

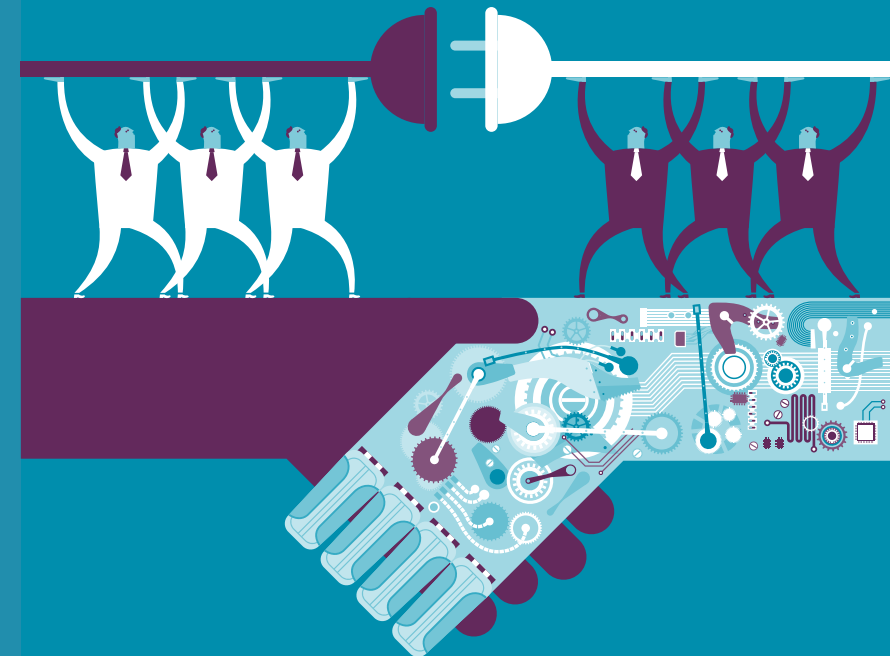


Rigorous empirical
research on
intellectual property

Anti-Suit and Anti-Anti-Suit Injunctions in SEP litigation

Host: Axel Ferrazzini, Managing Director, 4iP Council

Presenter: Dr Igor Nikolic



What do we do?



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For SMEs:

Which types of intellectual property do you need?

Filter table columns

?	PATENTS	COPYRIGHTS	DESIGNS	TRADEMARKS	TRADE SECRETS
What do they protect?	An invention, a new and creative way of doing something or solving a technical problem. See also	It is an original intellectual creation. See also	A new and original visual appearance of a product. See also	Distinctive signs. See also	Information that is not generally known and is not readily accessible. See also
Examples of what is protected	inventive products and processes in all fields of business. For example of successful inventions by SMEs. See also	Audio-visual works, pictures, graphics, architecture, databases, software, designs, literature, movies, games, apps, music and video, dramatic works. See also	Packaging, containers, furniture, graphics, symbols, computer icons, logos, graphical user interfaces, signs and signs. See also	Words, phrases, sounds, smells, and other signs. See also	Business secrets. See also
How are my rights protected?	Through professional advice, using an agent or the patent attorney. See also	Rights are automatically created upon creation of the work. Protects the integrity and attribution of the work. Resort rights. Public performance and display of the works. See also	Through registration of an original or similar visual appearance for the same kind of products and/or the same kind of signs. See also	Through registration. See also	Through registration. See also
How long is my innovation protected?	Up to 20 years. See also	Lifetime of the author +50 to 70 years after death (depending on the country). See also	Up to 25 years for registered designs. See also	Up to 10 years (depending on the country). See also	As long as the information remains secret. See also
Do I have to register it?	Yes, filing an application to a patent office is required. Have an patent applications in. See also	No. Copyright protection arises automatically with its creation. See also	No. But it is highly advisable to register designs, as protection only flows automatically creating and they have shorter term of protection (up to 5 years unless you're EU). See also	Yes. See also	No. See also



2 - NEGOTIATING
3 - FUNDING
4 - STRATEGIC VALUE

Explore how patents add value with our [interactive guide](#).

3 - COLLABORATION
4 - FUNDING

Explore the benefits of copyright with our [interactive guide](#).

4 REASONS 4 TRADEMARKS

- 1 - DIFFERENTIATION
- 2 - PROTECTION
- 3 - REPUTATION
- 4 - REVENUE

Explore the benefits of trademarks with our [interactive guide](#).

4 REASONS 4 DESIGN RIGHTS

- 1 - EXCLUSIVITY
- 2 - COMMERCIALISATION
- 3 - REPUTATION
- 4 - VALUE

Explore the benefits of design rights with our [interactive guide](#).



