lawsuit has sufficient reason to take risks.

3.3. Innovative interpretation based on the "broken window effect" theory

The "broken window effect" theory is an important research paradigm in the field of social psychology, first developed by the American scholar Zimbardo based on a sociological study of the causes of high crime rates in some neighbourhoods in his country, the "car experiment".[9] The theory suggests that due to the information asymmetry between the actor and the regulator, the violator acting infringement usually relies on apparently easily accessible external information symbols about the rules to infer the level of sanctions imposed by the regulator,[9] leading to an underestimation of the level of risk of sanctions to which the infringement may be subjected, thus leading to the proliferation and blinding of a particular type of

infringement.[9] In short, the main points of the application about "broken window effect" theory are: firstly, the information asymmetry between the two parties; secondly, the under-judgement of the risk of sanctions; and thirdly, the blindness and proliferation of violations. Although the "broken window effect" theory was originally developed to address the issues of crime governance and the allocation of enforcement resources for law in the "street corner society", it can be applied in the study of procedural violations in modern litigation, particularly in the analysis of the causes of abuse of injunction. The specific logic is as follows: firstly, on the issue of whether to sanction the abuse of the injunction, based on the aforementioned shortcomings of the injunction system, the litigation participants are essentially unable to predict and grasp the scale of the judge's inner freedom, coupled with our injunction system not requiring the judge to disclose the evidence of mind at all times. Therefore, the litigation participants are in a state of information asymmetry on whether to be sanctioned for abuse. Then the above information asymmetry and the prevalence of abusing the injunction lead to prejudgment of participants about the weakness of People's Court to sanction the abuse and the low probability of adverse consequences to be subject to regulation. Finally, due to the mentality about "lawlessness" and the effect of collective unconscious, the abuse of the injunction has become blind and widespread in recent years. This blindness is reflected in the tendency of participants to apply for injunctions, regardless of whether the elements of an injunction are present and the substantive basis for claims of IP. Its proliferation is reflected in the fact that injunctions have spread from occasional individual acts to a widespread problem in litigation. The "broken window effect" causes participants to underestimate the probability of sanctions for injunctive violations, which is an essential reason for the blindness and proliferation.

In summary, injunctive abuse in IP is widespread and normalized for three reasons: first, as discussed above, from the doctrine of civil procedure law, the sloppy and inadequate nature of the current system is the immediate superficial cause of abuse. Secondly, the economics of law clarifies that the essence of abuse lies in the insufficient strength of regulation, limited disciplinary measures and low cost of violation. Finally, the negative "demonstration" effect of individual abuses isn't effectively punished. The imitation effect based on the sociological "broken window effect" or the collective unconscious and underestimation of perpetrators about the strength of the already low ban abuse sanctions, which in turn leads to the blindness and proliferation.

4. IDENTIFICATION AND REGULATION OF ABUSE OF INJUNCTIONS IN IP LITIGATION

(i) Effective identification of abuse of injunctions in IP litigation

The premise of effective prevention and control is to know oneself and its opponent. Only fully understand the common manifestations of the abuse, can we prevent and control it rather than engage in "flooding" type. Otherwise, it will also cause an unwarranted waste of judicial resources and deprive the parties of their legitimate interests, constituting an undue restriction and interference of procedure. In the face of widespread abuse of injunctions in current IP litigation, it is important to start with the identification of abusive conduct and to accurately detect, identify and target various types in order to deal with appropriately.[5] In the author's view, according to the basic concept of procedural sanctions, there are two main ways to effectively identify such conduct, namely, through the identification of abusive subjects and typical patterns of abusive conduct, which will be discussed in detail below:

