

RECENT PATENT LITIGATION ON PHARMACEUTICALS IN GREAT CHINA

Mei-Hsin Wang*

CEO

China Biomedical & Technology Applications Association

ABSTRACT

Following the similar fashion worldwide, management of patent infringement through strategy planning and litigation skills by lawyers and the balance the efficiency and quality of judgments in the courts are both greatly improved during these years in Taiwan. This article reviews the important litigations like Eli Lilly's Gemcitabine and Takeda's Pioglitazone to provide guidance and lessons for biotechnology industry in great China to learn the skills for defending globalized companies. Although there are many factors which can be involved to affect the judgments in the courts, such as specific technology domains, complicated analysis of modern devices in suit, international trading relationship, political influence and media announcement, however, the facts and evidences, legal foundations and doctrines are the basics. Patent system to approve the patentability and award the exclusivity is a kind of support to pro the innovation. Enforcement of patent rights in the courts is also a legitimated means to protect the patent owner. Concepts like competition law and anti-monopoly are the new issues applied to challenge the patent system. However, we look forwards to the encouragement of innovation and fair trading to promote the social welfare. In addition, we pray for the justice and the perfection in our patent and legal system can be pursue through the cooperation globally.

Keywords: Patent troll, non-practice entity, patent infringement, fair trading

* Corresponding email: maywang3@gmail.com.

I. Introduction

Patent trolls started from the United States, and spreaded into even the developing countries in Korea, Taiwan, China, and India. The virtue of patent system is to reward the innovation for its contribution to enhance the wellbeing of the society. However, if one patent was not invented to be implemented but only used to against competitors in the courts, shall it be revoked same as the patent with poor qualities.¹ Debates and controversies are remained on how to define the qualities for patents?² But Stopping patent trolls is the consensus for industries and courts.³

The current situation in popular technology domains is that basically the patent thickets, companies sometimes feel difficult to avoid patent lawsuit even with intensive prior patent search and patent mapping. Those non-practicing entities (NPEs) can still find the leak to trap targeted companies. Most of the companies may worry the impact from a law suit, which may cause the drop of their stock price, sales, or image of product or company. Therefore, it seems easier to pay the acceptable amount to avoid the consequence and the arising attorney fees. On the other hand, there are globalized companies with advanced technologies and abundance resources including good connections to local government and media. Their intellectual property rights are well protected and can afford the best litigation team to sue those emerging companies and eliminate competitions. Therefore, the campaign regarding anti-monopoly to defend anti-competition is also a issue to maintain fair trading.

Nevertheless, it is hard to blame certain companies that do not manufacture or commercialize their inventions because that is not only involved with different professions but also related to the resources. There will be an additional huge investment on manufacturing and marketing the invention. Furthermore, there is no guarantee for the success on commercialization, not to mention that people who are good at research can be rather naïve on business matter. Licensing patents is not necessary to be a pleasant matter, if within a reasonable period of negotiation or without implementation of a patent for a legitimated period of time (ex: 3 years in Taiwan), potential licensees can apply for compulsory licensing. If the compulsory licensing is granted, will it be fair? As the value of the patent is subject to negotiation, there are many approaches to estimate the value for

¹ See 71 Pat. Trademark & Copyright J. (BNA) 659.

² See Mark A. Lemley, Douglas Lichtman & Bhaven N. Sampat, *What to do About Bad Patents*, 28(4) REGULATION 10 (2005-2006).

³ See Yu-Wen Huang, *Mei-Guo Guo-Hui Yan-Jiu Bao-Gao Ti-Chu Dui-Kang Zhuan-Li Zhang-Lang Fang-An [U.S. Congressional Report Proposes a Measure to Attack Patent Trolls]* (in Mandarin), OPENFOUNDRY, Sept. 11, 2010, <http://www.openfoundry.org/tw/news/8800?task=view>.

the patents. If the licensing negotiation fails, the patent owner is not always the one to be blamed. Personal preferences and cultural differences are often the causes. Furthermore, compulsory licensing can be applied by the potential licensee. If the licensing negotiation cannot be reached within a reasonable timeframe, the government authority can grant compulsory licensing. Concerning the legitimacy of compulsory licensing, it certainly conflicts with the protection of patent right. Therefore, how to balance the social welfares and respect of the patent rights is indeed a skill of arts.

