Study on Anti-Suit Injunction of Standard Essential Patents in International Parallel Litigation

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Abstract: Currently, standard essential patents occupy a central position in the field of communications, and the international parallel litigation and anti-suit injunction issues arising therefrom are one of the key topics of today's research. This study focuses on the root causes of the conflict arising from the antisuit injunction, compares and discusses the judicial practices of the United Kingdom, Germany, and China as well as the systems of each country, and reveals the similarities and differences in the functions and considerations of the anti-suit injunction. The study found that the frequent application of antisuit injunctions exacerbates jurisdictional gaming. The study proposes that a balance should be struck between the protection of intellectual property rights and the judicial sovereignty of each country by improving the uniformity of the standards for the issuance of injunctions and promoting the mechanism of international negotiations and judicial collaboration.

1 INTRODUCTION

With the rapid development of the information technology industry, standard essential patents have become one of the core competitive elements of enterprises. This has led to a series of standard essential patent litigations worldwide, in which anti-suit injunction has become the core issue of controversy in both theoretical and practical circles. In 2020, the Supreme People's Court of the People's Republic of China issued its first interim measures like an injunction in the patent dispute between Conversant and Huawei. The Supreme Court's considerations in the decision consisted of the impact of the provisional enforcement of the extraterritorial judgment on the Chinese litigation, the necessity of the interim measure, the balance of public and private interests, and the principle of international comity. In response to the considerations for anti-suit injunctions, which vary from country to country, U.S. scholars have summarized the considerations for conservatism in U.S. courts as the consistency of domestic and foreign litigation, the feasibility of resolving the foreign issue, the bona fide nature of the applicant, and the balance of international comity and foreign sovereignty (Contreras, 2019). The commonality lies in the fact that the principle of international comity is one of the factors to be considered, whereas the United States courts give discretion to the examiners, and the Chinese courts hold a cautious attitude towards the anti-suit injunction, and this difference leads to the courts of various countries' resistance to the anti-suit injunction and disrupts the international order. In this paper, the theoretical research method and case study method are applied to take the overview of standard essential patent anti-suit injunction as the starting point, compare the examination standards and attitudes of China, Britain, and Germany in the judicial practice of issuing anti-suit injunctions, and discuss the relevant principles of applying anti-suit injunctions, to propose a conflict resolution solution and cross-border collaboration mechanism. This reduces the number of situations in which there is a race to the bottom regarding anti-suit injunctions, safeguards the interests of enterprises, and regulates the international order.

2 LITERATURE REVIEW

Due to the legal nature of the FRAND principle, there is no agreement between the theoretical and practical communities. Issues surrounding jurisdiction over

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license rates. It has been argued that the assertion of jurisdiction by multiple courts has resulted in differences in the outcome of the decisions and has impacted the principle of international comity, with courts competing on a bottom-by-bottom basis and constantly lowering their policies and standards in order to compete for jurisdiction. The scholar builds on this by proposing that national courts in countries or regions should be limited to having jurisdiction only over their locally issued patents, i.e., the principle of territoriality, and that national courts set royalties in accordance with their policy national circumstances (Greenbaum, 2019). Other scholars have argued for the introduction of election clauses in FRAND documents. The FRAND document can be considered a contract, and it is a breach of contract to proceed in a court other than the one chosen for the clause. This move can reduce costs due to injunction litigation (Tsang & Lee, 2019). Other scholars advocate establishing a global FRAND rate arbitration tribunal, arguing that this institution effectively regulates the international order, which evaluates the patent information of the parties and sets the rate corresponding to the value of the patent. It is conducive to reducing the loss of enterprises, reducing the competition between courts, and promoting the parties to the dispute to resolve the dispute in a calm and friendly attitude (Contreras, 2019).

On the issue of how China can improve the system of anti-suit injunctions and anti-anti-suit injunctions, some scholars have suggested that the practice of German courts of countering the injunction of other countries by issuing anti-suit injunctions is a legitimate defense. China should learn from the method of Germany's anti-anti-suit injunctions, improve the interim measures system based on Article 103 of the Civil Procedure Law, introduce the concept of self-defense into the Civil Code, and attach the remedy of temporary injunction, i.e., accessory theory, to Article 72 of the Patent Law, Property Preservation (Zhang, 2023). Other scholars have suggested that the nature of interim measures is an injunction rather than an anti-suit injunction, and if it is based on Article 103 of the Civil Procedure Law of the People's Republic of China, it lacks a solid ability to prove. The scholar advocates introducing the concept of the principle of inconvenience into Article 530 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China on the circumstances under which the plaintiff's suit is rejected by the courts in China, which should be formulated by way of a comparative approach to the rules and should not be too detailed (Song, 2023).

