

Research on Judicial Judgment Issues of SEP Global Royalty Rates

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Executive summary: New trends in the international community's trial of SEP injunctive relief disputes have emerged. That is, in the case of *Unwired Planet v. Huawei* SEP injunctive relief, the Supreme Court of the United Kingdom recently determined that Huawei infringed the two British standard requirements of Unwired Planet's patent rights, and voluntarily adjudicated the global licensing fee terms of Unwired Planet's patent portfolio. If Huawei does not accept the terms of the contract, the injunction issued by the court will take effect. From the perspective of comparative law, with the exception of the British courts, the courts of major countries in the world will not take the initiative to determine the global standard-essential patent license rate for both parties in the case. The British court ruled that the global fee rate did not conform to the original intent of the principle of fairness, reasonableness and non-discrimination when the standard-essential patent holder violated the principle of fairness, reasonableness and non-discrimination. The determination of the fee rate on the principle of fairness, reasonableness and non-discrimination belongs to the scope of commercial negotiations between the holder of the standard essential patent and the implementer. The judicial intervention is only necessary when the market fails. Extraterritorial courts that have ruled on global rates have brought a great impact on the development of China's wireless communications companies and the jurisdiction. China should take measures to actively respond.

Key words: the principle of fairness, reasonableness and non-discrimination, injunctions, global licensing rates, injunctions, behavior preservation, standard essential patents, wireless communications

Preface

With the development of wireless communication technology, the number of standard-essential patents owned by enterprises and the technical gold content are constantly increasing. At the same time, there are more and more standard-essential patent licensing negotiations among wireless communication companies around the world. Patent licensing models have shown diversified and complicated characteristics, and conflicts and disputes caused by the failure to reach licensing agreements are also increasing. Judging from the judicial practice in the trial of SEP disputes in various countries, the number of SEP holders trying to urge SEP implementers to reach patent licensing agreements with courts has increased, and the courts of various countries are deciding whether to grant standard essential patent holders injunctive relief and judging whether the parties involved in the case have complied with the principle of fairness, reasonableness and non-discrimination (hereinafter referred to as the FRAND principle) and whether there is fault. There are still some major differences in the logic of the judgments. At present, the international community has seen new trends in the trial of the SEP

injunctive relief dispute, that is, the British Supreme Court recently heard a case involving Unwired Planet (UP) v. Huawei Technologies Co., Ltd. (hereinafter referred to as Huawei) SEP injunction relief dispute. It voluntarily adjudicated a license contract clause including global rates for both parties and made it clear that if Huawei accepts the license contract clauses ruling by the court, the injunction issued by the court will not take effect. If Huawei does not accept the license contract clauses, the injunction issued to it by the British court takes effect. The practice of the British courts in proactively adjudicating the terms of license contracts including global rates in injunctive relief cases brought by standard essential patent holders is worthy of attention and discussion.

I. Questions raised

1. Introduction to the UP v. Huawei case heard by a British court

UP is a patent non-practicing entity (Non-Practicing Entity, hereinafter referred to as NPE), which claims to have global standard essential patent packages including 2G, 3G, and 4G. From November 2013 to January 2014, UP only contacted and negotiated with Huawei for 3 months. On March 10, 2014, UP sued Huawei with 6 British patents it owned, requesting to issue an injunction prohibiting its patent infringement to Huawei.

From April 2014 to August 2016, UP made four quotations to Huawei. From June 2015 to October 2016, Huawei made three offers to UP.

In July 2016, the British Patent Court made a technical judgment: 2 patents of UP contain valid claims and are standard essential patents. In April 2017, the British Patent Court made a judgment on the determination of the FRAND conditions: the license fee quoted by UP for four times was too high and did not belong to the FRAND license; the British patent package license proposed by Huawei did not belong to the FRAND license.

In May 2017, the British judge asked the two parties to exchange quotations at the case management meeting and asked both parties to express their views on whether the court can determine the UP global patent package rate. UP stated that it gave three proposals: global patent package licensing, British patent package licensing, and British patent licensing involving litigation. UP prefers global standard essential patent package licensing and accepts any patent package rates and contract terms set by the court. Huawei stated that the British courts can only hear UP's British Standard Essential Patent Package licenses and are not authorized to hear UP's global patent package licenses, and promised to accept any licensing fees set by the British courts for UP's British Patent Package licenses.

On June 7, 2017, the British Patent Court made a first-instance judgment in the UP v. Huawei case: Huawei must not infringe UP's two British Standard Essential Patent Rights until Huawei signs the FRAND clause set by the court for both parties, the injunction can be lifted; Huawei shall pay damages to UP for infringing two patents of UP, unless Huawei signs a FRAND clause for both parties. The judgment encloses the license contract terms including the global standard essential patent package rate suitable for both parties.

Huawei appealed against the judgments of the first and second instance. On August 26, 2020, the Supreme Court of the United Kingdom upheld the original verdict.

