The Current Situation of the Predicaments of Taiwan High-Tech Industries for Patent Dispute Resolution

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ABSTRACT

Since patent dispute cases often involve industrial background and legal background in Taiwan High-Tech Industry, such as professional technology, short product life, time to market, uncertain patent claims, court judgments among different trial-level. But the rule of law and litigation emphasize the protection of procedural justice, which may be time-consuming and often leads to delayed justice. Actually, substantive justice is concern with the benefits of length time and cost, procedural justice is concern with the benefits of the trial court, and therefore, under the considerations of dual justice, applying for arbitration is superior to the sending of a warning letter, requesting a preliminary injunction, as well as filing a lawsuit. In practices of patent dispute solutions, OBM always not only rely on its own strengths with the large amount of capital and patent technique, but also take patent misuse to force competitors (OEM, ODM) out of the market by patent litigation. As a result, patent law is out of balance in legal system. Based on the above, this article discusses industrial background and legal background in Taiwan high tech industry, and patent misuse by patent holder, in order to explore which method is the best option under procedural and substantive justice. As a result, the findings of the study indicate that arbitration is the best option based on procedural and substantive justice.

Keywords: Patent Misuse, Arbitration, Time to Market, Short Product Life

I. Introduction

With the development of the knowledge economy and globalization, the environment of hi-tech industries has been changing constantly. Hi-tech industry business managers have been using various strategies to acquire patents and apply them more efficiently. Rationally considered, business managers are also concerned with increasing profits and decreasing time to market, and thus the commodification of patent technique. Only by doing so can enterprises acquire a predominant role in the global competitive market and thus upgrade their competence in all enterprises. However, in reality, patent dispute solutions of high-tech enterprises, due to laws stressing the maintenance of "procedure justice," must go through a number of processes at various levels of trial courts. Patent dispute cases often involve professional technology, but the rule of law and litigation emphasize the protection of procedural justice, which may be time-consuming and often leads to late justice. Even if each party wins the case, the victory may come too late for the viability of the product or procedure that has been fought for. After all, during the whole time spent fighting in court, the parties are losing business opportunities due to the shortness of product shelf life; even if they eventually win the case, the only prize may be a debt certificate with an apology for "delayed justice." Accordingly, due to constant environmental changes, regulating the procedure of justice and achieving legal distributive justice is not only important from the standpoint of abstract notions of fairness and justice and maintaining the citizens' confidence in our legal systems, but also profoundly influences trends and growth in the global market competition of high-tech enterprises. It is concerns about these matters that has inspired the present research.

In general, many patent lawsuits are filed by high-tech industries.[1] Common issues are protecting the patent holder's rights, compensation for patent losses, patent infringement, and to obtain licensing fees or royalties for the patent holder. However, there are also cases in which enterprises purse unfair competition and use litigation as a business strategy. Enterprises such as Nokia, Motorola, Samsung and Sony all have Own Brand Manufacturer (OBM) and frequently threaten the Original Equipment Manufacturer (OEM), Original Design Manufacturer (ODM) in Taiwan by demanding unfair and unreasonable licensing fees (royalties) or imposing license restriction clauses on these manufacturers. And sometimes they also may ask for court injunctions as business strategies in the global competitive market. If they win, they may ultimately take a leading role in the manufacturing of the relevant product. The methods mentioned above may not only violate the core idea of patent system but may be against the competition of the free market.

Indeed, legal justice is dependent on the practice of procedural and substantive justice. However, in the process, there are some contradictions which seem to go against the common sense and universal values of the public, like the cases mentioned above where the enterprises are pursuing an unfair competitive advantage. If we put too much emphasis on the procedural justice, we may not be able to avoid the cases mentioned.

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[1] Patent Assertion AND U.S. Innovation, Executive Office of the President, June 2013, https://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf. (last visited Feb. 20, 2016). Fiona Scott Morton, Carl Shapiro (2014), 79 Antitrust Law Journal, No. 2, 463-499, http://faculty.haas.berkeley.edu/shapiro/pae.pdf. (last visited Feb. 20, 2016)

On the contrary, putting way too much emphasis on substantive justice can lead to bad results in some cases, leading to the conviction of some who are not guilty of any crime. Hence, the solution to the patent disputes should be based on the balance of procedural and substantive justice. Common law applies the equity law to legal regulations and judicial judgments. And the courts never make any judgments that violate the common sense and universal values of the public.

Based on the statements made above, this chapter discusses the present day patent system in three different aspects. 1. The background of the high-tech industry (including the specialization of high-tech products, the high confidentiality of high tech products, the short life cycle of the products, the promptness of the commodification of the Products, and the decision-making process of the business manager - the interchangeability of legal rationality and economic rationality). 2. The background of patent law (including how some patent claims can be highly uncertain, how judgment of patent effectiveness can be highly unstable, the difference between administrative and court judgments, the differences among the judgment of different trial-level courts, and the conflicts between national and transnational laws). 3. The misuse of the dispute solution mechanism by the patent holder (including the legitimacy of judgment for solving patent disputes - equity law, how the improper use of warning letters can violate anti-trust laws, how the improper use of injunction orders violate equity laws, and how the improper use of long proceedings violate substantive justice)

II. The Industrial Background of the Taiwanese High-Tech Industry

A. The Industrial Background of the Taiwan High-Tech Industry-The Specialization of High-Tech Products

Legal values can be quite multi-faceted, often being the result of balancing profits so as to pursue justice. The judicial concerns of the high-tech industries resemble other cases in other fields of industry. Nevertheless, when patents are related to high-tech techniques, the judgments of the patent cases should be made by those with high-tech knowledge in different spheres, such as physics, chemistry, electronics, semiconductor technology, Integrated Circuit (IC) design, TFT-LCD (Thin-Film Transistor Liquid-Crystal Display) Panel technology etc.

In general, in order to maintain the fairness of judicial judgments, laws have been designed to include both substantive and procedural laws, which not only put emphasis on legal proficiency but on knowledge in other fields, such as electronic engineering, biotechnology, etc. Thus, in Taiwan, the judicial system which deals with patent disputes has become central to the parties concerned, as it a key way to solve the disputes.

In other words, the regulations related to the patent disputes' solutions are not only relevant to the conditions of acquiring the patent but also to the abilities of the judges when making correct judgments. Even if the judicial system is destitute of professional knowledge and proficiency, the process may still be quite time-consuming and also may be questioned because of a deficiency of the abilities required, which may negatively influence the competence of the high-tech industries in the global market.

Because of this, the U.S. federal court has its own Expert jury (Blue Ribbon Jury), and the German federal court has its own separate system in which the composition of the Intellectual Property court is dependent on a few judges and many technical examination officers. Taiwan does not have a system like this. Under article 4 of the Taiwan (ROC) Intellectual Property Case Adjudication Act,[2] the performance and duties of the technical examination officer are limited to only an explanation to the parties concerned or the questioning of the parties, witnesses and appraisers. However, if the technical examination officers are not witnesses or appraisers, how can the technical examination officers be questioned by the parties? Moreover, if the opinions of the judges are different from those of the technical examination officers and the judges insist on their own opinions, this will be against the purpose of the Intellectual Property Case Adjudication Act for establishing the intellectual property court.