3 OVERVIEW OF STANDARD ESSENTIAL PATENT ANTI-SUIT INJUNCTION AND JUDICIAL PRACTICE

3.1 Overview of Standard Essential Patent Anti-Suit Injunctions

The anti-suit injunction originated in the English courts of equity and dates back as far as the 14th and 15th centuries. Courts of equity have developed remedies based on justice of conscience in order to fill gaps in the remedies of the common courts. An anti-suit injunction is initially used to resolve jurisdictional disputes where the parties have already filed suits in multiple domestic courts. Designed to prevent parties from abusing the litigation process or disrupting the judicial process. In the nineteenth century, the application of the injunction system shifted the scene from issues of domestic jurisdiction to issues of foreign jurisdiction.

Based on their different functions, anti-suit injunctions can be categorized as defensive, offensive, and anti-anti-suit injunctions. Defensive anti-suit injunctions are issued on the condition that there is a possibility that courts in other countries will interfere with domestic litigation, and their characteristics can be examined in terms of counteracting malicious anti-suit injunctions in other countries as well as safeguarding the lawful rights and interests of enterprises and the jurisdiction of the state (Ning & Gong, 2021). An offensive anti-suit injunction applies when a court of a state finds that a foreign court does not have jurisdiction over the action. Some scholars point out that the anti-suit injunction is completely weaponized in the litigation. Referring to OPPO v. Sharp, OPPO did not claim infringement in Chinese courts, and China still determines the jurisdiction of the Shenzhen court to set the global FRAND licensing rate, and the rate is lower than other equivalent rates (Zheng, 2022). Anti-anti-suit injunctions are frequently used in German litigation. Anti-anti-suit injunctions are relatively more peaceful in nature than injunctions and are countermeasures against two conditions: an injunction issued by a foreign court or the possibility of an injunction being issued.

3.2 Judicial Practices and Experiences of Anti-Suit Injunctions for Standard-Essential Patents in and Outside the Nation

3.2.1 UK Court Rules Global License Rates Cooperate with Anti-Suit Injunction Regime

The power of the English courts to grant injunctions is based on section 37 of the English High Court Act 1981 and section 44 of the English Arbitration Act 1996, which empower judges to grant anti-suit injunctions where it is convenient and fair to do so. In addition, when the reality is urgent, the judge, on the basis of the application of the parties, is authorized to issue a decision on the preservation of the act. The dual national and global nature of FRAND license rates was exacerbated by the UK High Court's decision in Unwired Planet v. Huawei to calculate a global license rate, which set a precedent for setting global license rates (Colangelo, 2024). The English court in Optis v Apple brought forward the granting of the injunction until the FRAND trial. Although the defendant argued that the prevailing process was to issue the anti-suit injunction only after the conclusion of the FRAND trial, the court found that the infringement persisted and that the timing of the early issuance of the injunction effectively safeguarded the patent holder's legitimate rights and interests and simplified the court's trial process. And if the implementer is unwilling to accept the license or is examined by the English courts as an unwilling licensee, the courts will simply issue an anti-suit injunction. For the patent holder, the patent holder still has the right to seek an injunction extraterritorially, regardless of whether the license rate is acceptable or not. Thus, the court's practice treats the patentee favorably regardless of whether the implementer accepts the license or not.

3.2.2 German Courts Take Countermeasures to Uphold Jurisdiction

Basis for issuing an anti-suit injunction exists in both the German Constitution and the Civil Code. The cause of anti-suit injunction cases is infringement, and rights other than life, body, health, liberty, and ownership are systematically summarized in Section 823 of the German Civil Code as other rights, and intellectual property rights fall within the category of other rights. Section 227 of the German Civil Code (BGB) defines self-defense as a stopping action taken by a party to protect itself from harm or to reduce harm. Under Article 47 of the Charter of Fundamental Rights of the European Union, individuals have access to justice and remedies when their rights are violated. In 2019, a lawsuit was filed by Continental in the U.S. District Court for the Northern District of California alleging that Nokia's failure to comply with its FRAND obligations constitutes unfair competition and requesting the U.S. court to issue an anti-suit injunction against it. In the same year, Nokia filed a request for an anti-anti-suit injunction in proceedings before the Munich District Court. In contrast to the rejection of anti-suit injunctions in previous cases, this case demonstrates the positive attitude of German courts towards anti-suit injunctions. The Munich District Court issued an anti-injunction order, without hearing the conditions of the hearing, against the injunction order issued by the United States Court of Northern California. German courts have demonstrated to other courts around the world a shift in position from rejecting the ordering of anti-suit injunctions to supporting the use of anti-suit injunctions to safeguard judicial sovereignty as well as the lawful rights and interests of businesses.