2. The British court voluntarily decided on issues arising from the terms of the global rate license contract

According to the judgment of the British court, in the injunctive relief lawsuit filed by the holder of the standard-essential patent, the British court determined that Huawei infringed the two British standard-essential patent rights of UP, and voluntarily decided on the FRAND license including the global rate for both parties in the dispute. The terms of the contract specify that if Huawei is willing to sign the terms of the license contract set by the British court for both parties, the injunction will cease to take effect. If Huawei does not accept the terms of the license contract, the injunction issued to Huawei by the British court will take effect. It can be seen that the British courts took the initiative to arbitrate the terms of the license contract including the global rate of the standard essential patent for both parties in the case where the holder of the standard essential patent filed injunctive relief with several valid UK patents, and passed the prohibition of the implementer from the UK market. The ban on the sale of wireless communication products guarantees the enforcement of its referees.

SEP litigation initiated by SEP holders against manufacturers and sales companies of wireless communication products are often presented in the form of parallel litigation across multiple jurisdictions. The British courts have voluntarily determined global rates in SEP injunction cases. By cooperating with its anti-suit injunction system that prohibits parties from litigating in foreign courts or applying for enforcement of foreign court judgments, British courts are made the preferred court for NPEs worldwide to initiate standard-essential patent dispute litigation. An American legal media commented on the UP v. Huawei case and stated that “a landmark judgment can make the UK a destination for litigation”. It can be seen that the UP v. Huawei case judged by the British court has had a wide range of influence in the international community.

China’s wireless communication companies are developing rapidly. Some companies have gone abroad to actively participate in international market competition. Disputes arising from the failure of Chinese and foreign companies to reach standard essential patent licensing agreements have also begun to increase. In this context, Chinese companies are often a party to international parallel litigation cases involving standard essential patents. For example, in the transnational parallel SEP litigation between UP and Huawei, UP sued Huawei in a British court on the grounds of SEP injunctive relief; at the same time, UP sued Huawei in a German court for SEP infringement. The court ruled against Huawei on infringement, Huawei provided financial account books, and it allowed UP to make the judgment public. Huawei sued UP in a Chinese court for the monopoly of standard-essential patent infringement; at the same time, Huawei also applied to the Chinese administrative authority for the invalidation of UP's standard-essential patent family in China, and the two parties engaged in a patent invalidation administrative lawsuit. In this context, the British courts took the initiative to decide the terms of the global rate contract for both parties in the injunctive relief dispute. This makes people think about the following questions: since the establishment of the 3GPP International Standards Organization for more than 20 years, the international community must deal with standards. What is the mainstream practice in patent disputes? The British court voluntarily arbitrates the global license fee rate contract for both parties in the case. Does the FRAND principle balance the protection of the interests of both parties? What impact will the UK court's voluntary ruling of the global license fee rate contract have on the parties to civil litigation and jurisdiction in China, and how should China respond? These issues are worthy of in-depth study.

II. The British court's initiative to determine the SEP global rates for both parties is contrary to the mainstream international practice

As we all know, based on the needs of wireless communication technology interconnection, technical standards have the characteristics of internationalization, and due to the existence of national judicial sovereignty, the operation of national patent legal systems has regional characteristics, and the combination of the two makes the operation of standard essential patent systems, reflecting the distinctive international and domestic dual attributes. This is also an important reason why standard-essential patent disputes are presented in parallel international litigation. For the same or similar disputes between enterprises due to the inability to reach a standard essential patent license agreement, the courts of the relevant countries have the jurisdiction and make rulings based on the litigation initiated by the parties. This article analyzes the typical cases of national courts applying FRAND rules to deal with standard-essential patent disputes. It can understand the mainstream practices of the international community in handling such disputes, and help analyze that the British courts actively arbitrate the global rates for both parties in the case against the mainstream practices of the international community.

1. The practice of the US courts

According to the standard-essential patent disputes heard by the US courts, it is usually in the case of infringement damages filed by the SEP proprietors, by arbitrating the high amount of damages for the infringed standard-essential patent in the US market, to urge implementors to reach a patent license agreement with the standard-essential patent right holder as soon as possible. In the case that both the holder and implementer of the standard-essential patent agree to the global rate, the US court will also determine the global rate of the standard-essential patent.

In the Microsoft Corporation (hereinafter referred to as Microsoft) v. Motorola Corporation (hereinafter referred to as Motorola) case, Motorola owns the necessary patents for the H.264 video and WiFi standards, and it has a dispute with Microsoft due to its failure to reach a patent license agreement. On November 9, 2010, Microsoft sued Motorola in the U.S. District Court for the Western District of Washington, requesting that the U.S. court confirm that Motorola violated its contractual obligations and constituted a breach of contract. During the trial of this case, Motorola agreed that the judge can hear the global FRAND rate. On April 25, 2013, the U.S. District Court for the Western District of Washington calculated 15 considerations for reasonable licensing fees based on standard-essential patents. It evaluated the importance of the patent portfolio to the relevant technical standards and the importance of the licensee's terminal products, and combined with comparable agreements, it calculated that the global FRAND license fee for Motorola H.264 patent package ranges from 0.555 to 16.389 cents, and the WiFi patent global FRAND license fee ranges from 0.8 to 19.5 cents. On this basis, Motorola's offer violated FRAND's obligations and constituted a breach of contract. Motorola refused to accept the judgment of the first instance and filed an appeal. On July 30, 2015, the U.S. Court of Appeals for the Ninth Circuit issued a second-instance judgment and upheld the first-instance judgment.

