

Research on Legal Application of “Fair Consideration” in Patent Infringement under Bona Fide Acquisition System

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Abstract: Article 77 of the Patent Law stipulates that if a bona fide user, a seller or a person who offers to sell an infringing patent product may claim in infringement litigation that an infringing patent product is originated lawfully, he/she will be exempted from indemnification. The notwithstanding clause in Article 25.1 of Interpretations of the Supreme People’s Court on Certain Issues Concerning the Application of Law in the Trial of Patent Infringement Cases II implemented on April 1, 2016 specifies the judicial rules of the “fair consideration” of a bona fide user. The infringer is not necessary to stop infringement as long as he/she can prove that he/she “does not know” the infringing acts and has paid the fair consideration for the above infringement. We should know how the Patent Law and its judicial interpretation impact the handling of patent infringement disputes. In addition, the intrinsic connection among legal provisions and their value needs to be further explored. The rules of counterargument of the “fair consideration” are defined by judicial interpretation. Its legislative wisdom needs to be interpreted in the context of the traditional civil law theory (the bona fide acquisition system).

Keywords: Patent Infringement; Reasonable Fees; Non-Cessation Infringement; Bona Fide Acquisition

1. Background and Objective of the Research

1.1 Research Background

Economic development has brought great challenges to the existing legal system. The protection of patent rights has become an economic and legal issue needed to be improved. Nowadays, people attach more and more importance to the construction of the patent right

system in legislation and judicial practice. The related infringement cases are increasing day by day. The concept of the patent right is also being enriched legally in the public. The exemption grounds from the bona fide infringer specified in Article 77 of the Patent Law is only limited to legitimate sources. However, the ground for counterargument of the “fair consideration” (that is, the “non-cessation infringement”) of the bona fide infringer is further added to the judicial interpretation. It urgently needs to explore if such a judicial interpretation beyond the scope of the legislative semantics conforms to the norms of jurisprudence.

In addition, in most of judicial practice, the “legitimate source” is taken as the ground for counterargument of a bona fide infringer who is exempted from compensation responsibilities. However, the infringer is rarely exempted from responsibilities due to the “fair consideration”. The reasons for the above are as follows: firstly, the notwithstanding clause in Article 25 of Interpretations of the Supreme People’s Court on Certain Issues Concerning the Application of Law in the Trial of Patent Infringement Cases II (hereinafter referred to as the Judicial Interpretation (II) of the Patent Law) is the key element to exempt the responsibilities specified in the legal norms, but its use conditions and scope has not yet been effectively defined and interpreted. Secondly, the “non-cessation infringement”, as a form for bearing the infringement responsibility, is not clear enough in the specific practice, and the manners for bearing the responsibilities are also difficult and uncertain in practice. Therefore, it is still needed to find a reasonable basis for the use of Article 25 of the Judicial Interpretation (II) of the Patent Law.

1.2 The Objectives of the Research

In this paper, Article 25 of the Judicial Interpretation (II) of the Patent Law is mainly

taken as a springboard to focus on the “bona fide acquisition system”, explore the ground for exemption of a bona fide infringer in the relevant legal system, compare the strength of the counterbalancing the interests between the infringer and the patentee in the judicial practice, and analyze the legal reasons for the value selection on the matter. Therefore, this can provide the jurisprudence bases for the legal protection of the patent rights and thus make some recommended legal contributions to the improvement and development of the patent rights.

2. Legal Logic of the Elements for the Counterargument Right in the “Fair Consideration”

Article 77 of the Patent Law specifies the followings: Any person, who, for production and business purpose, uses, offers to sell or sells an infringing patent product, without knowing that it was made and sold without the authorization of the patentee, shall not be liable to compensate for the damage of the patentee if he/she can prove that he/she obtains the product from a legitimate source. The Judicial Interpretation (II) of the Patent Law further specifies that if a person who uses, offers to sell or sells the infringing product for the objective of production and business that has been manufactured and sold without the authorization of the patentee subjectively does not know, should not have known and can prove the legitimate source of the product, he/she shall stop to use, offer to sell and sell the infringing product, unless the user of the alleged infringing product proves that he/she has already paid a fair consideration for the product.