3.2.3 Chinese Courts Open to Adjudicating License Rates

Our courts currently issue injunctions on the basis of Article 103 of the Civil Procedure Law of the People's Republic of China, which states that a court in China may, on the application of one party, make a ruling against another party on an act or omission with respect to certain conduct. The first injunction was issued by the Supreme Court of China in Conversant v. Huawei, in which the judge considered five aspects of the case, with the core factor being the likelihood of extraterritorial infringement, and the refinement of the elements could provide a theoretical framework for subsequent related IPR cases (Cui, 2023). The judge set up a penalty system in this case whereby the respondent would be penalized with a per diem fee for failure to act. The Oppo v. Sharp case formalized the authority of Chinese courts to award global licensing rates for standard-essential patents, thus shifting the attitude of Chinese courts towards anti-suit injunctions. Awarding global royalty rates first occurred in the United Kingdom, and judging from past cases in China, Chinese courts were cautious about awarding global royalty rates, but in Oppo v. Sharp, the Chinese court awarded global royalty rates despite repeated appeals by the opposing party. After the verdict of this case was announced, some scholars criticized the Chinese courts for using the anti-suit

injunction as a weapon at the international IPR level, which is very threatening and offensive (Zheng, 2022). Chinese courts have transformed from IPR followers to international IPR rule leaders.

4 DILEMMAS AND CONFLICT RESOLUTION MECHANISMS OF STANDARD ESSENTIAL PATENT ANTI-SUIT INJUNCTION

4.1 The Dilemma of Standard Essential Patent Anti-Suit Injunction

4.1.1 Differences in Issuance Criteria from Country to Country

The conditions under which courts issue anti-suit injunctions or anti-anti-suit injunctions vary from country to country. This paper argues that the relevant behavioral preservation system in the Code of Civil Procedure should be refined rather than reconstructing a new injunction system. It can be dialectically understood that there is a correlation between the formulation of the behavioral preservation system and the meaning of an injunction. The scope of application of the injunction should be strict, provided that there is international parallel litigation and cases with a link to our country are considered for application of the anti-suit injunction (Yuan & Pan, 2024). English law issues anti-suit injunctions in two situations. The first is where the parties have agreed in a contract to choose or not to choose a particular forum, and the existing litigation is in breach of the jurisdictional terms of the contract. The second is where there is duplication of international parallel litigation, which the English courts have found to be harassing and coercive (Cotter, 2021). The act of issuing an anti-anti-suit injunction order by a German court is a counteraction to an anti-suit injunction, and the three conditions that must be met for the issuance of an anti-suit injunction order are reasonable jurisdiction, the existence of the possibility of an injunction order being issued by the foreign court or the issuance of an injunction order, and the filing of a request by the parties for an anti-suit injunction order (Zhang, 2023). Combining the different considerations of the above three countries as well as the relevant judicial practice, we can summarize that the British courts are inclined to safeguard the rights of patent holders, the German courts take countermeasures to safeguard the judicial sovereignty of their own countries, while our country's attitude is more cautious.

4.1.2 Lack of International Collaborative Mechanisms

The current controversy over standard-essential patents shows a tendency towards fragmentation, and there is an urgent need to bring the fragments together (Bonadio & Contardi, 2024). In related infringement disputes, the parties argue about the level of the license rate, the validity of the patent, the existence of infringement, and the right to award a global license rate, among other things. This article further analyzes the reasons for the conflict in the following sections. Patents are territorial in nature, and courts in different regions and countries may adjust the calculation of royalty rates according to their characteristics, and disputes arise between litigants over the level of royalty rates. One of the reasons for inaccurate licensing rates is that courts do not have access to transparent and publicly available patent information. Differences in the validity of patents are due to differences in the standard of review, where the same patent action that is found to be infringed by a court in one country may be held to be the opposite by a court in another country. These cases demonstrate the bias of national courts towards holders and enforcers of patents, which compete to set global license rates. The regions of China, Germany, and the United Kingdom have become a race to the bottom for injunctions, and the possibility exists for India to join the race. The deep-seated reason for this phenomenon is the lack of international collaboration and the lack of a unified patent mutual recognition body, resulting in patents being protected only within a certain geographical area. The emergence of international parallel litigation not only increases the litigation costs of the parties but also reduces the judicial efficiency of the courts.