In the case of TCL Corporation (hereinafter referred to as TCL) v. Ericsson Corporation (hereinafter referred to as Ericsson), Ericsson owned the 2G/3G/4G global standard essential patent package. Beginning in 2011, Ericsson and TCL had negotiated standard-essential patent licenses. The two parties agreed that once the negotiations failed, they would seek a binding court ruling on the global patent portfolio license. In March 2014, TCL sued Ericsson in the U.S. California Central District Court. TCL

requested the U.S. court to confirm that Ericsson failed to provide FRAND terms and determine the global FRAND rate that TCL should enjoy. During the litigation, TCL agreed to be bound by the US court's decision on the FRAND clause of the global patent portfolio license. On December 21, 2017, the U.S. California Central District Court made a first-instance judgment. It adopted the Top-Down method, used the U.S. patents as the starting point, determined the rates in Europe and other regions based on the U.S. rates and patent layout, with comparable agreements as cross-validation, and calculated the FRAND value ranges of each licensed global patent portfolio in dispute.

Judging from the two typical cases judged by the U.S. court, the U.S. court will only judge the global FRAND rate of the standard essential patent portfolio involved in the dispute when the parties in the dispute agree and will not actively arbitrate the global fee for both parties. Rate licensing contract terms.

2. The practice of German courts

Sisvel (hereinafter referred to as Sisvel) and Haier (hereinafter referred to as Haier) had a dispute over the licensing of standard essential patents. In September 2014, Sisvel sued Haier in the District Court of Dusseldorf, Germany, claiming that Haier infringed its two wireless communication standard-essential patents EP1264504 and EP0852885, and requested the German court to issue an injunction to Haier. The German Dusseldorf District Court held that Haier had infringed Sisvel's standard-essential patent rights. Haier had obviously delayed the negotiation and the FRAND license defense could not be established. The judgment gave Haier an injunction. Haier appealed against the judgment of the first instance. In March 2017, the Dusseldorf High Court of Germany held the second instance that Sisvel's offer of a license fee to Haier was significantly higher than the previous license fee to others, and there was discrimination, and it ruled to suspend the enforcement of the injunction. Sisvel was dissatisfied and filed an appeal. In July 2020, the German Federal Supreme Court's third-instance judgment held that Sisvel's patent portfolio license to Haier is not illegal in itself, but two conditions must be met: not to force the licensee to accept non-standard essential patents and that the method of calculating the license fee will not be detrimental to licensees seeking to obtain a license only for a specific area.

Global patent portfolio licenses often appear in commercial negotiations and are efficient. However, acceptance of global patent portfolio licenses cannot be used as a criterion to measure whether a party fulfills FRAND obligations, and standard-essential patent implementers are allowed to explain why they do not accept global licenses. Non-discriminatory licensing does not require that all licensees be given the same licensing conditions under any circumstances, and Sisvel's more favorable licensing to third parties does not affect competition in the European market. Therefore, Sisvel's license to Haier is not discriminatory, and the final judgment of the German Federal Supreme Court overturned the judgment of the Dusseldorf High Court.

Judging from the German court's handling of the standard-essential patent injunction relief dispute, it is based on whether the quotations given by the two parties in the negotiation process conform to the FRAND principle as an important condition for judging whether to issue an injunction. The two parties ruled on a global FRAND rate licensing contract clause that both parties must comply with.

3. The practice of Japanese courts

Samsung and Apple Japan (hereinafter referred to as Apple) were unable to reach an agreement due to standard-essential patent licensing negotiations and a dispute occurred. In 2011, Samsung sued Apple in the Tokyo District Court of Japan, claiming that the wireless communication products imported and sold by Apple in Japan infringed its patent for invention No. 464289, which is a UMTS/3G standard essential patent, and requested the Japanese court to issue an injunction to Apple, which prohibits Apple from implementing Patent No. 464289 in the Japanese market by manufacturing, selling, and importing.

The first-instance judgment of the Tokyo District Court of Japan held that: Patent No. 464289 is an essential patent for the Japanese UMTS/3G standard. According to the cross-licensing offer between Samsung and Apple, both parties are willing to accept the FRAND license, but because Samsung has not provided Apple with the patent license to others the company's relevant information makes it impossible for Apple to determine whether the licensing conditions given by Samsung comply with the FRAND principle. Therefore, Samsung's application for a ban is an abuse of rights that violates the principle of good faith. Samsung appealed against the judgment of the first instance, and the Tokyo Intellectual Property High Court of Japan held that its application for an injunction against Apple was not established and should be rejected for the same reason. But at the same time, it was determined that Samsung had the right to obtain damages for past patent infringements of Apple. The amount of damages is equal to the patent license fee that meets the FRAND commitment, and the amount of infringement damages in Japan for Apple's infringement of Samsung's 464289 patent is calculated according to the Top-Down method.