II. Case Discussion

There are a few models of patent trolls, such as the willful conduct to sue the defendant who obviously does not infringe plaintiff's intellectual properties, or the abuse of the litigation process by applying injunction based on bad faith. In Taiwan, although a defendant can pursue a violation of the fair trade law to claim damages from plaintiff for its inequitable conduct, however, the damages award often can not be enough to compensate for the sales loss, company image, and the depreciation of stock price, not to mention the humiliation, stress, pain and suffering during the litigation process.

A. Case 1: Gemcitabine from Eli Lilly

This is one of the top-ten litigation in the Great China region. It took more than 10 years to reach the final judgment for Eli Lilly. In Taiwan, Eli Lilly filed the law suit against two Taiwanese companies. One is TTY Biopharm, and the other one is ScinoPharm. The suit lasted for 5 years. The court of the first instance for the case between Eli Lilly and TTY Biopharm ruled, "TTY Biopharm shall not use the Taiwanese patents no. 66262, 110476, and 109978, and TTY Biopharm can not use, offer to sell, sell and import Gemcitabine, including medicines which contain Gemcitabine. The defendants shall pay two millions NT dollars."⁴ The court of the second instance ruled, "The appellant shall not used the Taiwanese patents no. 66262, 110476, 109978, unless the purpose is research, education or experiment for further invention. The appellant cannot use, offer to sell, sell and import Gemcitabine, including medicines which contains Gemcitabine. The defendant shall pay two millions NT dollars."⁵ The court of the third instance reversed the decision of the court of the second instance due to the evidence from the litigation between Eli Lilly and ScinoPharm Taiwan.⁶

⁴ Eli Lilly v. TTY, Taipei District Court, 93 Zei Zi no. 77.

⁵ Eli Lilly v. TTY, Taiwan High Court, 94 Zei-Sun Zi no. 26.

⁶ Eli Lilly v. TTY, Taiwan Supreme Court, 96 Tai-Sun Zi no. 1710.

ScinoPharm is a leading research company in Taiwan, it provided the new evidence to prove there are more than one method for synthesizing Gemcitabine. The burden of proof shall be Eli Lilly's responsibility based on civil procedure. However, the raw material provider-Hansoh pharmaceutical⁷-is in China. Unless Eli Lilly could prove the synthetic method same as the said patents, TTY Biopharm would not be liable for the damages, not to mention the litigation in China was not yet finalized in 2007.⁸

In China, the litigation between Eli Lilly and Hansho Pharmaceutical started in 2001 at the JianSu People High Court that dismissed the case.⁹ Thereafter, Eli Lilly appealed to the People Supreme Court that then reversed the case in 2002.¹⁰ However, the JianSu People High Court again dismissed the case in 2003,¹¹ which made Eli Lilly had no choice to again, unfortunately, appeal on Dec. 3, 2010.¹² The People Supreme Court favored Hansho Pharmaceutical and ruled Eli Lilly to pay 75000 RMB for the expert report in the first instance and court fees, 37510 RMB for the first instance and 50300 RMB for the second instance.¹³

There were various strategies and tactics applied in the courts for the past 10 years, where even the private investigators were employed to search evidence in Taiwan and China. For example, the invoice from Scinopharm Taiwan to Argentina was presented in the court against Scinopharm. Though, the case between Eli Lilly and Scinopharm in Taiwan was dismissed. Because of a few scientific papers as evidence for proving that there are more methods for synthesizing Gemcitabine, the method in Eli Lilly's patents is not the only one method. But, that shows that litigation has become a standard measure against competitors.

However, the pros and cons of this measure should be examined from different angles. At least, these Gemcitabine law suits did not bring in extra sales for the company as Gemcitabine was an anticancer drug under doctor's prescription. Medicines that treat cancer are often very expensive and cannot be covered by national health insurance policies. Therefore, if there are cheaper choices, Those expensive medicines will alternatively replaced as patient has to pay for themselves and private insurance company would like

⁷ HanSoh Pharmaceutical's company website, <http://www.hansoh.cn/> (last visited Oct. 8, 2012).