2.1 Interrelation of the Law and Its Judicial Interpretation

As mentioned above, a bona fide user, a seller and a person who offers to sell a patented product may claim exemption of responsibilities by referring to the “legitimate source of the product”. A bona fide user also can exempt the responsibilities in cessation infringement on the grounds that the “reasonable expenses have been paid”. From the perspective of the wording and linguistic logic between the two articles, Article 77 of the Patent Law is the precondition for Article 25 of the Judicial Interpretation (II) of the Patent Law. Article 25 of the Judicial Interpretation (II) of the Patent Law is

specifically explained as a breakthrough to Article 77 of the Patent Law. In the formulation of the Patent Law, the legislators accord with the practice and weigh the values of various interested entities to use the “lawful source” as an important ground for exemption of responsibilities based on the general disposal of judicial cases. However, due to the complexity and diversity of patent infringement cases, [1] as well as the needs to maintain social order and increase economic benefits, the ground for counterargument of the “legitimate source” is no longer sufficient to dispose the relevant infringement. Thus, based on the practice, the Supreme People’s Court added the ground for counterargument of a bona fide infringer based on the judicial interpretation to fill in the blanks of the Patent Law in the judicial practice. The Judicial Interpretation (II) of the Patent Law is, on the one hand, a realistic, timely and strategic arrangement made by the Supreme People’s Court in accordance with the changes in the society and practice, [2] and, on the other hand, embodies a breakthrough and improvement of the existing legal norms.

2.2 Research on Breakthroughs in the Notwithstanding Clause of the Judicial Interpretation

The judicial interpretation specifies that a bona fide user has the right to be exempted from compensation if he/she proves that all the infringing products he owns come from legitimate sources, which is an unquestionable interpretation of Article 77 of the Patent Law. However, this interpretation further specifies that a bona fide user may be exempted from the responsibilities from the infringing act by paying a fair consideration. This notwithstanding clause actually creates an additional counterargument condition beyond the legal norms for the user to alleviate its burden of responsibilities. The premise that the “fair consideration” is applied is as follows: The product meets the conditions that the product has the “lawful source” indicated in the first half of the first paragraph of judicial interpretation. From this point of view, the “fair consideration” relies on the ground for counterargument of the “lawful source” but is not an independent ground for counterargument. On the contrary, it is one of the constituent elements of the counterargument right that a bona fide user of an infringing product needs to invoke to be exempted from responsibilities for

cessation infringement.

The reason why the judicial interpretation specified such a provision lies more in the above needs to meet the growing demand for handling patent infringement cases and to balance the interests of the parties. Nonetheless, compliance is still inevitably discussed. The judicial interpretation broke through the Patent Law and added the constituent elements of the “fair consideration” of the user. Further, the effect of counterargument of non-cessation infringement has the deeper impact on the patentee. [3] Therefore, in judicial practice, the application of the “fair consideration” should be more cautious. First of all, it is necessary to consider the public interests to be safeguarded in the process of legislation and legal practice. [4] The intellectual property system itself carries certain social attributes and needs to seek the balance between the interests of intellectual property owners and the public interests of a society. In intellectual property cases, the public interest must be taken into account, which may result in the creation of some contradictions. If we do not stop some infringement, it will damage the interests of intellectual property owners. However, if we stop infringement, it will damage the public interest of the society. Under this situation, we need to weigh interests. Under the judgment that to stop the infringement will seriously affect the public interest of society, we should replace civil responsibility of cessation infringement with the economic compensation and other alternative ways.