Judging from the trial of standard-essential patent injunction relief cases in Japan, the Japanese courts, based on the litigation request of the parties, regard whether the parties comply with the FRAND principle during the negotiation process as a condition for issuing the injunction, and will not take the initiative to determine the global licensing fee rate of the SEP patent portfolio. The Japanese court held that the SEP right holder has the right to obtain compensation for infringement damages in Japan due to the perpetrator's past infringements in order to relieve the right holder.

4. The practice of Chinese courts

There was a dispute between Huawei and Samsung (hereinafter referred to as Samsung) due to the failure to reach a license agreement in the cross-licensing negotiations for standard essential patents. In May 2016, Huawei in Shenzhen Intermediate People's Court sued Samsung, which argued that Samsung infringed Huawei's two 4G LTE / standard essential patents, requesting Chinese court ordered Samsung to stop to manufacture, sell, offer to sell and import wireless terminal products Infringement of Huawei's patent rights. The Shenzhen Intermediate People's Court held that from the perspective of the form of the negotiation between the two parties and the substance of the offer price, Huawei has complied with the FRAND principle and has no major subjective fault, while Samsung has not followed the FRAND principle, which is subjectively significant. The fault caused the negotiations between the two parties to be prolonged and deadlocked, and Samsung was ordered to stop infringing on Huawei's patent rights.

Judging from the standard essential patent injunction relief cases judged by the Chinese courts, the Chinese court will judge whether the standard essential patent portfolio quoted by both parties in the negotiation process conforms to the FRAND principle, as an important condition for judging whether the parties should be given an injunction. In the case of relief disputes, the two parties took the initiative to determine the global licensing rate of the standard essential patent portfolio.

In summary, judging from the standard-essential patent precedents of the major national courts, in the case of the standard-essential patent rate suit, the U.S. court can rule on the standard-essential patent for both parties if the owner and implementer of the standard-essential patent agree on the combined global rate. In addition, no country's courts, like the British courts, voluntarily decide for both parties in a standard-essential patent injunctive relief suit a license contract clause including global rates and pass the enforcement of an injunction to the enforcer, essentially forcing the implementer to reach a global license agreement. The practice of the British courts taking the initiative to judge global rates for both parties in the case is contrary to the mainstream practice of the international community .

III. Problems in the English courts applying FRAND rules to actively determine global rates

Standard-essential patents have the attributes of public goods. In order to prevent standard-essential patent holders from carrying out patent hijacking and avoid patent stacking, various international standards organizations generally require standard-essential patent holders to export their standard-essential patents in accordance with the FRAND principle to obtain licenses. Based on the principle of reciprocity of rights and obligations, the implementer of a standard-essential patent should also pay a patent license fee to the standard-essential patent holder in accordance with the FRAND principle. In this way, both the standard-essential patent holder and the implementer of the standard-essential patent have the obligation to sign a standard-essential patent license agreement in accordance with the FRAND principle. When a standard-essential patent dispute occurs, courts around the world hear SEP cases in accordance with the FRAND principle .

1. Violation of the original intention of the FRAND principle

The standard essential patent FRAND principle contains the basic mechanism of balancing the interests of SEP right holders and implementers, from the generation of standard essential patents, licensing negotiations, and dispute resolution rules, all embody the principle of balance. Take the case of UP v. Huawei in a British court as an example. UP has only had 3 months of contact and negotiation with Huawei . It can be said that when the negotiation has just begun and there is no sign that the negotiation cannot proceed , UP immediately filed a case with the British court. The lawsuit for injunctive relief requested the British court to issue an injunction to Huawei. According to industry practice, from the point of view of negotiation procedures, it is difficult to say that UP 's behavior conforms to the FRAND principle. Under normal circumstances, the license negotiation between the holder of a standard-essential patent and the implementer will first experience contact with each other

and express their willingness to negotiate, then sign a confidentiality agreement, enter the technical negotiation link, and then enter the commercial negotiation stage, and finally the two parties sign a license agreement . As far as UP 's behavior is concerned, it filed a lawsuit as soon as it had contacted and negotiated with Huawei, which did not comply with FRAND principles.

At the same time, in the absence of signs that the negotiation could not be carried out, UP tried to seek to reach a license agreement by filing injunctive relief to the court, which will cause certain coercive pressure on the licensee (Huawei), which may lead to the licensee. Forced to sign a license agreement that does not comply with FRAND principles. In the UP v. Huawei case, the British court found in the FRAND trial that, judging from the actual content of the negotiated quotation, UP 's four consecutive offer licensing conditions did not comply with the FRAND principle. The above offer made by UP was made after injunctive relief proceedings were filed in a British court. Judging from this fact, UP , to a certain extent, subjectively resorted to injunctive relief to the court to achieve the purpose of forcing Huawei to accept higher licensing fees.