The first is about the identification of the subject. In IP litigation, the deprivation of litigation rights and reputational chastisement of defaulting executors is an essential way and a typical manifestation of the progressive development of civil preservation and enforcement in modern litigation, from property and personal governance to the so-called "reputational governance".[9] Technology tools such as big data and AI should be used in a comprehensive manner to pre-judge and identify subjects frequently engaging in abusive conduct. In addition, the abuse of injunctions in IP litigation can be understood as a kind of litigation breach of trust through a similar system such as the list of defaulted executors and the establishment of the aforementioned database, which should be dealt with in the context of the actual situation when the court is hearing cases against the aforementioned subjects, and should usually be analyzed and grasped by applying a more prudent standard of judgment. However, it is worth noting that, under the premise of establishing the above list, the above-mentioned IP should not be neglected for the remedies that should be obtained complying with the law. The prior illegal acts and bad faith litigation cannot mean that the actor's subsequent acts are all abusive, namely, we cannot adhere to "presumption of guilt" mode, but should strictly examine whether the various elements of its are true and effective. When the injunction is to be promulgated, it should support it strictly in accordance with the law.

The second is the identification of patterns of common abusive conducts. Some scholars have pointed out that IP, as an emerging regime of right, are designed to protect the social value as well as the wealth generated

by the IP of its owner. In IP litigation, it is no longer the single case that right-holders use legitimate IP to litigate in bad faith. As the abusive conduct is essentially an infringement, it can be identified from the perspective of infringement, i.e. based on the four elements including harmful acts, harmful results, causation and subjective malice.[8] Therefore, the identification of using IP to file malicious lawsuits, which is a substantial infringement, can be done in two main ways:

(i) from the perspective of substantive law, it is possible to determine whether it constitutes a malicious lawsuit; to add provisions on the defence of abuse of infringement of IP litigation; to strengthen articulation and referral mechanisms for judicial protection between administrative organs such as market supervision and People's Court and Procuratorates in the process of enforcing IP. If abuses are found, other authorities should be informed as soon as possible.

(ii) Procedural identification should begin with strengthening the review process of prior authorization for IP, thereby eliminating some instances of abuses by using an unstable base of right.

(iii) Robust regulation of abuses

According to the principle of procedural sanctions, procedural violations should be treated as void. Specifically, the source of legitimacy of procedural sanctions in civil litigation is rooted in the principle of good faith, pursuant to which the theory of procedural sanctions should be developed around the good faith as the imperial clause. From the theoretical basis of procedural sanctions, the theory of should consist of two basic principles: firstly, the improper advantage of litigation obtained by participants due to their violation of legal procedures should be void; secondly, the improper benefit obtained from litigation due to the violation of the good faith should be rejected.[21]

From the above theory, if we aim to achieve effective regulation of abuses, we should work on the issue of invalidation, that is, a certain degree of serious abuses should be treated by invalidation. The above idea should also be the basic concept of value in long-term path for People's Court when managing the abuses. Accordingly, robust regulation of abuses includes two aspects: first, increase the cost of violation and crack down on the abusive use of injunctions to infringe on the legal rights and interests, through fines, detention or even criminal liability. Gradually, rational economic people will not choose to carry out illegal activities by increasing the cost of violations in abuses. Secondly, for serious abuses, a procedural sanction mechanism should be treated void, i.e. for the above-mentioned abuses, the People's Courts should directly apply the system of inadmissibility or discretionary dismissal after discovering and verifying them, in order to strongly regulate and ultimately eliminate them.

5. CONCLUSION

A Chinese Scheme for the Identification and Regulation of Abuse of Injunctions in IP Litigation for New Era.

With the wave of the new technological revolution, the injunction system in IP litigation has increasingly become a tool for compliant countries to hijack and restrict technology from emerging technological power. The abuses conducted by foreign subjects in international parallel litigation to the detriment of China's national security and development interests has become a regular occurrence. The alienation and abuse of injunctive procedures have three aspects: legal doctrine, legal economics and legal sociology, resulting in Chinese courts facing a practical dilemma in identifying and regulating the common and normalized abuse of injunctions in IP litigation. In this regard, the existing injunction procedures should be integrated and optimized on the basis of procedural sanction theory, while AI and big data technology should be fully utilized to build a precise and dynamic identification mechanism for the abuse of the right to apply for injunction. Moreover, it should be complemented by supporting procedural settings such as punitive damages, dismissal by default, judicial discipline and judicial referral system to achieve effective regulation of the abuses.

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