4.2 Mechanisms for Conflict Resolution and International Collaboration

4.2.1 Harmonization of Standards for the Issuance of Anti-Suit Injunctions

In the process of negotiation between the patent holder and the implementer, an anti-suit injunction will serve to stop the continued infringement by the implementer in the event that the two parties are unable to reach an agreement (Bonadio & Contardi,

2024). By summarizing the considerations that the courts of the above three countries take into account in granting anti-suit injunctions, it is possible to form a more complete set of criteria for granting them. First, the issuance of an anti-suit injunction presupposes the existence of international parallel litigation, i.e., where the same litigants are litigating in more than one district because of the same claim. Secondly, to rationalize the allocation of jurisdiction, the principle of forum inconveniences should be a priority consideration, and the court should examine on its own initiative whether there is a link between the case and its own country and the magnitude of the link that exists, and the court that determines that it is inconvenient to have jurisdiction should suspend the proceedings. The principle of the doctrine of court received first was applied after it, with the first court to be received having the power to hear the case first. Next, the principle of proportionality is introduced to examine the necessity, appropriateness, and least prejudice of issuing an injunction, balancing the interests of the parties by introducing the principle of proportionality (Bonadio & Contardi, 2024). Then, the licensee and the patentee are examined to see whether they are acting in good faith. Patent holdout, where the patent implementer refuses to negotiate, maliciously delays and deliberately lowers the license rate, and patent hold-up, where the patent holder unreasonably raises the license rate, will be regarded as not acting in good faith. Finally, the principle of international community serves as a bottom line, and states should take the issue of comity into account at any point in the proceedings.

4.2.2 Establishment of the Uniform Adjudication FRAND License Rate Authority

An effective measure to solve the lack of international collaboration mechanisms is to actively seek international cooperation. Referring to the Unified Patent Court of Europe (UPC), establish a unified body to adjudicate FRAND license rate. Firstly, it is the role of the patent office to collect, for example, commercial information on patent specifications and technical versions, and to increase openness and transparency so that experts can properly assess whether patents are standardized and essential (Jacob & Nikolic, 2023). Currently, to ensure the continued validity of patents, patent holders are required to pay annual maintenance fees to the Intellectual Property Office and may face the conversion of different currencies. Once the agency is operational, patent holders will only be required to pay a flat annual fee and maintenance fee to the agency. In addition, the agency has the authority to calculate license rates based on a combination of cost analysis and commercial information for patents that have been successfully registered and found to be standard and essential. The agency may calculate a global standard rate or a range for the patent, and different implementers may face different license rates, but the license rates they are required to pay will be within the initially determined range. Finally, one of the agency's responsibilities is to encourage holders and implementers to resolve FRAND license rate disputes through consultation and negotiation. If negotiations between the two are not possible, or if the two parties never reach an agreement, the agency will adjudicate patent disputes in a uniform manner, which is expected to reduce the emergence of international parallel litigation, lower the cost of litigation, and improve fairness and certainty.

5 CONCLUSION

Although anti-suit injunctions are said to be directed only at litigants, there has been a tendency in recent years for States to compete for jurisdiction. This paper adopts the theoretical research method and case study method to compare the judicial practice of various countries, and summarizes that the international comity principle is one of the considerations for the issuance of anti-suit injunction in the disputes of standard essential patents in various countries, and that the British court treats the review standard of anti-suit injunction as more inclined to support the patent holder. In Germany anti-suit injunctions are usually issued with a countervailing effect, emphasizing the examination of the risk of first infringement in a dispute. Chinese courts are oriented towards safeguarding the judicial sovereignty of the State and the legitimate interests of enterprises, and issue anti-suit injunctions on the basis of behavioral preservation. This paper further elaborates on the dilemma of non-uniformity of issuance standards and the lack of an international collaborative mechanism in disputes over anti-suit injunctions. Based on this, this paper proposes the harmonization of the issuance standard of injunction and the setting of FRAND license rate institutions through international collaborative mechanisms. The implementation of this recommendation is expected to improve judicial efficiency, reduce the cost of transnational litigation, balance the interests of both parties to a certain extent, and promote friendly consultation and negotiation between the litigating parties. Future research can

expand the research sample to include the United States, India, and other regions with frequent disputes over standard-essential patents so as to improve the global nature of the research and facilitate the in-depth study of the topic.

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