

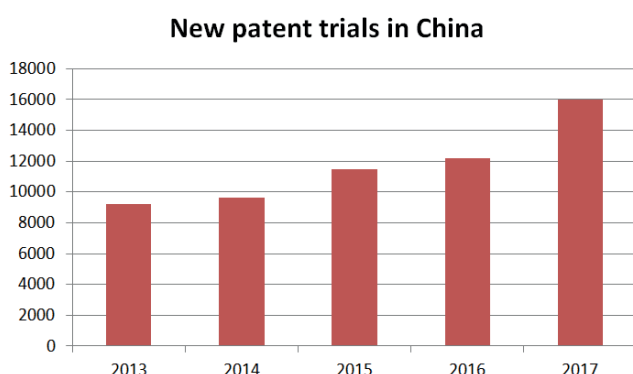


Patent Litigation in China

There has been a noticeable step up in the value of patent lawsuits in China, combined with a readiness for the Chinese courts to recognize value in patents owned by foreigners and patents owned by non-practicing entities (NPEs).

Trends and Success Rates

The average award for patent damages has risen from RMB 0.45m in 2013 to over RMB 1.6m in 2017.) The number of patent lawsuits is on the increase too, as shown in the following chart:



Overall, the success rate for patentees is high at 66.5% (higher for utility models and design patents). The reconciliation rate is 27%. Foreign IP owners fare

only slightly worse than the average. The proportion of the “successful” patent infringement litigation cases of the foreign-invested enterprises involved in the past five years is 50.7%. We have additional data upon request.

Example: Iwncomm v Sony

One high-value example of these trends is the case of Iwncomm v Sony, in which the Chinese company Xi’an Iwncomm asserted a standards-essential patent (SEP) against Sony and was awarded approximately £1 million of damages and costs (approx. 95% damages and 5% costs).

The patented feature related to WLAN Authentication and Privacy Infrastructure or “WAPI” and was mandated in every mobile phone in China. Sony admitted that the WAPI functionality was tested for purposes of authority to sell into the Chinese market, but attempted to argue that the actual feature was not used in production and that users do not use it after purchase. The patent had only method claims, so Sony were not direct infringers, but they were unsuccessful in various defences to indirect infringement.

The damages award included treble damages on account of bad faith demonstrated by Sony in the course of license negotiations. The damages award was arrived at as a licence fee of 1 RMB per phone (the exact number of phones sold was registered with the Chinese Ministry of Industrial and Information Technology). That fee was based on comparable licences to others.

Sony's negotiating behaviour included refusal to sign Iwncomm's NDA before accepting claim charts, and the Beijing Court took the view that Sony were unreasonably dragging out the negotiation (often referred to as "hold-out" behaviour). For this reason, the Court awarded damages of 3 RMB per phone and an injunction against further unlicensed sales by Sony.)

Example: Beijing Watchdata System v Hengbao

Another example of high-value award for patent infringement is Beijing Watchdata System v Hengbao decided on 8 December 2016. In that case, the Beijing IP Court awarded damages of RMB 49 million and attorney fees of RMB 1 million (equivalent to £5.8m or \$7.6m at present rates). The Court found that Hengbao infringed the product and method claims of Beijing Watchdata System's patent CN100542088 for USB keys used for bank transactions. That remains the highest compensation awarded by the court.

Comment

China is no longer seen as merely finding its way in dealing with patent disputes, and is now seen as an important forum for disputes between international companies battling over the Chinese market.

It remains difficult in many cases for a foreign entity to succeed over a local manufacturer when there may be jobs at stake within the jurisdiction of the court, but there have been various high-level political speeches and initiatives to impress on the courts the need to be impartial and recognize the rights granted under Chinese patents, regardless of whether those rights are in the hands of a local or foreign entity or a practicing or non-practicing entity.

The Iwncomm litigation contains some salutary lessons for anyone (patent holder or prospective licensee) involved in SEP license negotiations in China. Hold-up by the rightholder or hold-out by the putative infringer can be punished severely by the Chinese courts.

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