

China's Top Court Affirms Right To Set Global FRAND Rates

By **Britain Eakin**

Law360 (September 10, 2021, 3:52 PM EDT) -- China's top court has affirmed that a lower court had jurisdiction to set global licensing rates for 3G and 4G standard essential patents in an intellectual property dispute involving a Chinese mobile phone manufacturer and Japan-based Sharp Corporation, according to an unofficial copy of the decision and interviews with IP experts.

The Intellectual Property Tribunal of the Supreme People's Court said even though patent owner Sharp isn't based in China, the dispute had a sufficient connection to China, according to an unofficial, translated copy of the Aug. 19 decision obtained by Law360.

The Supreme People's Court said the Shenzhen Intermediate People's Court had jurisdiction because most of the standard essential patents involved are Chinese, the allegedly infringing products from Guangdong Oppo Mobile Telecommunications Corporation Ltd. are manufactured in China and more than 70% of its products are sold there, and the parties engaged in licensing negotiations in the country, among other factors.

Aaron R. Wininger, director of the China intellectual property practice at Schwegman Lundberg & Woessner PA, recently wrote about the decision. He told Law360 it sends a clear message to non-Chinese companies seeking to license standard essential patents to Chinese companies.

"They will want to be really careful on how they proceed so they don't get pulled into Chinese litigation they weren't wanting or expecting," Wininger said in an interview. "They'll need to be especially careful with any communications they have with any Chinese entities."

The lower court ruling at issue in the appeal was handed down by the Shenzhen Intermediate People's Court in October 2020. According to the China Justice Observer, which reported on the lower court's decision, it marked the first time a Chinese court unequivocally declared jurisdiction to set global standard essential patent rates.

The decision by China's top court came as the body that represents the European Union at the World Trade Organization was seeking information from China about recent court decisions on standard essential patents, including the Oppo ruling. The July 6 request for information from the European Commission also noted other cases in which Chinese courts have granted anti-suit injunctions that prevent foreign rulings from being enforced against Chinese companies.

China responded to the request on Tuesday, saying in a five-paragraph response that it was not obligated to respond to the European Commission's request, but would do so "in the spirit of good faith, cooperation and transparency." The response didn't touch on anti-suit injunctions or standard essential patents, but instead outlined the Supreme People's Court's procedures for publishing decisions.

It also said that the cases the European Commission pointed to had no general, or broader, application.

App developer and former intellectual property activist Florian Mueller, who wrote about the Oppo decision Monday in a Foss Patents blog post, told Law360 the EU's request for information was likely the precursor to a formal complaint accusing China of stepping on IP rights.

"It's not warranted because China can make the same argument against others, and that's probably the reason why China's response was as thin as it was," Mueller said in an interview.

China is not the first country to hand down a court decision saying it can set global licensing rates. The U.K. Supreme Court **ruled in August 2020** that English courts can grant an injunction against a company that infringes a standard essential patent in Britain if the offender does not agree to global license rates for the patent portfolio on fair, reasonable and nondiscriminatory or FRAND terms set by the court.

German courts have also flexed their authority over standard essential patent matters. In May 2020, the German Federal Court of Justice **held in a dispute** between Luxembourg-based patent licensing company Sisvel and Chinese consumer electronics manufacturer Haier that the entire burden of offering a FRAND license can't fall on the patent owner.

It said patent owners can still meet FRAND requirements when requiring licenses to include large, multinational patent portfolios and while offering different rates to competing licensees.

--Editing by Robert Rudinger.