The achievement of the standard-essential patent FRAND rate, in addition to the need to rely on judicial judgments to achieve post-correction relief after disputes between the negotiating parties, requires both parties to negotiate a license agreement through good faith negotiations, and the establishment of a good faith negotiation mechanism to facilitate the realization of the transaction should be a standard necessity The core of the healthy operation of the patent system. Since UP did not conform to the FRAND principle in terms of procedures or entities during the negotiation process, in order to ensure the establishment of a good faith negotiation mechanism, its request for injunctive relief should not be supported. When the negotiating behavior of the standard-essential patent right holder does not conform to the FRAND principle, the court of a country voluntarily judges the global licensing rate of a patent portfolio and urges the licensee to sign a global licensing agreement by issuing an injunction. This is to a certain extent allowed the holders of standard essential patents to ignore FRAND's commitments during negotiations . Even in this case, it is still possible for the holder of a standard-essential patent to obtain an injunction issued by the court to the implementer, and the establishment of such ruling rules will inevitably lead to an imbalance in protecting the interests of the holder of the standard-essential patent and the implementer. In the Sisvel v Haier case heard by the German court, the German High Court of Dusseldorf upheld in the second instance that Sisvel's offer to Haier was significantly higher than the license agreement previously licensed to others, and there was discrimination, and it ruled to suspend the enforcement of the injunction. Obviously, the German court held that if the holder of the standard-essential patent does not comply with the FRAND commitment, it will not be able to obtain injunctive relief.

In summary, this article believes that if a court of one country still take the initiative to decide the global rate and urges the implementer to sign a licensing agreement by issuing an injunction to the implementer under the condition that the SEP holder does not comply with the FRAND commitment, this practice is not in line with the original intent of the FRAND principle and is debatable.

2. Violating the principle of prioritizing market allocation of resources

The logic of argument that the British courts actively judge the global rate in the standard essential patent injunction relief dispute is that if the global license does not constitute FRAND, then the threat of an injunction by the court of a certain country should not be used to force the licensee to accept the license, but if the global license constitutes FRAND, the situation will be different. When the patent is valid, infringed, and the patent is a standard-essential patent, FRAND means that the right holder has the right to obtain injunctive relief, and the licensee must either accept the FRAND license or stop the product transaction. UP related patents have been determined to be valid, necessary, and infringed. UP wants to sign a global license, and Huawei is willing to sign a UK portfolio license but refuses to sign a global license. However, the British court held that the global license constitutes FRAND, and UP has the right to insist on this proposition. In this case, the only combined license in the United Kingdom will not constitute FRAND, so Huawei should be issued an injunction. It can be seen that the British court believes that the dispute between the two parties is mainly caused by the failure to reach a global FRAND license agreement. Therefore, the court determines the global licensing fee rate for a patent portfolio and urges Huawei (licensee) to sign a global license by issuing an injunction in the UK market. license agreement, which is effective dispute solution summarily. This article believes that the dispute resolution method is questionable for the following reasons.

When the license negotiation between the standard-essential patent holder and the implementer is deadlocked and a standard-essential patent license agreement cannot be reached, the standard-essential patent holder can file an injunctive relief lawsuit and submit it to the court to apply the FRAND rules to determine the standard-essential patent holder with the implementer, which party has complied with the FRAND principle and which party violated the FRAND principle. With the help of the judicial force of the court injunction, the implementer is urged to reach a FRAND license agreement with it as soon as possible. From the perspective of comparative law, we can make a comparative analysis of the practice of the British court in the UP v. Huawei case taking the initiative to adjudicate global rates and the practice of courts in other countries. For example, the German court did not take the initiative to determine the global rate in the case of injunction relief brought by the SEP holder. When the German court held that the SEP holder had complied with the FRAND commitment in terms of negotiation procedures and licensing fees while the implementer violates the FRAND principle in the above-mentioned aspects, the German court will issue an injunction against the implementer; but when the SEP holder does not comply with the FRAND commitment, the German court will refuse to issue an injunction against the implementer.

Due to the large number of declared standard-essential patents and a large number of over-declaration problems, it takes a lot of manpower and financial resources to determine the true standard-essential patents. There are great difficulties and ambiguities in determining the FRAND rate of standard-essential patents. Therefore, the standard FRAND rate of essential patents should be a flexible numerical range,

not a fixed numerical value. The above-mentioned German court's handling of the *Sisvel v. Haier* case was to issue an injunction (that is, order to withdraw from the German market) to the implementer who violated the FRAND principle to urge the implementer and the holder of standard essential patents to reach a FRAND agreement as soon as possible. The practice of the German courts is still to hand over the licensing agreement to the two parties through negotiation in the market, that is, the two parties negotiate and determine a value within the flexible value range that conforms to the FRAND principle. In the *UP v. Huawei* case, initially, both parties did not have the idea of letting the British court arbitrate the global rate. Instead, during the trial of the case, under the guidance of the British judge, they gradually moved in the direction of arbitrating the global rate. In the case of the standard essential patent injunction relief dispute, the British court voluntarily decided a fixed value global rate for both parties instead of handing it over to the two parties to negotiate and determine a value within the FRAND flexible range, which violated the principle of prioritizing the allocation of resources by the market. After all, the determination of FRAND rates falls within the scope of commercial negotiations between the holders of standard essential patents and the implementers. The judicial system should try not to interfere too much in the market, and do not arrange matters that belong to the autonomy of the parties' commercial negotiations. Only in the case of market failure, judicial intervention is necessary.