European Court Decisions

Case Law post CJEU ruling *Huawei v ZTE* [Back to main 4IP Council site](#)

4IP Council home | Case law home | CJEU decisions | German court decisions | Dutch court decisions | English court decisions | French court decisions | Irish court decisions | Italian court decisions | Romanian court decisions | National Courts Guidance | Authors & contributors

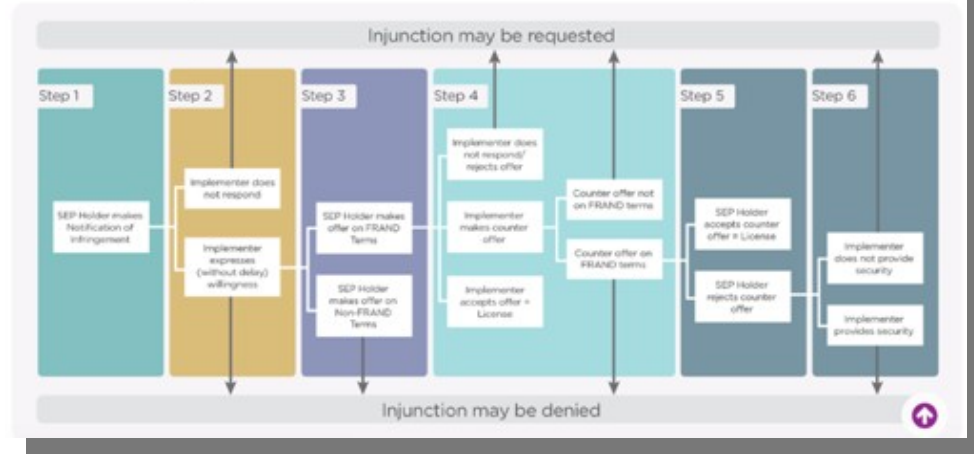
National Courts Guidance

Negotiating Licenses for Essential Patents in Europe

Increased clarity provided on the principles established by the Court of Justice of the European Union in *Huawei v ZTE*.

The Court of Justice of the European Union clarified, in *Huawei v ZTE* (Case No. C-170/13), European law relating to the availability of injunctive relief for infringements of FRAND-based standard essential patents. In doing so, the Court provided a legal framework focused on the good faith conduct to be expected of both parties. Since

Huawei v ZTE process



Anti-Suit and Anti-Anti-Suit Injunctions in SEP litigation



Dr Igor Nikolic

Dr Igor Nikolic is a Research Fellow at EUI. He specialises and writes in the areas of intellectual property rights, competition law, standard essential patents (SEPs), innovation and technical standardisation, competition and digital economy.

Anti-suit injunction

China wakes up in global SEP litigation

Samsung–Ericsson Royalty Feud Tests Foreign Injunction Strength

Anti-suit injunction

Munich court confirms AAAASI in SEP battle between InterDigital and Xiaomi

InterDigital's Indian anti anti-suit injunction confirmed in escalation of Xiaomi dispute

Richard Lloyd

07 May 2021

 Print article

<https://www.juve-patent.com/news-and-stories/legal-commentary/china-wakes-up-in-global-sep-litigation/>

<https://news.bloomberglaw.com/ip-law/samsung-ericsson-royalty-feud-tests-foreign-injunction-strength>

<https://www.juve-patent.com/news-and-stories/cases/munich-court-confirms-aaaasi-in-sep-battle-between-interdigital-and-xiaomi/>

<https://www.iam-media.com/litigation/indian-court-confirms-interdigital-anti-anti-suit-injunction-in-escalation-of-xiaomi-dispute>

Anti-Suit and Anti-Anti-Suit Injunctions in SEP litigation

1. What are ASI and AASIs?
2. ASIs and AASI in the SEP litigation
3. Proposals

What are ASIs and AASIs?

- **Anti-suit injunction:** an order from one court to the party not to pursue, or not to commence, court proceedings abroad
- Common law countries – the UK and the US
- Legal tests:
 1. **contractual choice of forum clause**
 2. adjudication would **dispose of foreign claims**
 3. **overlap** + foreign proceedings ‘**vexatious**’ and ‘**oppressive**’
- Must not be against **the principle of international comity!**

What are ASIs and AASIs?

- **Europe and civil law systems:**
 - **ASIs are relatively unknown and uncommon**
 - prohibited within the EU member states
 - courts would refuse the enforcement of non-EU judgments

What are ASIs and AASIs?

- **Anti-enforcement injunction**
 - No enforcement of a foreign judgment
 - A narrower ASI
- **Anti-anti suit injunction**
 - Restrain a party from seeking or enforcing foreign ASI



Why do we have ASIs/AASIs in SEP disputes?

