

Patent Litigation: Final Remedies (China)

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Practice notes | [Law stated as at 01-Nov-2024](#) | China

A Practice Note addressing the final remedies available in patent infringement litigation under the laws of China.

This Note is part of a global suite of jurisdiction-specific resources helping in-house lawyers and private practice attorneys navigate each jurisdiction's legal framework for final remedies in patent litigation (*Patent Litigation: Final Remedies Toolkit (International)*).

This Note discusses important considerations for litigating final remedies in patent infringement litigation in *China (PRC)*, including the types of monetary and non-monetary remedies, the methodologies used to quantify monetary remedies, and the limitations on remedies. It also addresses procedural aspects of remedy litigation, such as burden of proof, evidentiary issues, trial, enforcement, and appeal.

This Note does not cover temporary or preliminary remedies, such as a preliminary injunction, a *saisie-contrefaçon* (an order for search and seizure of evidence), or a freezing order.

To view and customise charts comparing final remedies law and practice for patent infringement litigation in different jurisdictions, see:

- [Quick Compare Chart, Patent Litigation - Final Remedies](#).
- [Quick Compare Chart, Patent Litigation - Final Remedies - Procedure](#).

Monetary Remedies

Monetary remedies in patent infringement cases include damages in the form of:

- Actual losses of the patentee, including lost profits (see *Loss-Based Damages*).
- Surrender of the infringer's profits (see *Infringer's Profits*).
- Royalty-based damages (see *Royalty-Based Damages*).
- Statutory damages (see *Statutory Damages*).

(Article 71, *Patent Law of the PRC 2020* (2020 Patent Law, with effect from 1 June 2021).)

Compensation for infringement of a patent must first be determined based on either:

- Actual losses the patentee has suffered due to the infringement.

- Profits the infringer has obtained through the infringement.

(Article 71, 2020 Patent Law.)

If it is difficult to determine the patentee's losses or the infringer's profits, compensation is instead determined by reference to a multiple of reasonable royalties. If this also proves difficult, the court can award statutory damages of between RMB30,000 and RMB5 million (see *Statutory Damages*). (Article 71, 2020 Patent Law.)

In practice, courts often award statutory damages, as it is typically difficult for a patent holder to provide sufficient evidence of losses, profits, or reasonable royalties to obtain compensation on the other available measures.

Additional monetary awards include:

- Reasonable expenses for enforcing the patent (see *Reasonable Enforcement Expenses*).
- Punitive damages (see *Punitive Damages*).

Loss-Based Damages

Compensation should be based on the actual loss suffered by the right holder due to the infringement (Article 71, 2020 Patent Law).

Standards for Assessing Loss-Based Damages

To receive compensation for lost profits in China, the patentee must demonstrate that there was a high degree of probability that, but for the infringement, it would have made the infringer's sales. For the patentee to obtain as damages the profits on sales it would have made absent the infringement (measured by the sales made by the infringer), it must prove:

- Demand for the patented product.
- Its manufacturing and marketing capability to meet market demand.
- Absence of acceptable non-infringing substitutes.
- The sales amount of the infringing product.
- The profit margin of the patented product.

The lost-based approach is less common than the infringer's profits approach, because the level of proof required for actual losses or lost profits is much higher than when proving the infringer's profits (see *Infringer's Profits*). Therefore, this approach is rare in practice when awarding compensation for patent infringement. Under the lost-based approach, the amount of compensation is calculated by multiplying the number of infringing products sold by the price of the patented product, which is considered to represent the losses suffered by the patentee ((2017) Hu 73 Minchu No. 615).

The courts do not generally factor in profits from the sale of related non-infringing products (convoyed sales) when determining the amount of compensation.

Restrictions on Lost Profits Damages Calculations

In practice, when the patentee claims lost profits-based damages, the accused infringer usually argues that there is no direct causal relationship between the sale of infringing products and the loss suffered by the patentee because (either or both):

- The patentee's manufacturing capacity is limited, so that even in the absence of infringing products, they would have been unable to meet market demand.
- There are substitutes available in the market for the patented product.

If the accused infringer provides sufficient evidence to support the above arguments, the court may reject all or part of the patentee's claim for lost profits-based damages.

When determining the actual loss suffered by the patentee in a patent infringement action, the court generally does not factor in sales of infringing products outside China.

A patentee that has licensed their patent cannot generally claim the losses their licensees have suffered, unless the licence agreement clearly grants the patentee the right to claim damages on the licensees' behalf.

Infringer's Profits

The patentee can claim damages based on the profits the accused infringer obtained through carrying out the infringing acts (Article 71, 2020 Patent Law).