IV. How should China deal with the adverse effects brought about by extraterritorial courts actively adjudicating global rates?

1. Extraterritorial courts take the initiative to determine the adverse effects of global tariffs on China

(1) Extraterritorial courts take the initiative to rule that the Chinese rate in the global rate is difficult to meet China's reality

In the current 4G era, China is the world's main market for wireless terminal products such as mobile phones, and wireless terminal products such as mobile phones of major global brands are manufactured and sold in China. China has become the world's largest manufacturer and seller of wireless communication products. China's market sales exceed those of European and American countries, and its market position is becoming increasingly important. At the same time, mankind has entered the 5G era. Driven by 5G technology, the industrial Internet characterized by artificial intelligence and big data has developed in depth, and human society has begun to enter the era of Internet of Everything. China is in a relatively advanced position in the development of 5G technology and standard-essential patents, and it is also a huge potential market for 5G-related products in the world. In this context, the value of the patent portfolio of Chinese enterprises is increasing. Unfortunately, due to various reasons such as history, in European and American courts in the case of standard-essential patent disputes involving Chinese enterprises, China's wireless market position of communication products and the value of standard-essential patents of Chinese enterprises have been seriously underestimated. For example, in the *UP v. Huawei* case, the British court listed the European and American markets as "main markets" and listed China's wireless communication product market as "China And other markets". At the same time, the European and American courts ruled on the higher standard-essential patent licensing rates of the right holders in the European and American markets for the export products of Chinese enterprises when the prices and profits of the wireless communication products of Chinese enterprises were low, resulting in the impact of standard-essential patents on wireless communications. The value contribution ratio of the product deviated significantly, which unreasonably squeezed the profit space of

Chinese enterprises and ignored the development status of Chinese enterprises. This status quo should be changed.

When foreign courts decide the global rates of standard essential patents, including China, they still make decisions in different regions. For example, in the UP v. Huawei case, the British court divided the global standard-essential patent licensing market into "main markets" and "China and other markets." Foreign courts may not understand China's patent legal system due to reasons such as ignorance of the Chinese language, and thus cannot accurately determine the value of the patent portfolio of standard essential patent holders in China. Under normal circumstances, companies in Western countries first consider applying for patents in English-speaking countries in terms of patent layout, and then enter China for patent layout. Due to language translation and other reasons, standard-essential patents with relatively stable rights in Western countries may be declared invalid in China and are in an unstable state. It is difficult to grasp and judge whether the standard-essential patents declared in Chinese jurisdictions are valid and true standard-essential patents by foreign courts.

Judging from the determination of the standard-essential patent rates in Chinese jurisdictions and the TOP-Down method, due to the number of real standard-essential patents in the Chinese jurisdiction and the number of real standard-essential patents owned by the SEP owner, It is difficult to grasp and difficult to judge. In addition, from the perspective of the comparable agreement method for determining the standard-essential patent fee rate, it is difficult to separate the standard-essential patent fee rate in Chinese jurisdictions because the description of the prior patent package fee rate agreement is generally very general or very vague. Therefore, when an extraterritorial court decides on a global fee rate including China, it is difficult to determine the FRAND fee rate for a standard-essential patent holder in a Chinese jurisdiction. For example, the Supreme People's Court found that Unwired Planet Wireless Licensing Co., Ltd. (hereinafter referred to as Unwired Planet) and Huawei in the second instance confirmed non-infringement of patent rights and standard-essential patent licensing disputes. The German court determined that Unwired Planet complies with FRAND's Chinese licensing rate quotation. , Which is 18.3 times higher than the Chinese fee rate confirmed by the Nanjing Intermediate People's Court in the first instance that Unwired Planet complies with the FRAND principle.

In summary, it is difficult for foreign courts to make correct judgments on the FRAND rates of standard-essential patent holders in Chinese jurisdictions when deciding global rates for standard-essential patents including China. This is very difficult for companies in Chinese jurisdictions.

(2) Violation of the principle of the closest connection in the jurisdiction of the case

For most Chinese companies, the Chinese market is their main market, and the foreign market is a non-main market. In this context, extraterritorial courts voluntarily ruled global rates when Chinese and foreign companies did not reach an agreement, which violated the principle of the closest connection in the jurisdiction of intellectual property cases. Take the case of UP v. Huawei as an example. In Huawei's global sales business, products are produced in China and the main market is also in China. The Chinese market accounts for 56% of Huawei's global sales, and the UK market only accounts for 1% of Huawei's product sales. At the same time, the UK is not a major global market for wireless terminal products such as mobile phones.