- Disputes global – patents national
- Global vs national license
- Some jurisdictions more favourable
- Race to secure favourable jurisdiction



ASIs and AASIs in SEP Litigation: United States

ASI Granted	AEI Granted	AASI granted	ASI Refused	ASI requested but not decided
<i>TCL v Ericsson</i> (2015)	<i>Microsoft v Motorola</i> (2012)	<i>Ericsson v Samsung</i> (2021)	<i>Vringo v ZTE</i> (2015)	<i>Continental v Avanci</i> (2018)
	<i>Huawei v Samsung</i> (2018)		<i>Apple v Qualcomm</i> (2017)	<i>IPCom v Lenovo</i> (2019)
			<i>Optis v Huawei</i> (2018)	

ASIs and AASIs in SEP Litigation: Europe

AASI granted	AASI refused
<i>Conversant v Huawei and ZTE</i> (UK 2018)	<i>Ericsson v Apple</i> (2021)
<i>IPCom v Lenovo</i> (UK 2019)	<i>GE Video and Mitsubishi v Xiaomi</i> (2022)
<i>IPCom v Lenovo</i> (France 2019)	
<i>Nokia v Continental</i> (DE 2019)	
<i>Interdigital v Xiaomi</i> (DE 2021)	
<i>IPBridge v Huawei</i> (DE 2021)	

- Foreign ASIs contrary to public order, fundamental right to property and access to courts

ASIs and AASIs in SEP Litigation: China

AEI	ASI
<i>Conversant v Huawei</i> (2020)	<i>Oppo v Sharp</i> (2020)
	<i>Interdigital v Xiaomi</i> (2020)
	<i>Samsung v Ericsson</i> (2020)

- AEI conditions similar to the US
- ASIs much wider than in the US/UK

ASIs and AASIs in SEP Litigation: China

Ø *Conversant v Huawei* (2020)

- Conversant obtained an injunction in Germany
- **AEI granted:**
 - German injunction would **interfere with Chinese proceedings**
 - AEI will **not affect comity** - Chinese action brought **before German**
 - AEI does **not affect other claims in Germany and the determination of validity of German patent.**

ASIs and AASIs in SEP Litigation in China

➤ *Xiaomi v Interdigital* (2020)

- ASI granted:
 1. Withdraw request for injunction in India;
 2. No injunction proceedings *anywhere in the world*
 3. No *lawsuits anywhere in the world* requesting the determination of FRAND royalty rates for its SEPs.
- **No discussion on the impact on comity**
- interference with Chinese proceedings
- conflicting judgments and harm to Xiaomi.

ASIs and AASIs in SEP Litigation in China

Ø *Samsung v Ericsson* (2020)

- ASI prohibited Ericsson from:
 1. **Applying for and enforcing injunctive relief before any courts or agencies anywhere in the world**
 2. **Requesting any court anywhere in the world to determine Ericsson's FRAND licensing terms, or to immediately withdraw or suspend such claims**
 3. **Initiating any legal proceedings anywhere in the world to determine whether Samsung fulfilled its FRAND obligation, or to immediately withdraw and suspend such claims**
 4. **Requesting AASI or anti-enforcement injunction from courts anywhere in the world, or to immediately withdraw or suspend such claims.**

ASIs and AASIs in SEP Litigation: Responses to Chinese ASIs

Ø **India:** *Interdigital v Xiaomi* (2021)

- **AASI granted**
- Access to court “the very essence of civil liberty”
- Different issues: FRAND (China) vs patents (India)

Ø **US:** *Ericsson v Samsung* (2021)

- **AASI granted**
- No impact on comity – Chinese case is allowed to proceed

ASIs and AASIs in SEP Litigation: Responses to Chinese ASIs

- Ø Germany: *Interdigital v Xiaomi* (2021)
 - **AASIs will be issued if the implementer:**
 - 1) **threatens to file** a request for ASI
 - 2) **has filed** a request for ASI
 - 3) filed an action in **jurisdictions where ASI can in principle be granted.**
 - 4) **has already threatened or has filed ASI before** + no indication it will refrain from doing so
 - 5) **failed to declare in writing and in short deadline set by the patent owner that it will not request an ASI**
 - **Consequence: implementer will be treated as an ‘unwilling licensee’!**
- Ø *IP Bridge v Huawei* (2021) – pre-emptive AASI

The effects of global jurisdictional battles



Legal uncertainty



Race to the court



Litigation costs



Imprisonment

Proposals

1. Judicial restraint

- In SEP cases comity always impacted
- **ASIs preventing foreign SEP litigation should not be granted!**
- **But AEI exceptionally when:**
 - i. there is a strong connection with the issuing court (domestic parties, SEP owner's HQ)
 - ii. foreign proceedings are obviously frivolous and vexatious, and
 - iii. a short duration

2. ASI as a sign of unwillingness to license

- German approach
- Deterrent from seeking ASIs
- Implementer risks an injunction without examination of *Huawei v ZTE*
- SEP owner may not obtain an injunction

3. Facilitate arbitration

- **Short term:** Rebuttable presumption of 'unwillingness to license' for refusal to enter into arbitration agreement
- Incentivises parties to arbitrate FRAND terms
- **Long term:** specialised arbitration of FRAND terms at SDOs.
- But problematic access to court, agreement in SDOs, methodologies

Thank You!

Q&A

Forthcoming Webinars:

Date	Title	Summary
24-03-2022	How IP helps to secure your business investment	Joint webinar EUIPO/4iP Council for SMEs. Understand how Intellectual property rights are an important tool for getting a business competitive advantage and to secure finance for your business.