Standards for Assessing Infringer's Profits

To prove the profits obtained by the accused infringer, the patentee must prove:

- The sales volume of the infringing products.
- The profit margin of the infringing products.
- The contribution of the patented invention to the profitability of the infringing products. For example, if the patent protects only one component of the infringing product, the court should consider the value of that component as a proportion of the overall product. Other considerations include the degree of inventiveness of the patent compared to the prior art and the number of patents the patentee has over the same product.

Usually, the profit margin refers to the net profit margin. If the patentee can prove that the entire business of the accused infringer relies on the infringement, the profits of the infringing product can be calculated by multiplying the sales volume of the infringing product by its sales profit margin.

Restrictions on Infringer's Profits Calculations

For the purposes of calculating compensation, the infringer's profits are limited to those profits attributable to infringement of the patent. Profits arising from other factors must be reasonably deducted. Therefore:

- When the infringing product is a component of another product, the amount of compensation must be determined based on the value of the component part itself and its contribution to the profits of the finished product. For example, considering whether the infringing component drives demand for the finished product.

- When the infringing product is a package, the amount of compensation must be determined based on the value of the package itself and its contribution to the profits of the packaged product.

(Article 16, *Interpretation of the Supreme People's Court (SPC) of Several Issues Concerning the Application of Law in the Trial of Cases Involving Disputes over Infringement of Patent Rights 2009* (SPC Interpretation 21/2009).)

Royalty-Based Damages

If it is not possible to determine the patent holder's actual losses or the infringer's profits, the patentee can claim damages based on a reasonable multiple of royalties (Article 71, 2020 Patent Law).

Standards for Assessing Royalty Damages

Royalty damages seek to approximate the value of what was taken by the accused infringer's unauthorised use of the patented technology.

If the patentee has licensed the patents extensively, the court may consider the appropriate royalty rate to be established. Relevant evidence of an **established royalty** includes:

- Licence agreements.
- Filing records regarding licence agreements with the *China National Intellectual Property Administration* (CNIPA).
- Records or certificates of payment of licence fees by licensees to the patentee.

Established royalty rates are not typical, however, and may be difficult to demonstrate.

Theoretically, absent an established royalty, the party claiming damages could demonstrate the **royalty rate** that a reasonable patent holder and reasonable accused infringer would have agreed to during hypothetical arms-length negotiations conducted at a time just before the alleged infringement began. However, the Chinese courts rarely accept the use of any hypothetical royalty rate in patent infringement litigation.

Therefore, if the patent holder has not licensed the patents extensively before the infringement occurred, the court is unlikely to award royalty-based damages.

Restrictions on Royalty Damages Calculations

Calculating the royalty base. Royalty damages are typically calculated by multiplying a royalty rate by a royalty base. For example, either:

- A specific RMB amount times the number of infringing products sold.
- A percentage of the revenues from sales of infringing products.

The royalty base for reasonable royalty damages should not include activities that do not constitute patent infringement, such as sales occurring:

- After the asserted patent's expiration.

- Entirely outside China.

Apportionment. Most products contain multiple components, and most patents do not cover all aspects of a product but only particular features. However, the royalty base may include a product's total revenues if the patented feature drives the product's demand. Patent holders may present evidence, such as consumer surveys, to show that the non-patented features do not contribute to consumers' purchase of the product.

In most cases, however, royalty damages must be tied to the value attributable to the invention. Potential approaches to apportioning royalty damages to reflect the invention's value include:

- Identifying the smallest saleable patent-practising unit.
- Determining the proportion of the price attributable to the patented parts.

Comparable Licence Agreements

Comparable licence agreements involving either the asserted patent or one or both of the parties are a relevant factor when determining reasonable royalty damages. However, courts may exclude parties from using licence agreements in the following circumstances:

- There is a close relationship between the patentee and the licensee (for example, the patentee is a subsidiary of the licensee, or vice versa).
- There are other relationships involving commercial cooperation between the patentee and the licensee, and the licence agreement is only part of that cooperation, so that the royalty rate is non-comparable.
- The parties entered into the licence agreement to settle a lawsuit, making the royalty rate non-comparable.

Statutory Damages

When it is difficult to determine the actual loss of the patent holder, the infringer's profits, or reasonable royalties, the court can award statutory damages of between RMB30,000 and RMB5 million depending on factors including the:

- Type of patent right.
- Nature of the infringing act.
- Circumstances of the case.

In practice, the courts often award statutory damages, as it is typically difficult for patentees to provide sufficient evidence of the other measures for compensation.

Additional Monetary Awards

Compensation for patent infringement also includes reasonable expenses of the patent holder to stop the infringement (Article 71, 2020 Patent Law). See *Reasonable Enforcement Expenses*.

In addition, the courts can award punitive damages (see *Punitive Damages*) if: