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# Patent Litigation 2023

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## **China: Trends & Developments**

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## Trends and Developments

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### Patent Litigation in China 2022: Practice and Prospects

The year 2022 is particularly worthy of the spotlight in patent law practice in China. The advancement of a series of leading judicial cases and the implementation of policies crystallise the experience of China's judicial practice and response to the evolving demands of the patent law practice. In terms of judicial practice, several landmark cases have demonstrated China's determination to participate in the rule-making of global IP rights governance and its position to continuously strengthen the deployment of IP protection decisions in various fields. In addition, the automotive industry association released the Guidelines of Standard-Essential Patent (SEP) Licence for the Automotive Industry (2022 edition), providing an outline for SEP licensing negotiations in the automotive industry, a pioneering industry in the technological revolution. As for the administrative regulations, the draft amendment of the Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Exclude or Restrict Competition further regulates and restricts the patent pool entities' operation and regulates the behaviour of an undertaking in the process of standard development and implementation.

This article compiles and analyses the significant events in 2022 in the patent field in China, and the authors provide an interpretation, looking at this extraordinary year.

### Judicial Practice

*Chinese courts: more active and deeper involvement in the development of global IP rights governance rules*

In September 2022, the SPC issued a final ruling on the jurisdictional challenge in the SEP global royalty rate dispute case, OPPO v Nokia, reconfirming the jurisdiction of Chinese courts in adjudicating SEP global royalty rate disputes after a year. The court's reasoning of the ruling in OPPO v Nokia is similar to that in OPPO v Sharp, issued in August 2021, where the Chinese court for the first time confirmed the jurisdiction over SEP global royalty rate disputes of the Chinese court. In the ruling of OPPO v Nokia, the SPC reassured the court's authority to adjudicate the licence conditions on a global scale.

This case was tried at the Chongqing No. 1 Intermediate Court on 27 October 2022, and if the case continues to move forward, the judgment might be issued in 2023. This is a milestone in that the SPC has taken a position on the 5G SEP global dispute for the first time. In addition, since no Chinese or overseas courts have yet issued any judgments on the 5G SEP global royalty rate, it will profoundly impact global 5G SEP judicial practice and licensing negotiations if a Chinese court takes the lead in deciding the rate for 5G portfolio in this case.

## *China's first administrative adjudication on major patent infringement dispute case officially landed*

On 27 July 2022, the China National Intellectual Property Administration (CNIPA) issued the first administrative adjudication on a major patent infringement dispute in China, ordering the respondent, Guangdong Dongyangguang Pharmaceutical Co Ltd (“Dongyangguang Pharmaceutical”), to immediately withdraw the display of the accused infringing pharmaceutical products from the listed pharmaceutical procurement platform; and ordering the respondent to immediately stop manufacturing, selling and offering to sell products that infringe the patent rights of the petitioner, Boehringer Ingelheim Pharmaceuticals, Inc (“Boehringer Ingelheim”).

This case is the first national administrative adjudication on major patent infringement disputes since the implementation of Measures for Administrative Adjudication on Major Patent Infringement Disputes (“Measures”), marking a concrete practice of the system of administrative adjudications on major patent infringement disputes at the level of national authorities. In this case, the Linagliptin tablets developed by Boehringer Ingelheim were approved for import by the China National Medical Products Administration (CNMPA) in 2013. Dongyangguang Pharmaceutical applied to the CNMPA for a marketing licence for generic linagliptin tablets in 2018. This application was approved in July 2020. Dongyangguang Pharmaceutical began selling and offering to sell the linagliptin product in February 2021. Boehringer Ingelheim, on the one hand, filed a lawsuit with the Shanghai Intellectual Property Court for the infringement of its patent right of ZL03819760.X, and on the other hand, filed a request for an administrative adjudication on a major patent infringement dispute with the CNIPA based on its patent

ZL201510299950.3 (a divisional application of the 760.X patent), requesting that Dongyangguang Pharmaceutical be ordered to stop manufacturing, selling and offering to sell the generic medicine.

The CNIPA held that the accused infringing products fell within the scope of protection of the patent at issue and that the respondent shall stop manufacturing, selling and offering to sell the accused infringing products. This article will analyse the following two issues involved in the adjudication.

- Firstly, the scope of protection of the parent patent is different from that of the divisional patent. After filing a lawsuit based on the parent patent, the patentee can still apply for an administrative adjudication on a major patent infringement dispute based on the divisional patent. The respondent claimed that since the infringement dispute of the parent patent has been on the docket in the Shanghai Intellectual Property Court, the case was no longer eligible for administrative adjudication. In this regard, the CNIPA held that although the petitioner had filed a lawsuit based on the parent patent, the parent and divisional patent infringement disputes were not the same because the patents in the two procedures were different. The evidence, facts and grounds for infringement were also different. Therefore, the CNIPA could accept the case.
- Secondly, this case need not be suspended again due to the second round of the invalidation procedure. The panel held that this case had been suspended once due to the invalidation procedure. Considering the fairness and efficiency of the administrative adjudication of major patent infringement disputes, the panel decided not to suspend the processing of the case for a second time.

In China, IP owners protect their IP rights mainly by filing a lawsuit before a court or filing an administrative petition. Compared with court proceedings, it is said that administrative action has high efficiency, but some patent owners worry about the professionalism of local intellectual property departments. In this context, the CNIPA published the Measures on 1 June 2021, stipulating that the CNIPA has the authority to decide major cases related to patent infringement, providing more options and more feasible guidelines for patent owners to protect their rights, and establishing the criteria of administrative adjudication applications. The Measures enable the petitioners to seek an administrative adjudication on a major patent infringement dispute directly to the CNIPA without having to worry about the professionalism of local intellectual property departments and the possible jurisdictional conflicts. It is expected that the Measures will make the administrative proceeding a more attractive option for patent owners to defend their rights in complicated cases.

*The total amount awarded in the patent infringement dispute between AUX and Gree Rises to RMB220 million (USD32 million), but the patent at issue is facing a risk of being invalid*

Two patent infringement disputes between well-known air conditioner manufacturers AUX and Gree have aroused widespread public attention since 2021. The patents at issue in both cases were compressor patents. At the end of 2021, the Ningbo Intermediate Court first made a judgment, finding that Gree's actions constituted infringement of the patent at issue and awarded Gree RMB160 million in damages. In August 2022, the Hangzhou Intermediate Court made another patent infringement judgment in the case of AUX v Gree in the first instance, with damages amounting to RMB55 million. With the

same patent, AUX has accumulated an award of nearly RMB220 million, reaching a new record of damages for patent infringement cases in the home appliance industry in China. It is worth noting that the Hangzhou Intermediate Court, based on the expert report provided by Plaintiff AUX, found that the technical contribution of the patent at issue was 20%.

To fight back, Gree filed an invalidation request against the patent at issue. The CNIPA determined that the patent at issue was invalid in part. Gree then filed the administrative action against the CNIPA's decision to the Beijing IP Court, holding all claims shall be invalid. In December 2022, the Beijing IP Court upheld Gree's claims in the first instance judgment, deciding that the invalidation decision shall be withdrawn. If the remarkable judgment comes into effect, it would probably destroy the achievements of AUX in the Ningbo and Hangzhou Intermediate Court. Therefore, it is foreseeable that AUX will appeal against the judgment issued by the Beijing IP Court.

*Role shifting of Chinese telecom companies from implementers to patent owners*

In recent years, Chinese companies in the telecom field, which worked as traditional manufacturers before, have been actively increasing their investment in R&D, and as a result, accumulating more SEP resources. They are accelerating their activity in patent licensing and operation. Now it is seen that they are actively leveraging patent portfolios for royalties or using them as a means of offsetting royalties in cross-licensing. The role of Chinese telecom companies is gradually changing.

In early 2022, the Shenzhen Administration for Market Regulation ("Shenzhen Intellectual Property Administration") organised the selection of

the “Top Ten Shenzhen IPR Events of 2021”, of which the candidate event No. 15, “The First Time a Chinese Enterprise Took the Initiative to Request the Court to Determine the Global Royalty Rate”, attracted widespread attention. ZTE filed a request before the Shenzhen Intermediate People’s Court to determine the royalty rate between ZTE and a Chinese mobile phone company for its global patent portfolio of 4G LTE SEPs. This is the first royalty rate-setting case between two Chinese companies based on the FRAND principle. In addition, relevant information on patent licensing negotiations news between ZTE and Vivo, OPPO was also released successively in 2022.

