CHINA’S PATENT INFRINGEMENT REMEDIES

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I. INTRODUCTION

The remedies against patent infringement are directly related to the efficiency of patent systems. Fair and sufficient remedies are among the key elements which help establish a successful patent system. The provisions regulating patent laws form the legal basis for arriving at the remedies. Therefore the analysis in this article is based on relevant substantive provisions in Chinese patent law, supplemented by practical observations when necessary.

In this article, the remedies analyzed are damages, injunctions, criminal punishments and costs. Generally speaking, these remedies are obtainable through litigation. However ADR (Alternate Dispute Resolution) and administrative bodies may also be involved in the process for obtaining these remedies.

II. ANALYSIS AND EXAMINATION OF SPECIFIC REMEDIES

A. Damages

China recently amended its Patent Law effective 1 October, 2009. Under previous amendments, there were no national provisions in the Patent Law concerning the calculation of damages. Under the new amendment, the quantum of damages caused by patent infringement is based on the losses suffered by the patent holder or the profits which the infringer has earned through infringement. If it is difficult to determine the losses suffered or the profits earned, the amount may be assessed by reference to an appropriate multiple of the value of the royalties.

The financial loss method is generally used in China to calculate damages when the patented product or the product manufactured by the patented process has been put on the market by the patentee or its licensee on a large scale and its market position has been adversely affected by the infringement of its patent. Damages are generally assessed with reference to the infringer’s total profits when the patented product or the product manufactured by the patented process has not entered the market or has only entered on a small scale and, as a consequence, the product has not achieved a


2 See supra note 1, art. 65.
significant market share to be reduced by the infringement. The royalty method is used when there is insufficient evidence to calculate damages using the other two methods.

Damages can be obtained through general civil procedure in the courts if the plaintiff chooses to litigate. Alternatively, in accordance with the latest amendment of the Patent Law and the local Administrative Authorities for Patent Affairs (AAPA) (i.e. the local Intellectual Property Administration Offices, formerly local Patent Administration Offices), the patent holder may, upon the request of the parties, mediate damage claims for patent infringement. If the mediation fails, the parties may institute judicial proceedings in accordance with the China Civil Procedure Law.³

Damage awards in China for patent infringement are less than in the United States, United Kingdom or other developed countries. As the largest developing country by population, development in the field of patent protection, including the awarding of damages, attracts significant attention from international experts, including the head of the World Intellectual Property Organization (WIPO).⁴

B. Injunctions

In China, according to the new amendment of the Patent Law, both preliminary injunctions and permanent injunctions may be sought by the patent holder.⁵ Before this amendment, Chinese courts granted permanent injunctions after a judgment of infringement was entered. Neither the Patent Law nor the Civil Procedure Law expressly authorizes preliminary injunction, although the courts hearing infringement cases have issued preliminary injunctions citing the Civil Procedure Law, which provides that courts may grant “provisional property remedies” using “other forms permitted by law”. An order to stop patent infringement granted by the authority for patent affairs is also effectively an injunction, if the infringer does not institute proceedings in time before a court. Before the new amendment, the generally accepted opinion among Chinese judges was that preliminary injunctions might be necessary to effectively protect patentee rights, but should be granted cautiously because of the severity of this action. Injunctions can also be granted by the AAPA in China according to the Patent Law.

³ See supra note 1, art. 60.
⁵ See supra note 1, art. 60, 61.
C. Other Remedies

1. Criminal Punishment
The latest amendment of China’s Patent Law states that any person who infringes the patent of another will be prosecuted according to criminal procedure if the circumstances are serious.\(^6\)

2. Costs
In China, costs are difficult to estimate given the propensity for intellectual property owners to rely on administrative channels rather than the courts. However, both channels have fixed costs which are determined according to the property or an account of money in dispute.

In addition, an interesting matter concerning the remedies is whether costs recoverable from the losing party. In China the losing party normally bears the case acceptance fee but otherwise each party typically bears their own legal fees.

III. CONCLUSION

A. Better Remedies are Necessary
The changes that have taken place over the past 200 years, as modern technology has developed and the knowledge-based economy has appeared have been breathtaking. Despite being one of the most important mechanisms to improve technological and economic development, the patent system, especially with respect to remedies, has changed little in the past 200 years. The further development of technology and the economy requires strengthening the patent system. Perfecting China’s system of remedies is essential to running a modern patent system. Without fully developed remedies, China will find it difficult to absorb further investment and the development of key innovations will be stymied. After its entry into the WTO, China strengthened its protection of IP rights greatly. This allowed China to align its policies with international trends, obey international rules, and promote domestic technological and economic development more efficiently.

B. Strengthening Coordination
More research on other countries’ legislation and practices is imperative to coordinate legal systems and build mutual understanding. \(^6\) Visiting scholars, additional training, and

\(^6\) See supra note 1 art. 61.
symposiums are useful methods of achieving this. It will be very helpful if international organizations such as the WIPO, WTO and WCO (World Customs Organization) as well as the EPO provide more opportunities to undertake these activities. When conditions are mature, TRIPS provisions on patent remedies may be considered, so as to strengthen further international coordination and effect national legislation and enforcement more efficiently.

C. Recognizing ADR and Administrative Agencies’ Functions

ADR is increasingly being considered by patentees due to the increasing cost of litigation in some jurisdictions and the increasing uncertainty in others. In addition, police departments are also involved in patent protection when criminal punishments are provided for by national laws. Therefore, when considering remedies from different angles, sufficient attention should be given to ADR, administrative law, and the way in which they supplement litigation.