⁸ See Mei-Hsin Wang, *IP Court System in Taiwan and the US Pharmaceutical Patent Litigation*, 23(4) COMMERCIAL CASES REVIEW 367, 367-394 (2010).

⁹ JianSu Province, People High Court, 2001Su-Min-San-Chu Zi no. 001.

¹⁰ People Supreme Court, 2002 Min-San-Zun Zi no. 8.

¹¹ JianSu Province, People High Court, 2003 Su-Min-San-Chu Zi no. 001.

¹² People Supreme Court, 2009 Min-San-Zun Zi no. 6.

¹³ See Mei-Hsin Wang, Presentation at LESI 2012 in Auckland on Apr. 3, 2012.

to cost down their expenses.

In addition, the areas of medicines and pharmaceuticals are life-saving professions. People in these professions are rather conservative. Actions like suing other people are far too aggressive and often cause negative images against a company which raises law suits. Anti-cancer drugs are prescription medicines. They are not consumer products and neither well-known to the general public. So, law suits released on media will not increase the sales. On the contrary, it is highly possible to cause market shrinkage which damages both parties. If a plaintiff tries to intimidate its competitors by ruining competitor's stock prices, that would be achieved for a short while, however, for the consumption or sales of anti-cancer medicines are mainly based on doctors' prescriptions and the natural growth of patient pools. Fortunately, in China and Taiwan, attorneys' fees and charges from the courts are not high. Therefore, it may not a financial burden to both parties. More intellectual property litigation is foreseeable in the near future.

B. Case II: Pioglitazone from Takeda

The Pioglitazone litigation demonstrates the standard strategies and tactics of how international companies deal with competitions in developing countries, such as Taiwan. Generally speaking, comparing to those globalized pharmaceutical companies, the biotech companies or emerging pharmaceutical companies in Taiwan are relatively small and much less competitive on intellectual property management. In most of cases, they are rather naïve on dealing with litigations. On the contrary, the globalized pharmaceutical companies only take actions before comprehensive planning with abundant resources. Sometimes, the attacks on competitors are fierce without mercy.

Based on the prior litigation planning in 2004, Takeda had no grounds to sue generic companies which were only conducting the clinical trials to apply sales certificates from the Taiwan Food and Drug Administration Office. In 2004, the patent right for a single molecular Pioglitazone had already expired. While Takeda still owned the combination therapy patent, physician's prescriptions are exempted from the liability of infringement.

Regarding the copyright issue on clinical trial protocol, the grounds are comparatively weak as the format and the necessary content of clinical trial are regulated by the Food and Drug Administration Office. However, Takeda continued the litigation, knowing that they would possibly lose. They prolonged the litigation process to maintain the market monopoly. That is also a typical type of patent trolls. Takeda did successfully stop three competitors from entering the market for more than 5 years.¹⁴

¹⁴ Reported by Po-Hung Hsieh from China Times on May 4, 2005,

During 2000 to 2005, there was quite a challenge for attorneys and judges to deal with pharmaceutical patent litigation, as there are specific laws and additional regulations from the Food and Drug Administration Office, such good manufacture practice (GMP), good clinical practice (GCP), good laboratory practice (GLP), active pharmaceutical ingredients (API), and regulations on several stages of clinical trials before registration trial, where specific requirements for trials guard the issuance of sales certificate for a specific medicine. In addition, there are post-market surveillances that monitor medicines in the market.

Takeda Pharmaceutical filed three law suits against three companies which conducted clinical trials. At the same time, the information of patent law suits was sent to remind the Taiwan Food and Drug Administration Office of not issuing the sales certificates to these three companies. Nevertheless, there was a severe acute respiratory syndrome (SARS) attacking Taiwan. The clinical trials conducted by those three generic drug companies suffered a further impact as patients in the clinical trials were afraid to go out, not to mention going to the hospital where there was a high possibility of catching more infection diseases including SARS. According to the good clinical practice (GCP) procedure, if a patient in the clinical trial does not follow the regulation, the data related to this specific patient shall be excluded. All three trials suffered a traumatic delay.