Due to these shortcomings, I think the legal and judicial system here in Taiwan should be improved so as to boost economic development. This can be done by providing regulations which can keep up with times and making international manufacturers (including OBM, ODM and OEM) more likely to agree to accept legal

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2 The article 4 of Taiwan (ROC) Intellectual Property Case Adjudication Act: The court may, whenever necessary, request a Technical Examination Officer to perform the following duties:1.Ask or explain to the parties factual and legal questions based on the professional knowledge, in order to clarify the disputes in action; 2.ask questions directly to witnesses or verification experts;3.State opinions on the case to the judge; and 4.assist in evidence-taking in the event of preservation of evidence.

and judicial judgments made and followed here in Taiwan and . If so, Taiwan's legal and judicial system will be as supportive of high-tech industry as many international competitors. The purpose of IP law is to discover the truth, and thus to win the people's trust. To accomplish this, we just need to imitate the jury system used in the US tech cases, or the system applied in German law, which lead to the people's trust in the courts. This will increase profits by ending costly and wasteful legal disputes.

B. The Industrial Background of Taiwan's High-Tech Industry-The High Confidentiality of High Tech Products

With the growth of knowledge based economies, knowledge management and innovation becomes a core value of industrial competition. In patent dispute cases, high tech industries not only use patent law as a kind of weapon to file lawsuits against competitors who don't get the permission in advance, but use the law as a kind of passive defending weapon to attain success in business negotiations. This makes the importance of patent rights ineffable.

As for IP protection, it is not only valuable with the legal protection but also is dependent on the effective managerial system used in the companies. In other words, an effective managerial system in high tech industries includes product technology, business strategy, etc. The acquisition of related information is not only relevant to the profits gained, but the key to success. As a result, if the patent technique is illegally used by opponents, the damage this may bring is beyond imagination. Thus, litigation concerning patent law should be kept confidential to avoid other competitors achieving the illegal advantages in improper ways, which has become the core issue of the relevant law.

The Playskool, Inc. et al v. Famus corp case was heard in U.S. Federal Court in 1981. The court viewed the pleas and statements about the evidence as business secrets and the protection of the legal rights of proceedings. First of all, as for the limitation of business secrets, the American federal courts take several factors into consideration when it comes to issuing the command of protection of business secrets. These include:3 (1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the amount of effort or money expended in developing the information; (5) the ease or difficulty with which the information could be properly acquired by others.

Furthermore, as for the context of the operational secrets, the US federal court also cited article.26(c) of the Rules of Civil Procedure (FRCP) and determined that it applies to the cases concerned, including the following points: 1. Not to expose the evidence and discovery. 2. Only to discover the evidence and the truth under certain conditions. 3. Only to use certain methods to discover the truth. 4. Not to inquire about certain details and to limit the truth discovery to a certain range. 5. People other than the ones appointed by the courts should not take part. 6. Sealed testimonial statements can only

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3 Playskool, Inc. et al v. Famus corp., 212 U.S.P.Q.8(S.D.N.Y. 1981).:"(1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the amount of effort or money expended by him in developing the information; (5) the ease or difficulty with which the information could be properly acquired by others."

be opened under the instructions of the court. 7. Not to expose business secrets or other confidential information. 8. The sealed confidential information provided can only be opened under the instructions of the courts. In addition, the context of the operational secrets is no longer limited to the statements made by the parties concerned.[4]

In contrast, article11-1 of the Taiwan (ROC) Intellectual Property Case Adjudication Act doesn't include the regulations and clauses mentioned above in the US Federal Rules of Civil Procedure. Moreover, article13-1 of Taiwan (ROC) Intellectual Property Case Adjudication Act is not as flexible and definite as the US Federal Rules of Civil Procedure, which balances the profits of both parties concerned. Obviously, article.26(c) of the Rules of Civil Procedure (FRCP) is a suitable response to environmental changes to balance the profits of both parties if compared with the Taiwan (ROC) Intellectual Property Case Adjudication Act.

The Industrial Background in Taiwan High-Tech Industry-The Short Life Cycle of Products and the Promptness of their Commodification

The competitive niche of the high tech industries is based on new technology commercialization. High tech enterprises appeal to the demands of the consumers; they just have to make the products promptly get them to retailers, i.e. time to market, to acquire a competitive advantage. Accordingly, in the process of the new technology commercialization, the life cycle of products is constantly shortening, making time a key factor in success. In view of the importance of the new technology commercialization, the OBM often uses time consuming litigations as a business strategy, intentionally posing market barriers to slow the development of their rival companies. This is a breach of fair competition in the market and violates the principles of fairness and justice. Therefore, how to improve the legal system to increase lawsuit efficiency for timely protection of the parties' legal rights has become an important issue.

Regarding patent disputes here in Taiwan, since the litigation system is divided into a dual legal system consisting of public law and private law, the jurisdiction of the court is divided into the general court and the administrative court, respectively responsible for civil criminal cases and administrative cases. Thus, the parties may use the dual legal system to claim their rights at the same time, but this may also lead to a contradiction in the two judgments which may arise from the different courts. If this happens, the claim proceeding may go back and forth to the intellectual property office, general court and the administrative court, wasting valuable time among the different authorities in charge of the cases. As for the levels of administrative relief, these include application, expositions, objection, withdrawal, and so on. First of all, it is necessary to apply the case to the Intellectual Property Office, and if not satisfied with the judgment, the parties can appeal to the Ministry of Economy. If again unsatisfied, the parties then can file a lawsuit to the administrative court.[5]

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[4] Yu-Shu Zhang, A Comment on the draft of Intellectual Property Case Adjudication Act and related to Protective Order – Discussion on US Legal Practice Models, 139 The Taiwan Law Review, Taipei: Angle publishing Co Ltd, 55 (2006).

[5] Article 32 of the Taiwan (ROC) Intellectual Property Case Adjudication Act: Unless otherwise prescribed by law, an appeal may be filed with the final administrative court against a judgment of the Intellectual Property Court.

Due to the importance of time-to-market for the high tech industries, if the legal proceedings take a long time, the final verdict of the court, even if favorable, may have come too late for the products viability. This can lead to a case where justice delayed equals justice denied. Recognizing this problem, the dual legal system between public law and private law was amended by the Intellectual Property Court Organization Act (IPCOA);[6] this change is mainly to avoid different judgments arising from different courts and save time for both parties and judicial resources for the state.