Secondly, we should fully consider the enforcement effect of the outcome of the judgements. Cessation infringement is a more common form of responsibility for infringement, and exists in the case of infringement continuation. When we took “patent infringement disputes” and “cessation infringement” as the key words in Adjudication Documents Network, we retrieved 11,285 adjudications. It preliminarily showed that in the judicial practice, whether patent infringement case is the patentee’s litigation request or the court’s adjudication results usually take cessation infringement as a common way to assume responsibilities is accompanied by the responsibilities for damages together. But in the main text of the judgment, it is further studied whether the general requirements of the infringer to stop infringing behavior is convenient. Cessation of infringement is only a general

reference. If the infringer is ordered to cease infringement, the specific manner and content of cessation infringement should be clarified in the main text as far as possible. Therefore, when the cessation infringement is not so easy to implement, it may be more appropriate to change the perspective and consider a way of assuming responsibility that is easy to implement and more conducive to the realization of economic benefits.

Finally, we need to continuously explore the dynamic balance between different values in the process of practical development. We face certain legislative challenges to protect intangible property. Further, because the patent right, as a kind of intellectual achievement, has uncertainty and the attributes of dynamic development, the advantages and disadvantages of involved various values will vary based on the law of the market economy. The value of the patent right has been rising in recent years, but the intellectual achievements will inevitably be attached to a carrier, that is, the value of the intellectual achievements should be reflected in the relevant goods. Therefore, when we judge the cessation infringement, we shall consider the proportion of the value of the intellectual property right in question in the products ceased to be produced or sold to prevent the waste of social resources and the imbalance of interests between the parties. [5] In cases where the value of a commodity is much greater than the value of the IPR attached to it, the court should choose carefully the application of the duty to cease infringement.

3. The “Lawful Source” and the “Fair Consideration”

According to the internal logic of the Patent Law and judicial interpretations, if a bona fide infringer is sued for the possibility of infringement of the patent right by the use or sale of a patented product and can prove that he/she uses, sells, or offers to sell the product of which the source is lawful, he/she is exempted from the responsibilities to compensate for the damages. If he/she can further prove that the alleged infringing product has already been obtained through the payment of a fair consideration, he/she is exempted from the civil responsibilities of non-cessation infringement. In this context, the existing legal norms are extended and supplemented through the judicial interpretations to balance the conflicts of interest

and damages between the patentee and the bona fide user of the infringing product.

3.1 Judicial Application of the Grounds for Counterargument of the “Lawful Source”

The “legitimate source of the product” is often cited by the user and the seller as the ground for counterargument in patent infringement cases. This is reflected in the number of patent infringement cases. If the “lawful source” and the “exemption from responsibilities” are used as the key words for search in China Judgements Online, nearly 3,000 documents can be retrieved. Further, the ground for counterargument of the “lawful source” is an important and special ground for exemption in patent infringement cases, is adequately and theoretically researched in the jurisprudence circle and enjoys rich theoretical experience in its law application.

According to Article 77 of the Patent Law and Article 25 (3) of the Judicial Interpretation (II) of the Patent Law, the lawful source indicates that a product is obtained by normal commercial means such as lawful sales sources and common sales contracts. If a product comes from a legitimate source, a person who uses, offers to sell or sell the product should provide relevant certifications based on trading practices. According to the above clauses, the legal subject who exercises the right of counterargument of the legitimate source is defined as a person who uses, sells or offers to sell the infringing product. In addition, the burden of proof for the legitimate source is sustained by the user. Whether the undertaking of the burden of proof is reasonable or not will be left aside for the time being. As far as the positive legal effect of the ground for counterargument of the lawful source is concerned, it seems to specially protect the bona fide infringer.