In the cases of Takeda suing Virginia Contract Research Organization Co., Ltd¹⁵ and LeiLi Pharm,¹⁶ the fact of infringement was based on the clinical trial approved by the Taiwan Food and Drug Administration Office-[PLPGOO]. However, the Supreme Court dismissed Takeda's appeal on May 12, 2005.¹⁷ In the case of Takeda suing APEX International Clinical Research Co. Ltd and Chenho,¹⁸ the fact of infringement was based on on the clinical trial approved by Taiwan Food and Drug Administration Office-[CE -004-01]. However, the Supreme Court dismissed Takeda's appeal on Mar. 24, 2006.¹⁹ In the case of Takeda suing Genovate Biotechnology Co., Ltd,²⁰ the Supreme Court dismissed Takeda's appeal on

<http://www.taiwanchambers.net/newslist/010100/10148.asp> (last visited on May 5, 2005).

¹⁵ Virginia Contract Research Organization's company website, http://www.vcro.com.tw/TC_Index.htm (last visited Feb. 28, 2013).

¹⁶ PeiLi Pharm's company website, <http://www.peili.com.tw/cht/product.php> (last visited Feb. 28, 2013).

¹⁷ Takeda v. VCRO, Taiwan Supreme Court, 94 Tai-Kan Zi no. 410.

¹⁸ Chenho's company website, <http://www.chenho.com.tw/p01.php> (last visited Feb. 28, 2013).

¹⁹ Takeda v. APEX, Taiwan Supreme Court, 95 Tai-Kan Zi no. 183.

²⁰ Genovate Biotechnology's company website, <http://www.genovate-bio.com/CHINESE/index.htm> (last visited Feb. 28, 2013).

Mar. 17, 2005.²¹ However, Genovate Biotechnology Co., Ltd has its own marketing team and manufactory, therefore, based on the intent to sell, Takeda continued to sue Genovate Biotechnology Co., Ltd for a possible liability for damages.

From 2005 to 2009,²² Takeda deposited 44 million to continue the litigation. As previous expected, there was no success in all three instances including the first instance-95 Zei-Kun Zi no. 1,²³ the second instance-96 Zei-Sun Zi no. 18,²⁴ and the third instance-98 Tai-Sun Zi no. 367.²⁵ However, if we consider the return of the investment on these law suits from economic point of views, those law suits maintain the exclusive market of Triaglitazon for another 4 years. The market value was more than 1.2 billion Taiwan dollars, while the cost on Takeda included attorney fees, which were much less than attorney fees in the U.S., and court charges, which were 1% for the first instance, 1.5 % for the second instance, and 1.5 % for the third instance, of the targeted damages claim and attorney fees to Genovate Biotechnology Co., Ltd, which was 440,370 Taiwan dollars ruled by the court.²⁶

Although Genovate Biotechnology Co., Ltd filed the complaint to sued Takeda for a violation of the Fair Trade Act in 2009, after the first instance-98 Min-Kon-Su no 6²⁷ and the second instance-99 Min-Kon-Su-Sun no 3,²⁸ the final judgment was from 101 Tai-Sen no 901 on Aug. 29, 2012 and awarded 20 million Taiwan dollars to Genovate Biotechnology Co., Ltd,²⁹ together with legitimate attorney fees for the third instance which was 60,000 Taiwan dollars.³⁰ From cost effectiveness point of view, this case indeed demonstrates the significance of applying litigation to market management and also can be a standard case for patent trolls.

The same compound in United States inevitably was a different case where the law suits were filed to defend competition. However, that was not science-based litigation but rather a merely patent troll action as occurring in

²¹ Taiwan Supreme Court, 94 Tai-Kan Zi no. 229.

²² Internal information acquired during the author's working period in Takeda.

²³ Takeda v. Genovate, TaiChung District Court, 96 Zei-Kan Zi no. 1.

²⁴ Takeda v. Genovate, Taiwan High Court in TaiChung, 96 Zei-Sun Zi no. 18.

²⁵ Takeda v. Genovate, Taiwan Supreme Court, 98 Tai-Sun Zi no. 367.