With regard to patent disputes, the intellectual property courts adopted exclusive jurisdiction under the Anglo-American law system.[7] However, the two laws newly announced don't have this exclusive jurisdiction at all, which may lead to its being dependent on the plaintiff to file a lawsuit. This may increase the controversies regarding courts and the judgments. Thus, the two laws mentioned above should be modified to make exclusive jurisdiction to avoid court options and controversies.[8]

The Industrial Background in Taiwan High-Tech Industry-The Way of Decision: Making of the Business Manager – The Interchangeability of the Legal Rationality and Economic Rationality

With the growth of globalization, the flows of thousands of goods are no longer limited to national boundaries. The establishment of law systems is related to culture, economics, politics and social values. The legal system is also dependent on input, output and feedback to reach a dynamic equilibrium. Nowadays, general economic knowledge has become more widespread, issues regarding patents have become core issues worth discussing.

Because of the business strategies of hi-tech industries used here in Taiwan, the concerns of business managers tend to be about costs, benefits and effectiveness. The reasons why business managers make certain decisions is based on economic rationality.[9] What business managers are really concerned about is how to pursue maximum profits in order to avoid time consuming problems and to solve disputes efficiently, not only based on the concept of substantive justice and predictability. Thus, how business managers reach a balance between economic and legal rationality has become an issue worth discussing.

Any solutions to disputes are all based on the principle of self-ruling and contract freedom. In general cases, both parties agree to the same court to settle litigation that may arise in the future. This is also called the Alternative Dispute Resolution (ADR).

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6 Articles 2 and 3 of the Taiwan (ROC) Intellectual Property Court Organization Act.

7 28 USC § 1338 (a) of the Federal Rules of Civil Procedure: The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights. For purposes of this subsection, the term "State" includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands.

8 Chung Hsin Chang, *The Progress Toward the Establishment and Operation of Taiwan Intellectual Property Court*, Taiwan Bar Journal, Vol.11 (4), Taipei: Taiwan Bar Association, 61-76 (2007).

9 Godelier Maurice 1972, Rationality and Irrationality in Economics, The Translated from the French by Brain Pearce, New York and London, Monthly Review Press, 12-15 (1966)., cited by Wei-Ming Liao, *Preliminary Study of the International Law in the New Century – Legal Theory and Legal Education Consideration* , I MCU Law Review, 75-79 (2003).

With this in mind, most patent disputes are solved with economic rather than the legal rationality.

As we know, quite a few high-tech industries have adopted arbitration as a way to settle patent disputes, such as the Motorola case in 2004, the Ben Q Mobile case in 2006, and the Qualcomm case in 2007.[10] The professionals here in Taiwan also hold the view that[11] 1. Due to transaction cost, it is wise to decrease wasted time and money through arbitration. 2. In multi-national transactions, arbitration can avoid possible political factors 3. It is a great step for the community to adopt arbitration as a way to settle disputes.

III. The Legal Background in Taiwan High-Tech Industry

A. The Legal Background in Taiwan High-Tech Industry-Patent Claims are Highly Uncertain

As for the patent scope, usually it is based on the claims of the patent in the original application; the title, abstract, legend, and illustrations are all related to its effectiveness.[12] Under the circumstance where the specifications have been revealed but did not ask for protection, it will be considered a contribution to the general public. If the specifications are not revealed but still asks for protection, then the patent claim is deemed invalid. The patent applicant defines the technical field which requests the government's protection in the patent claim's wording; patent claims are the primary means through which various inventions gain patent protection. Usually the patent claim uses clear and simple language to describe its necessary elements and limited conditions. U.S. patent infringement litigation cases must first define the patent claim which applies. The interpretation of such claims is a "Question of Law," and is performed by the judge assigned to the case. Next it will define whether the accused approach or device is within the patents' claims. If it is disputed, it may need to be confirmed by a jury and is a "Matter of Law".[13] With regard to the academic theory of patent claims, there are Central and Peripheral definitions. For example, nations which use a Civil Law system, including Germany, Japan, and the Netherlands, apply the Central definition, while Common Law system countries, like England, apply a Peripheral definition. In America, patent rights were switched from a Central definition

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[10] Qualcomm Files Arbitration Demand Against Nokia to Resolve Dispute Over License Agreement), http://www.qualcomm.com/press/releases/2007/070405_files_ arbitra tion _ demand.html. (last visited June 06, 2008)

[11] Lin Yeu Chu (2002), *The Arbitration of High Tech Industry, Industry analysis* – ProMOS Co Ltd, (2002), http://www.promos.com.tw/website/chinese/industrylist.jsp?id=1025600004727. (last visited June 20, 2008.)

[12] The article 56(3) of Taiwan (ROC) Patent Act: The scope of an invention patent right shall be determined based on the claim(s) set forth in the specification of the invention. The descriptions and drawings of the invention may be used as reference when interpreting the scope of the claims in the patent application. The article 106(2) Taiwan (ROC) Patent Act: The scope of a utility model patent shall be determined based on the claim(s) set forth in the specification of the patented utility model. When interpreting the scope of claims, the description and drawings of the utility model patent may be used as reference.

[13] Philip Luo, *Designing Around of Patent Infringements*, Topics on Industrial Property, Self-Published Authors (2003).

to a Peripheral definition when the Patent Act of the United States was amended in 1870.[14]

1. Central Definition

When the Patent Act of the U.S. was amended in 1836, it introduced the idea of patent claims. Article 6 of the Patent Act states:[15] the inventor shall "particularly specify and point out the part, improvement, or combination of his invention or discovery" which the regulation to "particularly specify and point out" the patent claims is of the Central Definition. The explanation of Central Definition is that creation itself is a case of technical thinking, and the description of the claims is only the concrete form of the creative thinking; thus the patent protection scope is not limited to the description of the patent claims. It is centered in the patent claim but recognizes there is a certain technical extension that may reach beyond the claim. So according to the Central Definition, the although judgment on patent infringement is centered on the patent claim, after consulting the specifications and illustrations of the patent application, it may be necessary to moderately expand the record of the patent claim itself in accordance with the Doctrine of Equivalents.[16] The advantage of the Central Definition is that the main ideas of creation and invention are easy to understand, and the disadvantage is the record of the patent claim may be over expanded.

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14 35 U.S.C § 112(2): The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicants regards as his invention.