If the alleged infringing product has a lawful source, it should mean that the infringer obtains the product sold through lawful sources of purchase, the common sales contracts and other normal commercial manners. In the infringement patent cases, whether the ground for counterargument of the “lawful source” of the infringer can be established depends on the objective requirement of the alleged infringing product that has a lawful source and the subjective requirement of the infringer who does not have subjective fault. For the objective requirement, the infringer should provide relevant certifications based on the transaction

practice. For the subjective requirements, the infringer should prove that he/she actually did not know and should not know that the product sold by him/her was manufactured and sold by the manufacturer without the authorization of the patentee. If the infringer can prove that he/she complies with the lawful and normal rules of market transactions with the clear source, lawful sources of the product sold, the reasonable prices, and the use and sale behaviors in line with the principle of good faith and the practice of the transaction, it can be presumed that the infringer actually did not know and should not know that the products sold are manufactured by the manufacturer without the authorization of the patentee, that is, it is presumed that the infringer is not subjectively at fault. [6] In this case, it is up to the patentee to provide contrary evidences. If the patentee cannot provide the further contrary evidence sufficient to rebut the above presumption, it should be identified that the counterargument of the lawful source of the infringer shall be established.

However, it should be known that the counterargument of the lawful source is only a counterargument of exemption from responsibilities, rather a counterargument of non-infringement. Even though the counterargument of the lawful source of the infringer is established, this still does not change the nature of infringement for the sale of infringing products, and can not exempt from the responsibilities to stop the infringing behavior.

3.2 Basis for the Ground for the “Fair Consideration” And Its Place in the Structure of the Law Provisions

Judicial interpretation broke through in the provisions of the Patent Law and derived the counterargument right of “fair consideration”, that is, the users need to prove that they have paid a reasonable price for the infringing product, so they are not necessary to stop the use of the products. However, does the non-cessation infringement following the establishment of the counterargument of the “reasonable consideration” need to be based again on the “lawful origin”? that is, if the infringer intends to have the legal effect of the “non-cessation infringement”, does he/she necessarily prove that the alleged infringing product has the lawful source while needing to prove that the product has been paid a reasonable price? The answer is related to whether the regulation (a bona fide

acquisition system) of the civil law is well applied in the patent infringement law.

3.2.1 The legal basis for the counterargument of the “fair consideration” invoked by a bona fide user of an infringing patented product

Article 311 of Civil Code stipulates that if a person without the right of disposition transfers immovable or movable property to a transferee, when transferee receives the immovable or movable property with subjective good intention at a reasonable price, the change in the property right should be completed, and the transferee may acquire ownership of the movable or immovable property in good will. This provision applies by reference if a party acquires other property rights in good faith. Article 311 (2) of the Civil Code extends the scope of application of the bona fide acquisition system to other rights. The patent right within the scope of intellectual property rights, like the ownership right, is a right in rem. Therefore, the bona fide acquisition system applicable to the ownership right can be better compatible with the patent right in terms of the legal gene. [7]

The patentee’s rights over the patented product include the rights to manufacture, use, sell, offer to sell, and import. In a patent infringement dispute, only a bona fide user has the right to claim that a fair consideration has been paid to counteract the patentee’s right to cease infringement. The reason is that, without the authorization of the patentee, unauthorized manufacture, import or sale of patented products can not produce the legal effect of transfer of ownership. The actors of unauthorized manufacture, import or sale of patented products do not obtain the infringing product patent. However, the manufacturer, importer or seller will not have right to dispose the patent rights of the product, which is the “no right to disposal” behaviors required by the goodwill constitutive elements. At the same time, the Judicial Interpretation (II) of the Patent Law also clarifies that the subject who has the right to invoke “fair consideration” as counterargument is limited to the user. At this time, the user of infringing products trades the infringing products together with the manufacturer, importer or seller, which is in line with the bona fide acquisition system in terms of “effective reason behavior” of the constitutive elements. [8]

Secondly, according to the subjective elements of bona fide acquisition, if the actor is exempted from the civil responsibility of cessation

infringement, he/she must have the subjective goodwill, [9] that is, Article 25 (2) of “Judicial Interpretation (II) of the Patent Law” stipulates “actually do not know and should not know”.