²⁶ Genovate v. Takeda for the attorney fee, TaiChung District Court, 95 Zei-Kan Zi no. 1.

²⁷ Genovate v. Takeda for violation of the Fair Trade Act, first instance in Taiwan Intellectual Property Court, 98 Min-Kan-Su Zi no. 6.

²⁸ Genovate v. Takeda for violation of the Fair Trade Act, second instance in Taiwan Intellectual Property Court, 99 Min-Kan-Su-Sun Zi no. 3.

²⁹ Takeda filed appeal for re-trial regarding the Fair Trade Act issue with Genovate. *See* Taiwan Supreme Court, 101 Tai-Shen Zi no. 901.

³⁰ Genovate requested for the attorney fee for the third instance. *See* Taiwan Supreme Court, 101 Tai-Shen Zi no. 706.

Taiwan.³¹ Competitors in the United States argued about the issues of double patenting and obviousness. One generic company Alapharm contended that Takeda's U.S. Patent No. 4,687,777 ("777 patent") with a title of "Thiazolidine Derivatives Useful as AntiDiabetic Agents" was already covered by one prior art which is also Takeda's U.S. Patent No. 4,444,779 ("779 patent") with a title of "Thiazolidine Derivatives," where the 779 patent claims the lipid and sugar control in blood. In order to get a privilege of 180 days exclusivity for sales, Alapharm further argued that Takeda's patent should be revoked due to obviousness.

The 779 patent covers 2 compounds including the commercialized product. The only difference is the functional groups on the 5th and 6th position in the benzene ring of the pioglitazone structure. These functional groups are 5-{-4-[2-(5-ethyl-2pyridyl)ethoxy]benzyl}-2,4-thiazolidinedione and 5-{-4-[2-(6-ethyl-2pyridyl)ethoxy]benzyl}-2,4-thiazolidinedione. There was another Takeda's U.S. Patent No. 4,287,200 ("200 patent") with a title of "Thiazolidine Derivatives" which claims the glycemic control effect and the same serial of compounds. However, the 779 patent demonstrated the teach-away or the unexpected, good results to support the patentability. Furthermore, defending the non-obviousness of a chemical patent requires proof of a process that is not mandatory but involved in meaningful thinking and innovative efforts. We cannot simply use an helpful insight to rebut a patent because of obviousness, which means that the adjustment of molecular structures or functional groups must be done with reasons and purposes as to prove the patentability. In the 779 patent, the formation of C-C bonds on the benzene ring at the 5th and 6th positions is a challenge, a lot of brain work and efforts are required to achieve the C-C formation, not to mention that putting a C-C bond at a specific position demands a sophisticate synthesis design. Therefore, the patentability in this case is well supported.

If litigation fights for justice and the approaches are based on legal foundations, scientific evidence, and facts, then we should encourage patent litigation to protect inventions and support the patent system as it awards the exclusivity to patent owners for their contributions to the society. In addition, it is indisputable that science and technology do improve the quality of life. Building a legitimate system for reviewing patentability and awarding the exclusivity with a means for enforcing patent rights in the courts are appropriate facilities for magnifying justice and encouraging more inventions.

³¹ Takeda Chemical Industries v. Alapharm PTY Ltd, decided on June 28, 2007, Appeal no. 2006-1329, <http://www.cafc.uscourts.gov/opinions-orders/0/all/takeda> (last visited Oct. 13, 2012).

III. Current Trend on Patent Litigation

Whether litigation skills have been abused on patent protection is debatable as patent owners definitely wish to enforce their patent rights and to get the best benefit out of the patent in a fast manner.

In reality, it is not so easy for every patent owner to meet all the required connections and to be able to coordinate with all necessary parties/channels to implement the patent. Not to be mentioned, the investment on implementing a patent into a marketed product can be much bigger than the investment on research for developing the same patent. Therefore, if a patent owner does not enforce his/her patent within legitimate years or if a licensing negotiation cannot be reached with a reasonable period of time, competitors have the right to apply compulsory licensing which seems not always reasonable as a business negotiation is a complicated skill of art.

