

# Injunction in China Patent Litigation

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# Agenda

- ◆ Current status
- ◆ A glimpse into the past
- ◆ Are we at a juncture of change?

# Automatic Injunction: the Perceived Basis

- ◇ Patent Law Article 11
  - ◇ ...no entity or individual is entitled to, without permission of the patentee, exploit the patent... for production or business purposes.
- ◇ SPC Judicial Interpretation re Patent Infringement Cases (II) 2016, Article 26
  - ◇ Where the defendant constitutes an infringement upon the patent, and the patentee requests to order the defendant to cease the infringing act, the people's court shall give support thereto, but, in consideration of the national interests and public interests, the people's court may not order the defendant to cease the alleged act, but order it to pay the corresponding reasonable expenses.

# Has Article 11 always been so interpreted?

## ◇ 2009 Opinions on Several Issues concerning Intellectual Property Trials Serving the Overall Objective under the Current Economic Situation

- 15. We shall give full play to the remedial role of the stop of infringement, **appropriately apply the liability of stopping infringement**, and effectively curb infringement. ... **If the stop of the relevant acts may cause any significant imbalance of interests** between the parties concerned, is **contrary to the public interest**, or can not be enforced actually, the court **may weigh the interests** as the case may be, and instead of ruling the stop of the relevant acts, settle the dispute by taking such alternative measures as making more sufficient compensation or economic compensation. ...

# An Objective-oriented approach

- ◆ **2009** Opinions on Several Issues concerning Intellectual Property Trials *Serving the Overall Objective* under the *Current Economic Situation*
- ◆ What “overall objective” and “economic situation”?
  - ◆ In order to ... make intellectual property trials better serve **the overall objective of “effectively coping with the impacts of the international financial crisis and promoting a stable yet relatively rapid economic development”** , ...we hereby put forward the following opinions ... under the current economic situation...:
  - ◆ **IV.** Improving the intellectual property litigation system, focusing on **improving the trade and investment environment**, and actively promoting the rise of the level of opening up
    - ◆ 13. We shall ... **curb the abuse** of intellectual property rights,
    - ◆ 14. We Shall...prudently take the measure of ordering the **stop of infringement before litigation**
    - ◆ 15. We shall ... **appropriately apply** the liability of stopping infringement

# 2018 JI re “Conduct Preservation” in IP Disputes

- ◆ **Article 7** When examining an application for act preservation, a people's court shall comprehensively consider the following factors:
  - 1. whether the applicant's request has a factual basis and a legal foundation, including whether the validity of the intellectual property requested for protection is **stable**;
  - 2. whether failure to take act preservation measures will cause **irreparable damage** to the legitimate rights and interests of the applicant, or cause difficulty in the enforcement of the ruling for the case, or cause other damage;
  - 3. whether the damage caused by the failure to take act preservation measures exceeds the **damage** caused by act preservation measures **to the respondent**;
  - 4. whether taking act preservation measures harms **public interests**; and
  - 5. other factors that shall be considered.

# Is it a time for change (again)?

## ◇ External

- ◇ US example

- ◇ German Patent Law Modernization Act, Sec. 139(1):

- ◇ “The claim is excluded insofar as asserting such a claim would cause **disproportionate hardship** for the infringer or third parties not justified by the exclusive right taking into account the particular circumstances of the individual case and the requirements of good faith. In such cases, the infringed party shall be granted adequate monetary compensation. This shall not affect the claim for damages under paragraph 2.”

- ◇ EC guidelines re proportionality

## ◇ Internal

- ◇ China as a manufacturing hub of the world

- ◇ Growth of domestic ICT industry

- ◇ NPE’s “gold rush”?