The burden of licensing fees for standard-essential patents is directly proportional to the implementer's product sales and sales volume. The higher the sales and sales volume of an implementer's products in a particular country, the higher the patent licensing fee it needs to pay. The closer it is to the jurisdiction of that particular country. Judging from the case of *UP v. Huawei*, UP filed an injunctive relief suit in a British court with two valid standard-essential patents as the connection point. The British court voluntarily ruled on licensing contract terms including global rates and made the British market injunction mandatory. Urge Huawei to accept the global rate agreement. As the UK market only accounts for 1% of Huawei's product sales, the UK courts still actively ruled global rates in injunctive relief disputes when the two parties did not reach an agreement, which violated the principle of the closest connection to the jurisdiction of intellectual property cases.

(3) Bring a heavy burden of litigation costs to the parties in the SEP dispute case in China

As we all know, it is often necessary to hire a lawyer to fight a lawsuit. For foreign-related SEP disputes, the parties need to find a local lawyer to provide legal services. Most of the intellectual property laws of various countries stipulate that attorney fees and other costs due to litigation are mostly borne by the losing party. Compared with other countries, the cost of litigation such as legal fees in the UK is very expensive. Take the case of *UP v. Huawei* as an example. Huawei has spent more than 200 million yuan in attorney fees after the third-instance procedure in a British court. This is an expensive litigation cost for Huawei. The practice of the British courts voluntarily adjudicating global rates is very likely to attract global NPEs to the British courts to sue Chinese SEP implementers. The implementers respond in the British courts and will have to bear the cost of litigation such as the expensive legal fees in the United Kingdom. This is undoubtedly a heavy burden for China's wireless communication product manufacturers and sales companies.

(4) It may cause conflicts and competitions between countries in the jurisdiction of SEP license rates

According to the industry practice of standard-essential patent licensing negotiations, when manufacturers and sellers of global communications products negotiate licenses with standard-essential patent owners, the geographical scope of licensing negotiations is usually the geographical scope of the implementer's product coverage, which can save costs. Provide efficiency. But when the two parties fail to reach a license agreement and cause a dispute, the extraterritorial court cannot simply because the geographical scope of the negotiation between the two parties is global. In order to resolve the dispute between the two parties, it is natural that the court of that country can judge the global rate. The two parties negotiate to resolve the issue of global FRAND license fees. After the negotiation fails, the court can voluntarily determine the global rate to resolve the dispute between the two parties. The two are not the same thing. Both parties negotiated and reached a global license agreement that belongs to the scope of autonomy of the parties. However, due to the territorial nature of patent rights, the patent legal system belongs to the scope of a country's judicial sovereignty. In the case of injunctive relief disputes, the British courts took the initiative to determine global rates for both parties. It involves issues of judicial sovereignty and international comity with countries including our country. Ignoring or neglecting to consider this factor is very likely to trigger conflicts and competitions between countries regarding the jurisdiction of SEP licensing rates.

The British court stated in the *UP v. Huawei* case that "at least in the absence of the consent of all parties, the Chinese court has not clearly asserted that it has jurisdiction to determine the global FRAND

licensing conditions". This should be subjective judgment of the British court. Article 16 of the "Guidelines for the Trial of SEP Dispute Cases (for Trial Implementation)" issued by the Higher People's Court of Guangdong Province on April 26, 2018 stipulates that "the standard essential If the license area of the patent exceeds the jurisdiction of the adjudication area, and the other party has not explicitly raised an objection in the litigation procedure or the objection raised is unreasonable after examination, it may make a judgment on the license fee within the license area." The reason for the explanation of this article is that this article is a provision on the territorial scope of the determination of the standard-essential patent license rate. Based on respect for judicial sovereignty and international judicial comity, the license scope determined in the trial of the standard-essential patent license fee dispute is limited in principle Within the jurisdiction of the adjudication. However, if both the right holder and the implementer agree that the people's court shall determine the royalties for licenses outside the territory or on a global scale, the people's court may make a ruling. In addition, if one party's objection is deemed unreasonable after the court's review, the people's court may also make a ruling on the license fee within the territory at the request of the other party.

(5) May cause injunction issues

In the case of injunctive relief disputes, the British courts voluntarily ruled on global rates, which often brought about the issue of anti-suit injunctions in conflict of jurisdictions between countries. For example, UP filed a standard-essential patent injunctive relief suit against Huawei in a British court. In order to counter UP, Huawei filed a standard-essential patent anti-monopoly suit against UP in a Chinese court, requesting the Chinese court to order UP to stop the monopoly infringement. In order to prevent Huawei from filing a lawsuit in a Chinese court, UP applied for an anti-suit injunction in a British court, requesting the British court to order Huawei to withdraw its standard-essential patent monopoly infringement lawsuit in the Chinese court. Huawei was worried that it would be punished by the British courts and was forced to withdraw its standard-essential patent monopoly infringement lawsuit against UP in a Chinese court.