Another current complaint from emerging companies or developing countries is over-comprehensive patent mapping by those globalized companies which exclude competition. There is no room for emerging companies to develop their own business even with their own patents, as those globalized international companies have abundant resources and litigation teams which can intimidate these emerging companies or even developing countries. Not to be mentioned, there are patent trolls mastering litigation strategies and skills by filing patent lawsuits as main business activities. Pains and suffering, time and expenses on litigation, and humiliation to company's or brand images are enormous hardships for those emerging companies to take.

Nevertheless, there are also quite a few situations where the patent system can be abused, including creating difficulties during licensing negotiations for a higher royalty rate, limiting or forbidding further innovations, as well as abusing patent prosecution skills, such as: filling over-comprehensive patent families to cover every aspect for the purpose of extending the scope and prolonging the patent protection, forming an alliance for cross-applications of prior arts and combining patent profiles to exclude competitors' patent applications, filing ex parte re-examinations, or bluffing patent infringement to exhaust competitors' resources ... etc.

There are counter-measures for stopping anti-competition and attempts to eliminate over-abusive behaviors, such as a violation of the Fair Trade Act of Taiwan. The famous judgment for punishing Takeda awarded 50 millions Taiwan dollars as damages to Genovate Biotechnology Co., Ltd on Feb. 23, 2012.³² In China, the very first anti-monopoly case³³ was ruled on Jan. 4,

³² Taiwan Supreme Court, 101 Tai-Sun Ze no. 235.

2013 to punish Samsung, LG, ChiMei,³⁴ AU Optronics Corp.,³⁵ ChungHwa Picture Tubes Ltd.,³⁶ and HannStar Display Corp.³⁷ for monopoly on LCD monitors. The punishment amounted to 353 million RMB (1.769 Million Taiwanese dollars). From some year, there was an initiative to eliminate the abuse of a patent right by willful refusal of patent licensing. By allowing an individual country to legislate compulsory licensing, furthermore, Article 41 of the TRIPS (Agreement on Trade Related Aspects of Intellectual Property Rights)³⁸ states that the judicial system shall have the right to award damages for compensating the loss and attorney fees.

Punishment can be a measure for reducing an abuse of patent rights. Legislation can be an alternative, such as the compulsory licensing provisions in Articles 87 to 97 of Chapter 5 of the Taiwan Patent Act³⁹ and the Patent Compulsory Licensing Act of China,⁴⁰ based on the Public Health Announcement from the World Trade Organization. The pharmaceutical products are allowed to be exported into least-developed countries which approve compulsory licensing based on national health emergency and legitimate causes, while only domestic markets were allowed for compulsory licensing in the past. In addition, education and awareness promotion are still the foundation to resolve the problems, if we can learn from the experience of how Taiwan has reduced pirated goods drastically for the past decades by education and awareness campaign.

³³ A news report (in Mandarin), http://big5.xinhuanet.com/gate/big5/news.xinhuanet.com/yzyd/fortune/20130104/c_114239088.htm (last visited Feb. 28, 2013).

³⁴ ChiMei's company website, <http://www.chimeicorp.com/en-us/> (last visited Feb. 28, 2013).

³⁵ AU Optronics' company website, <http://www.auo.com.tw/?sn=101&lang=en-US> (last visited Feb. 28, 2013).

³⁶ ChungHwa Picture Tubes' company website, <http://www.cptt.com.tw/> (last visited Feb. 28, 2013).

³⁷ HannStar Display's company website, <http://www.hannstar.com/Common.aspx?mid=7&tmid=1&modid=1> (last visited Feb. 28, 2013).

³⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS], http://www.tipo.gov.tw/ch/AllInOne_Show.aspx?path=3009&guid=f1fd234e-96f2-4cb6-8ced-a9952c7b8326&lang=zh-tw (last visited Oct. 10, 2012).

³⁹ Taiwan Patent Act, http://www.tipo.gov.tw/ch/AllInOne_Show.aspx?path=2769&guid=45f2e9ed-6a50-488e-8514-47a78e3cc320&lang=zh-tw (last visited Oct. 11, 2012).

⁴⁰ Compulsory Licensing Act of China, http://big5.gov.cn/gate/big5/www.gov.cn/flfg/2012-03/20/content_2095402.htm (last visited Oct. 11, 2012).