Besides ZTE, other Chinese patent owners and implementers have increasingly engaged in litigation in the SEP field. On 10 May 2022, Huawei filed two patent infringement lawsuits with the Jinan Intermediate Court, alleging that Netgear’s Wi-Fi 6 products infringed two Chinese patents, ZL201811536087.9 and ZL201810757332.2. Previously, Huawei had filed two patent infringement lawsuits against Netgear and its third-party online stores in German courts in March 2022. Apart from that, Huawei sued Amazon and seven other companies for patent infringement in the Suzhou Intermediate Court (Case No: (2022) Su 05 Min Chu No 916). The outcome of the above patent licensing disputes will become a focus of attention in the SEP field in the coming 2023.

## Policy Trend

### *The release of the Guidelines of SEP Licence for the Automotive Industry (2022 Edition)*

The Guidelines of Standard Essential Patent Licence for the Automotive Industry (2022 Edition) (“Guidelines”) were released in September 2022. The Guidelines are the first industrial SEP licensing guidelines in China and are jointly drafted and issued by the IP Committee of China

Society of Automotive Engineers (China-SAE), the Promotion Group of IMT-2020 (5G), and the working group of automotive SEP. Previously, various countries and jurisdictions have issued a series of policy or guidance-type documents for SEPs; for example, Japan issued the Guidelines for Good Faith Negotiation of Standard-Essential Patent (SEP) Licences in 2022. China has clarified the focus of the global automotive industry SEP licensing in the form of a guideline. Although the Guidelines mainly involve framework provisions, it is foreseeable that the Guidelines, as the first SEP licensing guideline for China’s automotive industry, will profoundly impact the future of China’s automotive industry SEP licensing negotiations.

Multiple core principles regarding the licensing level and the royalty calculation are put forward in the Guidelines.

- Regarding the licensing level, the Guidelines clarify that any level in the automotive industrial chain is entitled to obtain licences. In the meantime, it is appropriate to fully respect and consider the characteristics of the industry for both parties. The Guidelines provide that “any good faith patent implementer is entitled to obtain an SEP licence and SEP owners are obliged to license to an implementer who intends to obtain a licence, regardless of the level in the industry chain”. This provision is usually considered to be a principal provision. However, at the same time, the Guidelines also emphasise that “it is appropriate to fully respect and consider the industry characteristics and business customs, positively discuss and negotiate in seeking a licensing model accepted by both parties”, leaving ample room for the negotiating parties to choose the licensing model freely.

- Regarding the royalty calculation basis, the Guidelines propose that the basis should be set as the product unit that actually contributes to the automotive product. At the same time, the Guidelines aim to relieve the fundamental contradictions in SEP licensing in the automotive industry by clarifying the basic principle of royalty calculation basis to encourage differentiated licensing schemes on a case-by-case basis. The Guidelines propose that “the basis should be set as the product unit that actually contributes to the Automotive Product by SEP technology”. At the same time, taking into account the uncertainty of the licensing levels discussed above, the Guidelines add two basic principles for the calculation of royalty, that is, firstly, regardless of whether the basis is the parts and components of an automotive product or the automobile, the actual value contributed by the SEP technology to the automotive product should be taken into consideration; secondly, regardless of the licensing level, the SEP royalty for the same automotive product should be approximately the same, and the royalty should not differ significantly among various licensing levels.
- Regarding the royalty calculation method, the Guidelines clarify that methods such as “top-down” and comparable license methods may be adopted when calculating SEP royalties and emphasises that a reasonable cap should be imposed. In consideration of achieving a balance of interests between the licensing parties, the Guidelines put forward the principle of limitation to aggregate royalty rates: “a reasonable cap should be imposed against the aggregate amount of SEP royalties for automotive products. This cap could be a certain fraction of the reasonable profits in the licensed products industry”. The Guidelines do not render a preferential opinion over

calculation methods, including the comparable licence and top-down methods.