15 The 1836 Patent Act, Ch. 357, 5 Stat. 117, Section 6 (1836) : And be it further enacted, That any person or persons having discovered or invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter, not known or used by others before his or their discovery or invention thereof, and not, at the time of his application for a patent, in public use or on sale, with his consent or allowance, as the inventor or discoverer; and shall desire to obtain an exclusive property therein, may make application in writing to the Commissioner of Patents, expressing such desire, and the Commissioner, on due proceedings had, may grant a patent therefor. But before any inventor shall receive a patent for any such new invention or discovery, he shall deliver a written description of his invention or discovery, and of the manner and process of making, constructing, using, and compounding the same, in such full, clear, and exact terms, avoiding unnecessary prolixity, as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of any machine, he shall fully explain the principle and the several modes in which he has contemplated the application of that principle or character by which it may be distinguished from other inventions; and shall particularly specify and point out the part, improvement, or combination, which he claims as his own invention or discovery. He shall, furthermore, accompany the whole with a drawing, or drawings, and written references, where the nature of the case admits of drawings, or with specimens of ingredients, and of the composition of matter, sufficient in quantity for the purpose of experiment, where the invention or discovery is of a composition of matter; which descriptions and drawings, signed by the inventor and attested by two witnesses, shall be filed in the Patent Office; and he shall moreover furnish a model of his invention, in all cases which admit of a representation by model, of a convenient size to exhibit advantageously its several parts. The applicant shall also make oath or affirmation that he does verily believe that he is the original and first inventor or discoverer of the art, machine, composition, or improvement, for which he solicits a patent, and that he does not know or believe that the same was ever before known or used; and also of what country he is a citizen; which oath or affirmation may be made before any person authorized by law to administer oaths.

16 The U.S. Supreme Court in 1853 Winnas v. Denmead case, which some commentators use the expression of "the principle of equivalent for the first time.

2. Peripheral Definition

Because of the disadvantage of the Central Definition, that is, that it might result in a patent claim that is not precise enough and so lead to uncertainty when enforcing the law, the United States amended its Patent Act in 1870. Article 26 amended the recording approach of patent claims,[17] making it so that the "applicant must particularly specify and point out the part, improvement, or combination of his invention or discovery, and clearly request" that the specific idea at its heart be recognized. Patent claims' focus moved from the Central Definition to the Peripheral Definition, a change which has been recognized ever since. Under the Peripheral Definition, the patent applicant shall define the maximum limit of the claims. The technical content not mentioned in the specification of the patent claim will be deemed outside of the patent scope. The advantage of the Peripheral Definition is that it makes it easier to understand the patent claim, while the disadvantage is that the applicant might make the description of the items specified for patent application too complicated and over-inclusive for fearing any omission, thus maximizing the protective scope of the claim.

3. The Compromise Definition

The two definitions have both advantages and disadvantages, leading to a need for a theory that combines the good points of both, while putting emphasis on the context of the patent application scope. This idea has become a mainstream theory in most countries and regions dealing with patent issues. For example, No. 69 is the European Union's invention patent protocol. Doubtlessly, the advantage of a Central Definition is that the main idea of the creation and invention is easy to understand, and the disadvantage is the record of the patent claims might be over expanded. And the advantage of the Peripheral Definition is that it makes it easy to understand the patent claims. However, technology is changing and making progress every day, so if anything is left out in writing the specifications of a patent claim, it might lead to a later dispute. Due to the disadvantages of the above two definitions, the Compromise Definition advocates that the protective scope of the patent shall be based on the contents of the patent Claims, while the specifications and illustrations are used to explain such patent claims only. At present, this type of definition has become the main stream for patent applications in different countries, Article 69 of the Europe Patent Convention and its Protocol are good examples.[18]

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17 Patent Act of 1870, Ch. 230, 16 Stat. 198-217 (July 8, 1870): And be it further enacted, That before any inventor or discoverer shall receive a patent for his invention or discovery, he shall make application therefor, in writing, to the commissioner, and shall file in the patent office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery; and said specification and claim shall be signed by the inventor and attested by two witnesses.

18 Protocol on the Interpretation of Article 69 EPC：should not be interpreted as meaning that the extent of the protection conferred by a European patent is to be understood as that defined by the strict, literal meaning of the wording used in the claims, the description and drawings being employed only for the purpose of resolving an ambiguity found in the claims. Nor should it be

Of course, a patent's scope can be unstable and not easy to determine, though there is a theory which combines the goods sides of the central and peripheral definitions, which can make the scope more specific. In actual cases, however, even the professionals still find it hard to determine the exact range of patent rights, which explains the uncertainty of the whole system. It is true that a patent is an intangible intellectual property and that patent claims usually contain some uncertainty. Due to the construction of some claims, some practical matters which include distinctions in the Central definition which may be hard to define or have some items left out, especially in patent infringement disputes. Even if a compromise definition is used, theoretically the patent claim should still be precise. For example: section 3, article 56 of the ROC Patent Act stipulates that:[19] The scope of an invention patent right shall be determined based on the claim(s) set forth in the specification of the invention. The descriptions and drawings of the invention may be used as reference when interpreting the scope of the claims in the patent application. However, in practice, even professionals may not be able to clearly point out the limits of the specification claims. Thus, different reviewers may have different evaluation results for the same patent. For the same reason, the judgment on a patent infringement case may be inconsistent. In view of this, there can be tremendous uncertainty when the patentee is trying to establish patent rights.

A. The Legal Background in Taiwan's High-Tech Industry--The Judgment of the Patent Effectiveness is Highly Unstable

Patent rights are issued by a country to exclude other uses of the products with the traits of novelty, inventive step (non-obviousness), and industrial applicability (usefulness). Nonetheless, in order to avoid the misuse of patent rights, there is another reporting system to help secure the accuracy of the patent issuing matter. Patent rights are rights which the national authority gives the patentee whose invention and creation meet requirements of novelty, industrial applicability and usefulness, and pass certain criteria for originality and Non-obviousness, three elements. If the application passes, the national organization authorizes provides the patentee with an exclusive patent and monopoly right during a certain period of time. However, in order to avoid giving a patent right improperly and exercise patent technology unsuitably, in addition to the substantive review performed by the authorities during the first stage of an inspection, there are also patent laws that must be considered, as well as allowing possible objections, expositions, and even the possible revoking of a patent to assure the correctness in conferring the patent rights.[20]

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taken to mean that the claims serve only as a guideline and that the actual protection conferred may extend to what, from a consideration of the description and drawings by a person skilled in the art, the patent proprietor has contemplated. On the contrary, it is to be interpreted as defining a position between these extremes which combines a fair protection for the patent proprietor with a reasonable degree of legal certainty for third parties.

19 The ROC Article 56 (3) of Taiwan Patent Act: The scope of an invention of a patent right shall be determined based on the claim(s) set forth in the specification of the invention. The descriptions and drawings of the invention may be used as reference when interpreting the scope of the claims in the patent application.