IV. Conclusion

The abuse of litigation skills is common in legal profession, specially in countries where attorney fees are not expensive, such as Taiwan and China. Therefore, corporates will use this inexpensive tool for alternative business management if the traditional marketing or sales promotion are ineffective. Those conducts are not based on good faith and includes warning letters, *ex parte* re-examination, injunction, boarder seizure, false information to media or related authority, and so on, aiming to ruin other company's image and to take away product sales. The victim can only claim damages after a final decision by the court, and the damages are often much less than what had been deprived of.⁴¹

China will be the next battle field for major patent law suits⁴² based on a rising trend of in-China patent applications worldwide. High damage awards from the courts and inexpensive attorney fees further encourage litigation. Contrarily, attorneys' fees are very high and sometimes higher than the damages award in the United States. If plaintiffs have to claim attorney fees or even give up damages for attorney fees only, in this situation, litigation will be more or less discouraged.⁴³

In Taiwan, attorney fees can be decided by the court of the third instance. They are often very low, though attorneys may ask more than the listed price by the bar association. However, there is a benchmark reference from the local bar association for attorney fees. In the *Takeda v. Genovate Biotechnology* case, the litigation last for 4 years. The Taiwanese Supreme Court decided only 440,370 Taiwan dollars for the attorney fee.⁴⁴ The Fair Trade Act case between Genovate Biotechnology and Takeda is only 60,000 Taiwan dollars in attorney fees, while the case spent 3 years with three attorneys hired by Genovate Biotechnology.⁴⁵

⁴¹ See MBA Lib, *Patent Misuse* (in Mandarin), <http://wiki.mbalib.com/zh-tw/%E4%B8%93%E5%88%A9%E6%9D%83%E6%BB%A5%E7%94%A8> (last visited Oct. 8, 2012).

⁴² See Chin-Wen Huang, *Patent Mapping in Views of Litigation: China, the Next Main Patent Battlefield* (in Mandarin), North America Intellectual Property Ltd. IP database, http://tw.naipo.com/portals/1/web_tw/knowledge_center/expert_column/IHPE-32.htm (last visited Oct. 8, 2012).

⁴³ *Monsanto Co. v. David*, decided on Feb. 5, 2008, Appeal no. 2007-1104, <http://www.cafc.uscourts.gov/opinions-orders/0/all/monsanto> (last visited Oct. 12, 2012); *Monsanto Co. v. David* [Order], decided on May 2, 2012, Appeal no. 2012-1128, <http://www.cafc.uscourts.gov/opinions-orders/0/all/monsanto> (last visited Oct. 12, 2012); *In re Omeprazol*, decided on Apr. 23, 2007, Appeal no. 2004-1621, <http://www.cafc.uscourts.gov/opinions-orders/0/all/in-re-omeprazol> (last visited Oct. 12, 2012).

⁴⁴ See *supra* note 26.

⁴⁵ See *supra* note 30.

There are always counter-measures to stop patent trolls. However, if the market potential is relatively large and the profit is attractively high, there will be non-stop patent litigation as it has already become a standard business tool. For small and medium-sized companies which cannot afford litigation expenses or do not have sufficient experiences to deal with litigation strategies or file comprehensive patent portfolios, they might disappear from the real world.

What the truth is and whether the justice can be pursued are often challenged by the general public, as it is no longer a matter of the plaintiffs and defendants but shareholders' concerns. For example, during the litigation between Samsung and Apple, Samsung's stock price drop was much greater on Aug. 24, 2012 where the judgment regarding the injunction and 1.05 billion U.S. dollars was announced.⁴⁶ Only within a very short period of time, the United State Court of Appeals for the Federal Circuit reversed the case on Oct. 11, 2012,⁴⁷ which caused the stock price drop of 2 %.

Another famous settlement case relates to an "iPad" trademark in China. The original deal covered the right in ShenZen and amounted to 55,000 U.S. dollars. However, due to a tiny mistake which the right in ShenZen was discussed in an e-mail but not listed in a final contract, thereafter, both parties spent enormous efforts on negotiation combat in private sectors, in courts, and even in public places involved in politics and media to reach the final bargain of 60 million U.S. dollars.⁴⁸ From now on, when managing intellectual property in China, no one can underestimate the knowledge standard of a trademark owner in China which is only a small size company facing bankruptcy, particularly.