### *The Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Exclude or Restrict Competition has been open to the public for comments*

To implement the amended Anti-monopoly Law, the State Administration for Market Regulation (SAMR) developed a draft of the Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Exclude or Restrict Competition (“2022 Draft Amendment”) in June 2022, which has been open to the public for comments. Compared to the Provisions about the Prohibition of the Abuse of Intellectual Property Rights to Exclude or Restrict Competition revised in October (“2020 Provisions”), the 2022 Draft Amendment further regulates and restricts the operation of patent pool entities and also regulates the behaviour of the undertakings in the process of developing and implementing the standards.

The tightened regulation on patent pool entities will likely become a new trend. Compared with the 2020 Provisions, in Article 14 of the 2022 Draft Amendment, the exchange of price information among the patent pool entities is newly banned; and licensing the patents in a patent pool at unfairly high prices is added as one of the anti-competition acts. These changes will provide the SAMR with more grounds to regulate the anti-monopoly acts of the patent pool entities.

IP rights abuse in the standard development and implementation practice is possible even without a dominant market position. Article 15 of the 2022 Draft Amendment introduces the new rules about IP rights abuse leveraging standard development and implementation practices.

The abusive acts described in Article 15 are all related to horizontal agreements among competing undertakings in the process of developing and implementing standards, including excluding specific undertakings from participating in the standard development practices, excluding technical solutions from specific undertakings from the relevant standards, prohibiting specific undertakings from implementing relevant standards, and prohibiting the implementation of competing standards.

The licensor might face an increased risk of anti-monopoly when seeking injunctive relief in an SEP dispute. Compared with the 2020 Provisions, the new provision of “seeking injunctive relief” in Article 16 of the 2022 Draft Amendment is refreshing. If this provision is retained in the formally promulgated version, it will effectively limit licensors from arbitrarily and improperly seeking injunctive relief because they will face increased antitrust risk. At this point, in addition to seeking relief from the Chinese courts, the licensees can also respond to the threat of injunction from the SEP right holders by filing a complaint with the administrative department.

## Conclusion

After an extraordinary 2022, China has had a remarkable performance in terms of judicial practice and policy guidance in patent law practice. During this year, China’s legislative, judicial and administrative authorities responded to the international community’s concerns about China’s patent system through a series of landmark judicial cases and amendments to provisions. Looking ahead to 2023, it is believed that China will do more in reforming and innovating its patent system. So let’s look forward to it together.

# CHINA TRENDS AND DEVELOPMENTS

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**Han Kun Law Offices** is a leading, full-service law firm in China. Over the years, Han Kun has been widely recognised as a leader in complex cross-border and domestic transactions. Its main practice areas include private equity, M&A, international and domestic capital markets, investment funds, asset management, competition/antitrust, banking and finance, data protection, intellectual property and dispute resolution. It currently has nearly 800 professionals located in its six offices in Beijing, Shanghai, Shenzhen,

Haikou, Wuhan and Hong Kong. The IP team in Han Kun mainly focuses on IP litigation and dispute resolution. This team has gained rich experience through cases dealing with courts all over the country, covering wide technical fields, including semiconductor, information and software, and communication. All the firm's lawyers are graduates of top universities and have extensive experience in complex cross-border transactions and dispute resolution as counsel to both Chinese and foreign clients.

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**Jian Zhang** has been practising IP law for more than 15 years. She has extensive experience in both contentious matters including patent invalidation and infringement litigation, as well as

non-contentious matters including IP licensing, IP due diligence and IP strategy design. She has represented many high-tech multinationals in complex patent disputes. She has the expertise to design practical strategies and to help clients to resolve disputes efficiently. Jian is especially experienced in standard essential patents (SEP)-related matters and has handled a number of influential cases in the field, including royalty setting litigation, infringement litigation, invalidations and licensing negotiation.



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**Haiping Liu** focuses mainly on areas including patent-related litigation and administrative proceedings. Haiping has handled many patent invalidation procedures and civil infringement cases. He has successfully safeguarded his clients' rights and interests in the proceedings. In non-contentious IP matters, he participated in considerable engagements including IP landscaping, licensing negotiations and freedom-to-operate analyses.

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