2. Suggestions on China's response to the initiative of extraterritorial courts to determine global tariffs

(1) Apply for invalidation of the patent holder of a standard essential patent in China

As mentioned above, standard-essential patent disputes between wireless communication companies are often presented in the form of cross-border parallel litigation, and the parties involved in the dispute often choose to file a lawsuit in the court of a country that is advantageous to them. As the British courts take the initiative to determine global rates in injunctive relief disputes, it may attract global NPEs to bring SEP injunctive relief suits in this country to force implementers to sign SEP licensing contracts. In this case, China's wireless communication companies bear the brunt. For example, in recent years, due to the proactive ruling of global rate contracts in standard-essential patent injunction relief cases by the British courts, NPEs such as UP and Inter Digital Corporation (hereinafter referred to as IDC) have sued Huawei and ZTE respectively in the British courts. These NPEs passed Several British standard-essential patents to require the British courts to award global rates and issue an injunction through the British courts to urge Huawei and ZTE to reach a global standard-essential patent license agreement with them as soon as possible.

Since foreign courts actively ruled the terms of the global rate contract in the standard-essential patent injunction relief case, in order to fight against the standard-essential patent holder, Chinese companies usually choose to apply for invalidation of the patent of the standard-essential patent holder in China. For example, after the SEP license agreement between Huawei and IDC expired, the two parties were unable to reach a new SEP license agreement and disputes occurred. Huawei first sued IDC in a Chinese court, requesting the Chinese court to determine IDC's standard essential patent licensing rates in Chinese jurisdictions. In order to counterbalance Huawei, IDC later filed a lawsuit in a British court, requesting the issuance of an injunction to Huawei, and requesting confirmation of IDC's global rate of standard essential patent portfolio. Huawei applied to the Chinese administrative authority to declare IDC's standard-essential patents in China invalid, and many of IDC's 4G and 5G standard-essential patents in China were declared invalid. Due to mutual checks and balances, the two parties eventually withdrew each other's lawsuits by re-arising the standard essential patent license agreement.

(2) Initiate a lawsuit against the Chinese court for the licensing rate of standard essential patents

Since China's Huawei, ZTE and other companies went abroad to participate in international market competition, disputes caused by the failure to reach a standard-essential patent license agreement with NPE have increased. In order to counter the lawsuit brought by the NPE, Huawei and ZTE chose to sue the aforementioned NPE in a Chinese court, requesting the court to determine the standard essential patent license rate in the Chinese jurisdiction. This article believes that when Chinese companies and NPEs are unable to reach a standard-essential patent license agreement and fall into a deadlock, the Chinese companies choose to request a ruling on the NPE's standard-essential patent license rates in Chinese jurisdictions in a Chinese court. This kind of litigation complies with the law.

This article believes that when a Chinese company requests a ruling on the standard-essential patent right holder's litigation for the standard-essential patent license rate in the Chinese jurisdiction, regardless of whether the time of litigation is first or later, because the Chinese court is required to determine the standard in the Chinese jurisdiction. Litigation of patent licensing fees enjoys exclusive jurisdiction. Therefore, extraterritorial courts should exclude the trial of standard essential patent licensing fees in Chinese jurisdictions. For example, after Huawei's request to confirm IDC's standard-essential patent rates in the Chinese jurisdiction in the Shenzhen Intermediate People's Court, the International Chamber of Commerce (ICC) arbitrated IDC and Huawei's global standard-essential patent rates rulings on standard essential patent rates in Chinese jurisdictions.

(3) Establish an anti-suit injunction system for handling SEP disputes in China

The practice of foreign courts issuing anti-suit injunctions to civil litigants in China has caused great obstacles to the normal exercise of rights by litigants in civil litigations in China. At the same time, it has also caused a greater impact on the legal exercise of jurisdiction by Chinese courts. Due to the lack of international jurisdiction rules for foreign-related intellectual property disputes and the lack of an anti-suit injunction mechanism, it is difficult for China to form countermeasures in international competition, and it is unable to build the main battlefield for foreign-related dispute resolution. Therefore, China should establish the anti-suit injunction system on the basis of the principle of reciprocity and international comity.

It is worth noting that the Supreme People's Court issued an injunction against Conversant in the case of Conversant's standard-essential patent dispute with Huawei, ordering Conversant to not implement the

injunction judgment made by the German court against Huawei. r This is the first time that Chinese courts have applied the behavior preservation and anti-suit injunction system.

Conclusion

In the case of UP v. Huawei SEP injunction relief, the British court found that Huawei infringed two of UP's British Standard Essential Patent Rights, and on this basis, voluntarily ruled the global license rate contract for both parties. If Huawei accepts the license contract, the injunction Will be lifted, if Huawei does not accept the license contract, the ban will take effect. The practice of the British courts of voluntarily arbitrating global licensing fee contracts and issuing injunctions to ensure the enforcement of their rulings is quite different from the practice of handling standard essential patent disputes by the courts of major countries in the world.

Since UP and Huawei have just started to negotiate, UP immediately sued Huawei in the British court when there was no sign that the negotiation between the two parties could not proceed. And when UP, as the SEP right holder, violated FRAND's commitment to make an offer, the British court still took the initiative for both parties The arbitration of the global licensing rate contract and the issuance of an injunction to force its realization are not in line with FRAND's original intention, and it also violates the principle that the market should prioritize the allocation of resources. At the same time, this kind of adjudication may lead to conflicts and competitions between countries in the jurisdiction of SEP license rate disputes and trigger the issuance of international anti-suit and anti-suit injunctions, which is worthy of discussion. ■