V. Suggestions

⁴⁶ See Yi-Hsu Chu & Fu-Fong Ni, *Apple Won Super Patent Law Suit, and Samsung Lost a Month Sales for Damage* (in Mandarin), TIENJIN WEB, Sept. 18, 2012, http://www.tianjinwe.com/business/qcqx/201209/t20120918_86835.html (last visited Oct. 12, 2012).

⁴⁷ See Yuan Liu, *Injunction for Samsung Mobile Phone, CAFC reversed*, TAIWAN SIN NEWS, copied by e-China Times on Oct. 12, 2012, <http://news.chinatimes.com/realtime/110102/112012101201153.html> (last visited Oct. 12, 2012).

⁴⁸ See Zon-Jen Won, *iPad Trademark Issue resolved by 60 Million Dollars Settlement, Apple Paid Wei-Guan* (in Mandarin), NEWTALK, July 2, 2012, <http://tw.news.yahoo.com/ipad%E5%95%86%E6%A8%99%E6%AC%8A%E8%A7%A3%E6%B1%BA-%E8%98%8B%E6%9E%9C%E4%BB%98%E5%94%AF%E5%86%A0%E5%8D%83%E8%90%AC%E7%BE%8E%E5%85%83-095814487.html> (last visited Oct. 13, 2012).

There are international organizations, such as World Trade Organization, World Intellectual Property Organization, and Asia-Pacific Economic Cooperation, working aggressively to harmonize the legislation of intellectual property right and to push individual members for more comprehensive legislation and updated regulations. The next step should focus on the consistency of opinions and rulings in courts of individual countries.

Facing the concept of a globally-unified market, not only Taiwan but also China needs to leverage the standard on patentability, the criteria on infringement of intellectual property rights, and the definition of anti-competition or monopoly. In Korea, Japan, even India, or all other neighboring countries, one company can face patent litigation of the same items at the same period of time. In addition, due to business competition, companies in Taiwan or China have been frequently challenged by complaints filed to the European Union (EU) or U.S. International Trade Commission (ITC) for IP-related issues, aiming to intimidate certain business or country from entering into Europe or America. In early days, "301" sanctions were based on the Trade Act of the United States in 1974.⁴⁹ In present days, "Special 301" or recent "section 337" investigations are a new issue needed to be dealt with. Under these circumstances, local governments should be involved in supporting industries, as it is no longer a business issue but somehow a political issue.

Years of globalized litigation can ruin not only small and media companies, but also big companies. How to defend patent trolls globally has turned out to be an important issue along with research development and business management.⁵⁰ Alternative approach, such insurance policies on intellectual property, can be a new security for risk management. It is inevitable to deal with all the challenges together with the business development on intellectual properties, if we wish to make a practical use of these intellectual properties. Therefore, we can only hope that legislation, continued education, and enforcement with conscience can be remedies for help on creating a better business environment.

Cited as:

⁴⁹ See YU-CHENG LAI, THE POLICY MEANING OF SECTION 301 OF THE UNITED STATES FOR ITS DOMESTIC INDUSTRIES (in Mandarin), <http://wto.cnfi.org.tw/admin/upload/23/3-1.pdf>.

⁵⁰ See China Business Research, "*The Misuse of Patent Litigation*" Can Limit the Overseas Development of Industries (in Mandarin), <http://big5.chinainm.com/doc/70310/256098.html> (last visited Oct. 8, 2012).

[2013] Vol. 2 NTUT J. of Intell. Prop. L. & Mgmt.

Bluebook Style: Mei-Hsin Wang, *Recent Patent Litigation on Pharmaceuticals in Great China*, 2 NTUT J. of INTELL. PROP. L. & MGMT. 58 (2013).

APA Style: Wang, M.-H. (2013). Recent patent litigation on pharmaceuticals in Great China. *NTUT Journal of Intellectual Property Law & Management*, 2(1), 58-71.