Finally, on the basis of proving that he/she is a bona fide infringer, the actor objectively needs to meet the conditions of the payment of fair consideration and obtain the relevant rights of the product through the publicity of the change of property rights. [10] In Article 25 of the Judicial Interpretation (II) of the Patent Law, the “fair consideration for the product has been paid” reflects the constitutive element of “payment of fair consideration” in the bona fide acquisition system. For the conditions of property-right change publicity, infringing products can be equal to the movable property in Article 311 of Civil Code. Then, when the manufacturer, importer, seller deliver the infringing products to the user, the change of property right publicity is completed. Therefore, the notwithstanding clause of the judicial interpretation is combined with the constitutive elements involved by the “lawful source”. Therefore, the bona fide acquisition system just corresponds to the constitutive elements of the system. [11]

In summary, when the user has evidence to prove his/her goodwill and not to have negligence, the user can pay a reasonable price and publicize the ownership of the product to obtain the use right of the patented products from the manufacturers, importers or sellers. This also explains the reason why the bona fide user can also “retreat” in the case of patent infringement, because the bona fide acquisition system embodies the order and efficiency of the legal value [12] and embodies the principle of public confidence of publicity of right in rem. Judicial interpretation stipulates that the part of the “sub-rights” in the patent right is obtained through the “bona fide acquisition”, which also protects the market order and economic efficiency.

In addition, Article 25 and Article 26 of the Judicial Interpretation (II) of the Patent Law also stipulate the “reasonable payment for fees”. However, the notwithstanding clause of Article 25 discussed in this paper is different from Article 26. The most intuitive difference is that the subjects of application are different. According to Article 25, the subject who can “pay reasonable costs” to exempt the infringement responsibilities shall be in goodwill, that is, the subject shall be the bona fide user

repeatedly mentioned. However, the subject of Article 26 is not limited to the user, and does not require the subject to have the subjective goodwill. The reason why the court judges the infringer “not to stop” infringement mainly lies in the public interests. [13] In other words, according to Article 26, the “payment of reasonable fees” is an alternative way of bearing responsibilities. The notwithstanding clause of Article 25 is an important part of ground for exemption. Therefore, only Article 25 can reflect the spirit of the legislation of the bona fide acquisition system.

3.2.2 The constituent elements of the “fair consideration” and its legal relationship with the counterargument of the “lawful source”.

The Patent Law and the relevant judicial interpretation of the rules stipulate that if the user of infringing patented products seek the right to counter the patentee to stop the infringement, he/she should meet the corresponding conditions. First of all, the infringer must use the infringing product for the purpose of production and management, which is the same as the ground for counterargument of the “lawful source”. Secondly, the infringing act of the infringer must be the bona fide act, that is, the defendant shall subjectively have goodwill. When the defendant implements the infringing act, he/she should or in fact, does not know that the patent infringing product has been manufactured and sold without the authorization of the patentee. Finally, the infringer needs to provide evidence to support the authenticity and legitimacy of its claims. If the defendant wants to prove that his/her products are obtained through the payment of fair consideration, he/she must provide evidence. Therefore, the patentee finds the source of infringing products (manufacturers, importers or sellers). Hence, the source of the infringement is ordered to bear the responsibility for infringement.

From the perspective of the application of bona fide acquisition, the ground for counterargument of the “lawful source” and the ground for counterargument of “fair consideration” are intrinsically linked. If the bona fide infringer ultimately wants to achieve the legal effect of exemption from infringement responsibility, the premise is that the infringement act sued is in accordance with goodwill conditions in the patent field. The most important thing is to prove that he/she effectively obtains infringing products. That is, the infringer must prove that

the infringing patented product has a lawful source, which is the objective proving conditions to exempt from the responsibility to stop infringement in the patent field, and is also a part of the objective elements in the field of bona fide acquisition system. Only after meeting the condition of the “lawful source of the product” can we further confirm whether the user of the infringing product who “pays a reasonable fee” overall conforms to the fact that the infringing product is obtained in good will in the patent law, which is the objective constitutive element.

Thus, according to the provisions of Article 25 of the Judicial Interpretation (II) of the Patent Law, coupled with the bona fide acquisition system, the bona fide user pays a fair consideration for “not to stop the infringing behavior”, which is a legal provision linked to the comprehensive application process. If the user wants to achieve the effect of non-cessation infringement first via the “fair consideration”, the user shall firstly meet the subjective elements of good will, and secondly meet the objective element of the “lawful source”. On this basis, the bona fide infringer must also prove the fact of “payment of fair consideration” to obtain the related “sub-rights” of the patent right of the infringing product in good will. Then, the use of infringing product can be justified by the law.

3.2.3 The “fair consideration” generates the value game embodied by the legal effect of the non-cessation infringement

The judicial interpretation goes beyond the scope of the legal rules to establish a “fair consideration” to block the use of cessation-infringement responsibility, which is based on the consideration of the interests of many aspects. The legislation should have the effect of dispute settlement. The role of judicature is to maintain social justice. Without the authorization of the patentee, the use of the infringing product constitutes infringement, but the legislation does not absolutely and exclusively protects a value of a society. When a certain value is more obvious or the worthiness of a certain value is more prominent, the legislation needs to take them into account and balance them. Therefore, when the infringement of patent rights is regulated, we need to consider the impact caused by the infringement relief. [14] When the infringer does not have malice or negligence in his/her subjective behaviors, if the choice of the relevant infringement relief behaviors will generate the significant impact on the sued bona

fide infringer, which is obvious unfairness or obvious imbalance of interests, we shall modify the relief partially, and conduct the appropriate limitations on the application of relief of cessation infringement [15].

However, it shall be clarified which standards or boundaries shall be used in the judicial decision to determine the rules of “non-cessation infringement”. In the preceding paragraph, the bona fide user of the infringing products can counteract the right of the patentee to claim the compensation for infringement through the lawful source. On this basis, the user can be exempted from the responsibility of cessation infringement by paying a reasonable price. This provision has a bona fide acquisition system as the legal basis. Similarly, in the United Kingdom, the United States and other countries in judicial practice, [16] based on considerations of significant public interests, based on the balance between the losses of the right holder caused by infringement and the damages of the infringer caused by the injunction, or based on the considerations that the patent involved is investigated under antitrust due to its monopoly nature, the court can judge the compulsory license by the payment of a reasonable license fee and then refuse to issue a permanent injunction. [17]

4. The Extension of Thinking from the Ground for Counterargument of the “Fair Consideration”

In the case of bona fide acquisition system as the basis, the user of the infringing patented product can invoke the provisions of Article 25 of the Judicial Interpretation (II) of the Patent Law to counteract the patentee’s claim right of cessation infringement. However, as the bona fide acquisition system itself has certain theoretical deep meaning, when it is combined with the patent law norms, it will have a magnetic effect on the setting of the relevant system, and will also play a role in the orientation of the norms of judicial practice. Therefore, rooted in the legal basis of bona fide acquisition, the application of the “fair consideration” rules needs to be investigated.

4.1 Hidden Objections to the Concept Of “Having Been Paid”

The foregoing discusses the legal effect that the “fair consideration” can prevent “cessation infringement”. However, it still be understood

and applied whether the time of payment of the fair consideration need to be limited and regulated. For example, when a patented product is infringed, if the user has paid the fair consideration before or at the time when the patentee seeks relief through litigation and other ways, according to the provisions of the judicial interpretation, to meet the “goodwill”, “lawful source” and other basic conditions of the situation, the user can enjoy the counterargument right of the non-cessation infringement under the situation of meeting the basic conditions of the “goodwill” and the “lawful source”. If the user fully meets the subjective and objective requirements of the law, but pay a reasonable price after the lawsuit, can the user still enjoy the ground for counterargument?

We can understand it with the principle that the previously mentioned “fair consideration” counterargument should follow. The formulation of legal rules reflects a certain social value orientation. The provisions of the law of the judicial interpretation are broken through to additionally set the “fair consideration”, which is also the result of the game of the social values. In judicial practice, when we set the responsibility burden of cessation infringement for the infringer, we usually consider that the patentee suffers some kind of losses due to infringement or that the social order suffers some kind of adverse effects due to infringement. However, any matter has two sides itself. When we consider the social effect caused by the bona fide infringement in a dialectical view, non-cessation infringement can also realize the effect of cessation infringement to a certain extent. The bona fide infringer uses the patented product in goodwill, forming a stable market transaction pattern and the value of the source. If we stop the use behavior in a cut, we may break the stable order of transactions, and also can not realize the social and economic benefits of the harmonious unity. Therefore, the conditions of “having been paid” required by the “fair consideration” can be generated before the patentee seeks relief through litigation and other legal ways, or in the process of relief behavior. When the user of the infringing patented product does not have subjective malicious intent to infringe, the product is purchased through lawful sources, and the user of the product is extremely dependent on the patented product to engage in production and business activities, it can be considered to make up for the losses brought to

the patentee by the continued use of the infringing product by the subsequent user by requesting that the user pays a reasonable price, that is, it is permissible to postpone the payment of a fair consideration until the litigation process. In addition, there are legal and systemic disagreements as to whether fair consideration can be claimed without requiring that the bona fide infringer has actually fulfilled the obligation to pay, only that the parties have agreed in the contract or have reached a consideration agreement, or that it should be required that the bona fide infringer has in fact paid fair consideration. At this point, careful deliberation is required through the direction of thinking provided by the bona fide acquisition system. In the elements of bona fide acquisition system, as for the "fair consideration", it is not required that the transferee has actually paid. But it is only needed to form a reasonable market price between the parties to fulfill the agreement. The judicial interpretation specifies that the patent product of the bona fide user enjoys the "fair consideration", of which jurisprudence basis is the bona fide acquisition system. Therefore, the payment of fair consideration involved in the rules should also be interpreted in accordance with the concept of the bona fide acquisition system. Therefore, the bona fide user can claim that the "fair consideration" exempts from the responsibility of the cessation infringement, which only needs to objectively have a transaction price of the agreement. Then, as for the time limit of the "payment of fair consideration", whether the bona fide user has the agreement of the "fair consideration" at the time when the user obtains the right to use the infringing product, or the bona fide user reaches the agreement of the "fair consideration" in the process of litigation or after the court rules that the user shall pay a reasonable price in lieu of cessation infringement, the user shall claim the non-cessation infringement based on the provisions of Article 25 of the judicial interpretation.

4.2 The Issue of Responsibility for Proving How to Distribute The "Fair Consideration"

As mentioned above, if the person who is responsible for proving the "legitimate source" is the infringer, the infringer needs to prove its subjective goodwill. If the infringing patent product has a legitimate source, the infringer is presumed not to have subjective fault. The

patentee will need to provide contrary evidence if it wants to claim that it bears the liabilities of compensation for infringement. If the patentee cannot provide the further contrary evidence sufficient to rebut the above presumption, it should be identified that the counterargument of the lawful source of the infringer shall be established. In accordance with the provisions of the law and judicial practice and based on the allocation principle of the burden of proof principle of the "lawful source" of the bona fide infringer, when a party proves the subjective bona fide conditions of the "fair consideration", it is the infringer who puts to the proof.