20 The article 71 of Taiwan (ROC) Patent Act: Any person may request for an invalidation action against an invention patent with the Specific Patent Agency under any of the following circumstances…The article 72 of Taiwan (ROC) Patent Act: Where the interested party possesses recoverable legal interests due to the revocation of a patent, such interested party may file an

Preserving transactions safety is the top priority to commercialize the patent techniques in time. However, according to the patent laws here in Taiwan, starting from the date of obtaining the patent right, it is possible to have it withdrawn at any moment, which can cause a lot of uncertainty. According to article 73-2 in the patent law here in Taiwan, when a patent right is withdrawn, it is expunged from the record, as though it never exists. This may lead to issues of transactions safety. As for the the trading safety mechanism, for the patentee the most important thing is to commercialize the patent technology and market products within the limited product shelf life. Therefore, patent holders will generally either engage in manufacturing and sales themselves, transfer their patent, or authorize others to use it. However, according to the regulations in articles 67[21]and 68[22]of the ROC Patent Act, from the date the patent right is granted, it may be revoked anytime, even patents which have been reviewed and officially granted. This creates a degree of uncertainty for all producers. When the patentee exercises the patent right, he/she is faced with possible infringement from a third party, and there is a potential risk of the patent being revoked. In addition, the regulations in section 2, article 73 of the ROC Patent Act indicate that when the patent right is revoked by the authorities, its history is deleted. As a result, patent rights are still not solid guarantees of right, which not only shakes people's trust in the law, but also jeopardizes trading safety.[23]

Actually, the patent right review involves highly technical judgment, along with the constant development of professional skills. Thus, to decide whether an invention and creation meet the requirements of novelty, industrial applicability and usefulness, and inventive step or Non-obviousness, various judgments could be reached depending upon time and circumstances. Whether it is the intellectual property bureau in charge of the issuance of patent (administrative department), or the intellectual property court in charge of patent disputes (judicial department), the judgment on patent right acquisition or patent infringement often applies the present technical standard to evaluate the technique and standards at the time it the patent application is submitted. It is much more serious when the legal elements are regulated with uncertain legal ideas. This situation can occur when the intellectual property bureau in charge of the issuance of a patent (administrative department), or the intellectual property court in charge of patent disputes (judicial department) are entitled to judge the facts regarding the structural elements of a product and decide the legal aspects and decide whether the administrative handling and court judgment are consistent or not. This makes it

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invalidation action after the said patent has become extinguished ipso facto.

21 Article 67(1) Taiwan (ROC) Patent Act: Under any of the following circumstances, an invention patent right shall be revoked and the patent certificate issued thereto shall be recalled within a given time limit by the Patent Authority either by an invalidation action or ex officio, and if recalling fails, a public notice for revocation of said patent certificate shall be published:1. If the invention is found in violation of the provisions of Paragraph One, Article 12, Articles 21 through 24, Article 26, Article 31 or Paragraph Four, Article 49 of this Act; 2. If the home country of the patentee does not accept the patent applications to be filed by nationals of the ROC; or. 3. If the invention patentee is found being a person other than the person entitled to file the invention patent application.

22 The article 68 of Taiwan (ROC) Patent Act: An interested party may institute an invalidation action after the patent has expired or extinguished ipso facto if he/she has reinstatable legitimate interests as a result of the revocation of the patent.

23 The article 73(2) Taiwan (ROC) Patent Act: The effect of an irrevocably-revoked invention patent right shall be deemed non-existent ab initio.

impossible for the patentee to predict with complete confidence whether the patent rights effect exists or not. To know this with absolute confidence requires knowing both the intellectual property bureau in charge of the issuance of patent (administrative department), or the intellectual property court in charge of patent disputes (judicial department) to have a consistent standard on the judgment of patent right acquisition or patent infringement. Only this can guarantee the confidence of the people in predicting a patent dispute outcome.

B. The Legal Background of Patent Law in Taiwan-The Difference between Administrative Action and the Court Judgment

Along with the growth of a knowledge-based economy and globalization, R&D techniques, intellectual property rules, and business operation types are in constant flux. Diversified development and intellectual property protection has become steadily more complicated, and steadily more different from traditional property protection. Patent rights are related to intellectual property rights. The national authority confers the exclusive patent right to the patentee based on the trade-off relationship of economics. In the national patent system, when the nation authorizes the patentee with the rights of the initial stage, the relation between the nation and the patentee becomes public and formally legal; when the patentee exercises his exclusive patent rights afterwards, it is within a private law relation. It can be said that the design of the patent rights has both the private and public law two kinds of relations.

In the first stage, when the nation authorizes the patent rights for the patent holder (public law relation), the related patent acquisition, report, approval, and revocation and other such administrative processes involve high level scientific technique. Whether the resulting judgment is correct or not depends on the technology related personnel of the intellectual property bureau. They are the ones involved in the substantive review. As for the related disputes deriving from it, these also involve litigation proceedings, and the disputes derived from it apply to the administrative proceedings. Nevertheless, since the litigation system of Taiwan applies civil and criminal binary systems, when the common civil courts handle patent infringement litigation, the party concerned often provides the patent rights necessary for an effective defense. The civil courts are usually based on article 182 of the Code of Civil Procedures;[24] article 90 of the Patent Law[25] is applied to make the decision to stop the proceedings and wait patiently for the

[24] ROC (Taiwan) Civil Procedure Code, Article 182 (1): When the decision on an action, in whole or in part, is premised upon the existence or non-existence of certain legal relations to be determined in another action, the court may by a ruling stay the proceeding until that action is concluded. ROC (Taiwan) Civil Procedure Code, Article 182 (2): Except as otherwise provided, the provision of the preceding paragraph shall apply mutatis mutandis to cases where the existence or non-existence of a legal relation is to be determined by an administrative proceeding.

[25] The article 90 (1) of Taiwan (ROC) Patent Act: For any civil proceedings pending in a court in connection with an invention patent, the court may suspend the trial process until a decision on the patent application, invalidation, or revocation action related thereto has become irrevocable.

judgment of the administrative litigation.[26] In this way the legal patent system deviates from economic expediency. Because the proceedings are time consuming, even the party that wins the case in the final trial may end up losing, from the economic perspective, because of delayed justice.

In view of this, to solve disputes quickly and with economic effectiveness, article16 (1) of ROC (Taiwan) Intellectual Property Case Adjudication Act clearly stipulates that:27 When a party claims or defends that an intellectual property right shall be cancelled or revoked, the court shall decide based on the merit of the case, and the Code of Civil Procedure, Code of Administrative Litigation Procedure, Trademark Act, Patent Act, Species of Plants and Seedling Act, or other applicable laws concerning the stay of an action shall not apply. However, the judgment effect of patent rights made from the intellectual property court, since it does not apply to "the theory of issue preclusion" stressed in Civil Action, the approach may be different. According to article16 (2) of ROC (Taiwan) Intellectual Property Case Adjudication Act,[28] the judgment made by intellectual property court only has the relative effect of an individual case, not the relative effect of a common case. As a result, the judgment made by the intellectual property court (judicial authority) has no binding force on the intellectual property bureau (administrative authority). The party concerned must also file a report or revocation to the intellectual property bureau with the same evidence if there is a discrepancy between the administrative handling of the intellectual property court and the judgment made by the intellectual property bureau.

C. The Legal Background of Patent Law in Taiwan-The Differences among the Judgments of Different Trial-Level Courts

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26 The article 182 (1) of Taiwan (ROC) Civil Procedure Code: When the decision on an action, in whole or in part, is premised upon the existence or non-existence of certain legal relations to be determined in another action, the court may by a ruling stay the proceeding until that action is concluded the article 182 (2) of Taiwan (ROC) Civil Procedure Code: Except as otherwise provided, the provision of the preceding paragraph shall apply mutatis mutandis to cases where the existence or non-existence of a legal relation is to be determined by an administrative proceeding. The article 90 (1) of Taiwan (ROC) Patent Act: For any civil proceedings pending in a court in connection with an invention patent, the court may suspend the trial process until a decision on the patent application, invalidation, or revocation action related thereto has become irrevocable.

27 Article16 (1) of Taiwan (ROC) Intellectual Property Case Adjudication Act: When a party claims or defends that an intellectual property right shall be cancelled or revoked, the court shall decide based on the merit of the case, and the Code of Civil Procedure, Code of Administrative Litigation Procedure, Trademark Act, Patent Act, Species of Plants and Seedling Act, or other applicable laws concerning the stay of an action shall not apply.

28 ROC (Taiwan) Intellectual Property Case Adjudication Act, Article16 (2)：Under the circumstances in the preceding paragraph, the holder of the intellectual property right shall not claim any rights during the civil action against the opposing party where the court has recognized the grounds for cancellation or revocation of the intellectual property right.

As stated above, the patent rights system has both a private and public law, and therefore two kinds of legal character. When patent holders exercise their exclusive patent rights late in the proceedings, it is of private law character. As to the patent rights claims regarding judgments of effectiveness and infringement, these depend on the professional knowledge of professionals involved in the substantive review. Therefore, theoretically, according to article 17 (1) of ROC (Taiwan) Intellectual Property Case Adjudication Act, "the court may, whenever necessary, order the competent intellectual property authority to intervene in the action" to express the professional comments on patent right effectiveness.[29] As a result, the judicial department may come up with a consistent judgment regarding the disputes on patent right claims, their effectiveness, and, when applicable, infringement. However, since the litigation system of Taiwan applies both civil and criminal law, when the common civil courts handle patent infringement litigations, the judgment of the intellectual property right infringement does not apply due to "the theory of issue preclusion," which stresses the jurisprudence of Code of Civil Procedure. Thus according to article 16 (2) of ROC (Taiwan) Intellectual Property Case Adjudication Act, the patent judgment of the intellectual property court will only have relative effects case by case, not absolute effects in general cases.[30]

Article 16 (2) of the ROC (Taiwan) Intellectual Property Case Adjudication Act allows the patent judgment of the intellectual property court to only have relative effects case by case, not absolute effects in general all cases. This can block situations such as that in which the party pursuant deliberately files tiresome proceedings on the civil and administrative sides simultaneously simply to hamper and wear down the opponent, waste their time, and keep them and their product out of the market. In this way the party concerned might not be able to settle the two disputes at the same time. As a result, the relation between the procedural justice and substantive justice become unbalanced. In addition, since the patent infringement civil action and patent report administrative action are governed by the intellectual property court, the courts must examine the effects of the same patent one after another, even when the evidence and arguments are identical. This wastes time, money, and resources, as the intellectual property issue the court has already made a judgment on. Sending the same case through the civil action court and administrative action court might lead to differences between the judgments. Especially when the evidence and reasons are slightly different, the judgment on patent right effects may be inconsistent, leading to a tangled and complex legal predicament that could become even more difficult and time consuming to resolve.

To sum up, the design of the patent rights, according to the article17 (1) of the ROC (Taiwan) Intellectual Property Case Adjudication Act states that: "the court may, whenever necessary, order the competent intellectual property authority to intervene in the action." Theoretically, this may help avoid different judgments in different courts, however, because Intellectual Property Case Adjudication Act may not apply "the theory of issue preclusion" stressing jurisprudence of the Code of Civil Procedure,

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29 ROC (Taiwan) Intellectual Property Case Adjudication Act, Article17 (1)：To rule on the claims or defense raised by a party pursuant to the first paragraph of the preceding article, the court may, whenever necessary, order the competent intellectual property authority to intervene in the action.

30 Lu-Lin Hung, Intellectual property case adjudication act (June, 2009), (unpublished LL.M. thesis, National Chengchi University) (on file with author).

according to article 16 (2) ROC (Taiwan) of Intellectual Property Case Adjudication Act, it may allow patent judgments of the intellectual property court to only have relative effects case by case, not widely applicable general rulings. This will cause the judgment of the intellectual property court regarding the disputes on patent right claims to lack binding power in civil actions. In addition, administrative actions at a later stage in the proceedings will very probably lead to different judgments in court.

D. The Legal Background of Patent Law in Taiwan - Under the Globalization Trends, The Conflicts between National and Transnational Laws

Along with the rapid development of technology, the political, economic, social and cultural environments are changing too, and have led to effects which can cross national boundaries and accelerate the exchange and integration of related information, capital, commodities and labor among countries. As a result, the barriers of traditional national boundaries have gradually disappeared and been replaced with the borderless global village of the globalization era. Due to globalization, international legal affairs are becoming more diversified, which especially reflects on human rights, labor affairs, international trade, international finance, E-commerce, intellectual property rights, medicine and health, environmental protection, judgment and arbitration of foreign courts, etc., that together comprise the scope of Transnational Law.[31] Thus when law regulates the legal subject norms, activities, and behavior over national boundaries, it is not only limited to International Public Law or International Private Law, but also includes other laws.[32]

Nowadays, under the rapid changes of the globalization, a complicated and diversified set of social value norms have appeared on the surface that often conflict with the legal systems between national and transnational laws. In fact, to look into the conflict between national and transnational laws, the logic hidden behind them is like the Laws of Physics; the point is not the individual elements made up by atoms or molecules, but the interaction formed by permutations and combinations between atoms and molecules. For instance, the reason why the carbon atoms that make up diamonds do not give light themselves is because the special permutations and combinations in the structure of the carbon atoms to give out the sparkle.[33] In other words, national laws truly contain the elements that make up the international social structure; however, many National Law member countries signed transnational legal agreements with one another to set up the rules of the game based on mutual interests to maintain order in an international society. The contents of these laws may have

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31 Oxford Dictionary defines globalization as, "extending beyond national boundaries", quote in Thompson, The Concise Oxford Dictionary of current English, 9th ed, Oxford University press 1995, p1483. In addition, Harold J, Berman asserting that "world law" underpinning global civil society along the lines of common law, it is also includes Judge Philip's concept of "transnational law", cited by Harold J, Berman, "The Role of International Law in the Twenty-first Century: World Law", 18 Fordham Inte'l L.J., 1995, p1617, p1621. In this article, either "world law" or "global law" is collectively known as the "transnational law" to avoid confusion.

32 Judge Jessupin Storrs Lectures, Transnational Law, 1956, "to include all law which regulates actions or events that transcend national frontiers. Both public and private international laws are included, as are other rules which do not wholly fit into such standard categories [as pure domestic laws]."

33 MARK BUCHANAN, THE SOCIAL ATOM: WHY THE RICH GET RICHER, CHEATERS GET CAUGHT, AND YOUR NEIGHBOR USUALLY LOOKS LIKE YOU (2007).

nothing to do with the specialty of the national law. In view of this, how to adjust the gap between national laws and transnational laws to connect them has become an important issue worth further discussion.

Actually, the acquisition of patent rights and judgments of patent infringement belong different institutions, the Intellectual Property Bureau (administrative department) is in charge of the patent issuance, and the Intellectual Property Court (judicial department) is in charge of the patent infringement. As a result, the judgement conflicts between the Intellectual Property Bureau (administrative department) and the Intellectual Property Court (judicial department). In addition, the judgement conflicts are not only seen in national cases, but also happened at transnational area. For example, article 138(1) of the 1973 Convention on the Grant of European Patents (EPC) stipulates the reasons why certain European patents are invalid. But the recognition of the effects of governing disputes, examining the courts, etc., depends on the regulation of domestic substantive law and procedural law among the membership countries. Currently EPC has 38 members, so when there is a dispute regarding patent effects, the laws of more than 30 countries may be applicable. Thus the conflicts among transnational laws for the trading partners of the patent legal cases are very likely to cause uncertainty.

IV. Nowadays, the Patent Dispute Solution in Taiwan High Tech Industry -The Misuse of the Dispute Solution Mechanism by the Patent Holder

A. The Legitimacy of Judgment for Solving Patent Disputes-Equity Law

Equity law is used as a medium to remedy the change between the law and the social environment.[34] To speak from the standpoint of statute law, equality law not only explains and supplements the law, but also helps support ideas of fairness and justice.[35] Thus it is possible to solve some problems based solely on the principles of equality law.[36] Furthermore, in physical civil law, the judge may cite equality laws as judge-made[37] like the case of the court of chancery in England, in which the judge reached judgment based on customary law at the end of 15th century, which later on developed into the Doctrine of Unclean Hands and Doctrine of Laches, and Estoppel such cases related to equality law.[38] In addition, in the Code of Civil Procedure, the judge may order the defendant to make compensation and rehabilitation, or issue an Injunction Order or forbid the disposal of property or a similar multi legal remedy. In view of the constant stream of changes in high-tech technology day after day, the existing law will never be able to fully synchronize with the high-tech development and advance with the times. As a result, the federal courts usually take the "Equity Law" as

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34 HSIAN YUEN HO, *THE PRINCIPLE OF GOOD FAITH AND EQUITY LAW*, Taipei: San Min Bookstore Co, Ltd, 2-6 (1992).

35 Ibid

36 WOLFGANG. FRIEDMANN, *LEGAL THEORY*, 5Th Ed, New York: Columbia University Press, 1967, 533 (1967).

37 Mao Zong Huang, *Legal Method and Modern Civil Law*, NTU Legal Science Collection, Taipei: National Taiwan University, 375-383 (1987). Ian, Mcleod, *Legal Theory*, 5th Edition, Basingstoke: Palgrave Macmillan Limited, 160 (2010).

38 Hsian Yuen Ho, supra note 34, 157-164 (1992).

standard when facing patent dispute cases, using "judge-made law" to meet the problem, the implementation of a patent, the competition and combination between patents, anti-trust legal principles, or to connect equity law principles with modern technology enterprises. Accordingly, sending a Cease and Desist Letter, application Injunction, petition for arbitration, and filing for lawsuits are ways to seek solutions to patent disputes. Regarding the dynamic equilibrium of the patent legal system, whether they will comply with the requirement of the equity law is an issue worth further exploration.

B. The Improper Use of Warning Letters is against the Anti-Trust Law

When a patentee discovers a patent has been infringed, before bringing the case to the court, a warning letter will usually be sent to the other party. In addition to pointing out which patent items have been infringed, the other party will be asked to stop making, using, and selling such items. If the situation carries on, a lawsuit will be filed and compensation or damages will be sought. The legal effect of the warning letter is deemed a notification, which is important in the proceedings since, upon receipt of such a letter, the patentee assumes the other party has learned about the patent infringement, so on judgment of any damages or compensation, it is difficult for the accused party to prove they are unaware of the matter or at fault. If the defendant does not receive said cease and warning letter before the filing of the lawsuit, then the starting point of the damages or compensation will become effective from the date of receipt of the complaint. If the defendant has received the letter, then the compensation will begin from the date the letter was received. Therefore, the defendant must be careful on receipt of the warning letter. It should not be thrown away or disregarded. If the court decides this case is "willful violation" then the defendant is likely to pay a fine for compensation up to triple penalties. It is also possible that the court considers the defendant to have tacitly agreed, based on the inner conviction system, so a short and precise response from the defendant is necessary.

However, to make the warning letter a notification with legal meaning, it must comply with certain conditions. According to the regulations of U.S. Patent law:[39] A written notification from the patent holder charging a person with infringement shall specify the patented process alleged to have been used and the reasons for a good faith belief that such a process was used. A written notification from the patent holder charging a person with infringement shall specify the patented process alleged to have been used and the reasons for a good faith belief that such a process was used. After sending the letter, the patentee shall contact the opposite party actively without the conditions stated on equity law as: laches or inequitable estoppel, otherwise, even though the court considered there was patent infringement evidence, they will not make a judgment to ask the defendant for damage compensation. In a manner likewise, the

39 35 U.S.C. 287(b)(5)(B): A written notification from the patent holder charging a person with infringement shall specify the patented process alleged to have been used and the reasons for a good faith belief that such process was used. The patent holder shall include in the notification such information as is reasonably necessary to explain fairly the patent holder's belief, except that the patent holder is not required to disclose any trade secret information.

patentee sent a cease and desist letter to the competing customer to cause the improper interference in business has obviously gone over the necessary procedure of patent rights protection, and this not only commits the business behavior condemnation, but also affects the market trading order, which apparently is in violation of Article 24 of the Fair Trade Law R.O.C. (Taiwan).[40]

C. The Improper Use of an Injunction Order is in Violation of the Equity Law

In patent dispute cases, since they are time consuming, it is unlikely to offer the patentee an instant and efficient relief mechanism. As a result, when other competitors come into the market, to efficiently prevent such competitors from coming into the market, the patentee will usually take the "Exclusion of Infringement" to file at the court for provisional seizure and sequestration, and ask the court to issue an Injunction Order to prevent the competitor from making, using and selling such items temporarily. This is a judicial relief mechanism and market competition strategy approach. However, the shelf-life of high-tech products is usually very short, and any profit in such products lies in the rapid time to market. Thus, once the court has issued an Injunction Order to stop a competitor from making, using and selling a disputed item, the competitor may suffer from losing business opportunities due to the short shelf-life of their product or forced to withdraw from the market due to natural selection. According to whether the design and operation of the Injunction Order is good or bad, this will affect the patentee's legal interest as well as the fairness of the third party to compete in the market. Thus, when the court issues the Injunction Order, it is especially important to consider carefully the principle of equity between the patentee's legal interest and the public interest of fair trade.

To the common law system of the Anglo-American Law, the judgment of the common law system or equity law system on the substance the lawsuit usually lays on the relief requested by the plaintiff. If the plaintiff appeals to the court for damage compensation or reinstatement from the defendant, then it is a common law relief, however, if the plaintiff asks the court to issue an Injunction Relief, then it is an equity law relief, so the issuance of the Injunction Relief originates from equity law policy. According to the regulations of the Federal Rules of Civil Procedure (FRCP), the Federal Court may issue one of three injunction orders: 1.A Temporary Restraining Orders (TRO), 2.A Preliminary Injunction Order, 3.A Permanent Injunction Order. Of the three, a Preliminary Injunction has the most significant impact on the rights of the patent dispute party, because it will both increase the litigation costs of the competitor and irreparable damage will occur. Therefore, Article 65(a) of the Federal Rules of Civil Procedure stipulates that whether or not to issue a Preliminary Injunction depends on five factors: 1. Notice, 2. Hearing, 3. Security, 4. Reason, 5. Scope on Injunction. First, the court must notify the opposite party when issuing a Preliminary Injunction, because if it fails to serve the appropriate notice, any subsequent legal affairs may be deemed invalid. Next, the court shall call a hearing for substantive examination when issuing a Preliminary Injunction. Then, the court shall ask the petitioner to provide a certain amount of security to compensate for any losses of the party concerned for improper restriction when issuing a Preliminary Injunction. In addition, the court shall

[40] Article 24 of the Fair Trade Law, *R.O.C.* (*Taiwan):* No enterprise shall, for the purpose of competition, make or disseminate any false statement that is capable of damaging the business reputation of another.

have a good reason when issuing a Preliminary Injunction to explain the approval conditions and the restricted scope reasonably. The regulation of procedures of the Federal Rules of Civil Procedure of the U.S. has authorized the court to reach a judgment according to the case. In 1983, the United States Court of Appeal for the Federal Circuit (CAFC) for the case of Smith International, Inc. vs. Hughes Tool Co., clearly pointed out four standards when issuing a Preliminary Injunction, which are: 1. The plaintiff must prove it is possible to win the case; 2. The plaintiff must prove that if the Injunction is not approved, the plaintiff will suffer an irreparable loss; 3. The court has considered and compared the advantage and disadvantage, the gain and loss of the plaintiff and the defendant, and that the equity law relief is proper and reasonable; 4. The court approved Preliminary Injunction will not jeopardize the public interest.

D. The Improper Use of Long Proceedings is in Violation of the Substantive Justice

Along with the coming of the knowledge-based economy and the globalization of industrial competition, the technology enterprise operation environment is changing every minute. A major concern of the operational strategies of high-tech enterprises is how to obtain intellectual property rights and to protect, expand, and apply the same. In considering economic rationality, the major concern of business managers is how to maximize the technical effects and make the technique commercialized, and put such techniques into patent product within the short shelf-life of a product. Only by doing so can an enterprise gain an advantage in the market and take a leading place therein, and also upgrade its global competitive ability.

However, in reality, due to the law stressing the maintenance of “procedure justice”, patent dispute solutions for the high-tech enterprises must carry out the multi-level of the court procedure. However, patent dispute cases often involve highly technical issues in a complex legal field, and such a long procedure for seeking legal relief is time consuming, so any delays in the timing could mean that the patentee loses business opportunities due to the short shelf-life of their product, such that even if the case is successful, all patentee got was a debt certificate with a regret of “delayed justice”. Under the constant change of all kinds of factors and social conditions, the question of how to regulate procedural justice and substantive justice and realize legal distributive justice is concerned both with people’s trust in fairness and justice and also profoundly influences any upgrades to the global market competition of high-tech enterprises.

It is true that the fairness and justice of the pursuit of law depends on the realization of procedural justice and substantive justice. The two complement each other, like two wings of a bird and four wheels of a vehicle to. However, in search of fairness and justice, it is inevitable that the results of legal inferred logic often deviate from subjective common sense and any prevailing values, even as mentioned above, several high-tech personnel, upon legal economic analysis, and because of their wealth and financial status, and core technology, and use them as weapon with which to attack competitors by means of long and tiresome lawsuits. All kinds of abuse of rights and the misuse of legal prosecutions go against the goals of design and the core values of the patent rights system, and they also violate the principle of fair competition in the market.

V. Conclusion: Arbitration as the Best Option based on Procedural Justice and Substantive Justice

In practice, patent dispute resolution is nothing more than a warning letter by mail, requesting a preliminary injunction, and applying for arbitration and litigation. From a legal-economic viewpoint, a warning letter by mail is a minimum cost option with maximum effectiveness, but it will violate the anti-trust law[41] if the warning letter is used improperly. Therefore, it is clear that a warning letter by mail is not the best option under considerations of substantive justice and procedural justice. Requesting a preliminary injunction is in a similar category to the warning letter by mail, since any court injunctions must comply with equity law.[42] As a result, it is again clear that the requesting of a preliminary injunction is also not the best option under considerations of substantive justice and procedural justice. Since products with short life-cycles require rapid time to market, and litigation takes a long time to complete, it leads to the situation of 'justice delayed is justice denied', even if the parties will file the lawsuits after all. Consequently, litigation is also not the best option under considerations of substantive justice and procedural justice. Nevertheless, arbitration is superior to the sending of a warning letter and the preliminary injunction strategy in terms of the rule of res judicata, although it is not superior when considering the time and cost of such action. Arbitration is superior to litigation in terms of time and cost, and on par when considering res judicata. Evidently, arbitration is the best option under considerations of substantive justice and procedural justice when compared to warning letters, preliminary injunctions or litigation. It is true, the parties in the patent dispute solution were considering the "Economic Rationality", and the parties tried every legal relief means in the name of "Legal Rationality", which included filing civil and administrative litigation in Taiwan or demanding that the United States International Trade Commission (ITC) should promulgate an injunction. The attack and defense on all kinds of legal relief in the process of legal actions by the above mentioned both parties may have fully explained how their industrial strategy had the double considerations of "Legal Rationality" and "Economic Rationality". Doubtlessly, the final settlement was the best choice in the zero-sum game. In the viewpoint of this article,[43] if the parties apply for arbitration at the beginning of any disputes, it may save more time and costs in substantive justice, and may also comply with the due process of law.

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[41] 35 U.S.C. 287(b)(5)(B): A written notification from the patent holder charging a person with infringement shall specify the patented process alleged to have been used and the reasons for a good faith belief that such process was used. The patent holder shall include in the notification such information as is reasonably necessary to explain fairly the patent holder's belief, except that the patent holder is not required to disclose any trade secret information.

[42] Smith International, Inc. v. Hughes Tool Co.,718 F.2d 1573, 1581 (CAFC 1983).

[43] Article 35 U.S.C. 287(b)(5)(B)

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