An important foundation of the "fair consideration" is the bona fide acquisition system. In this paper, the "fair consideration" shall be proved to exist based on the bona fide acquisition system. However, the allocation of responsibility for proving the subjective elements of the bona fide acquisition system is still controversial in the academic community. In the bona fide acquisition system, concerning the issue on which party bears the responsibility of proving that the transferee is subjectively "in good faith and without fault", some scholars argue that the determination of the element of the "goodwill" should adopt a presumptive method, that is, the transferee is presumed to be in good faith. The original right holder who asserts that the transferee is not in good faith should bear the responsibility of proving the transferee's bad faith or gross negligence. That is, the burden of proof should be borne by the original right holder. The reason is that the fact of subjective "good faith" of an actor belongs to a negative fact, that is, the actor is subjectively ignorant, but it is more difficult to prove the existence of negative fact than the existence of positive fact. If the burden of proving the fact of the "goodwill" is placed on the transferee, the objective for which the bona fide acquisition system is established will be difficult to be realized.

It should be noted that, as for the "lawful source" in the allocation of the burden of proof, if the actor provides evidence of the lawful source of the product, he/she is presumed to be bona fide. This is different from the presumption of goodwill in the bona fide acquisition system. The former still requires the actor to bear the burden of proof. Only after that can be recognized as subjective goodwill, that is, to prove the lawfulness of the product source is the same as proof of subjective goodwill. The

subjective burden of proof of the bona fide acquisition system is a direct presumption, which does not need to provide evidence to prove its subjective goodwill. At this point, the theory of allocation of the burden of proof seems to be misleading, that is, if the doctrine of liability fixation of the counterargument of the “fair consideration” is established in accordance with the allocation of the burden of proof of the counterargument of the “lawful source”, the rule of the “fair consideration” will be contrary to the fundamental principle of the bona fide acquisition system, and the unity of the legal order will be undermined.

However, the principle of doctrine of liability fixation for bona fide acquisition can not be shallowly and rigidly understood that the burden of proof is completely placed on the patentee. The allocation of burden of proof of the subjective elements of the “fair consideration” shall also refer to the principle of allocation of responsibility of the “lawful source”. In addition, we shall conclude from the legislative spirit of the subjective doctrine of liability fixation of the bona fide acquisition system. The reason why the burden of proving the subjective goodwill of the actor is generally borne by the original right holder is because of the difference in the degree of difficulty and practicability of proving positive and negative facts. The fact of the positive elements in patent infringement cases is the fact that the actor has paid a reasonable fee. Therefore, the actor shall provide the evidence for paying a reasonable price to infer that the infringer who claims the establishment of “bona fide infringement” is subjectively bona fide. Therefore, the patentee who claims that the fact is not established shall provide the evidence that the infringer subjectively does not have the goodwill. From this point of view, whether the subjective responsibility allocation in accordance with the bona fide acquisition system or the distribution of responsibility that the subjective goodwill of the “fair consideration” is established in accordance with the subjective doctrine of liability fixation of the ground for counterargument of the “lawful source” has the same result.

4.3 Characterization of Costs in the “Fair Consideration”

Article 26 of the Judicial Interpretation (II) of the Patent Law mentions the concept of “reasonable fees”. Obviously, this rule for the

payment of expenses established based on public interest are different from the “fair consideration” discussed in this article. Reasonable fees in Article 26 is a kind of compensation measures independent from the general license fees and the compulsory license fees and is also alternative relief of cessation infringement. The reasonable fees are comparable with the responsibility of compensation for damages. However, the “fair consideration” in Article 25 can not simply lump together.

The bona fide user of patent infringing products claims to continue to use the infringing products in the case of meeting the elements listed above. The rationality of this method is to take into account the gains and losses of the user and the patentee. How to understand the nature of a fair consideration paid by the user is a big problem. Generally, the user obtains the infringing product from the source infringer (the manufacturer, importer or seller of the infringing product), and also obtains the use value of the product. However, the user pays a reasonable price to the source of the infringer, and does create a legal reason for its use. However, the patentee’s loss is still not compensated. Therefore, the balance of interests theory previously discussed also has no foothold.

This requires a holistic understanding of the legal system, that is, the “fair consideration” is interpreted as a license fee of the patent product. The infringing product used by the bona fide user may have a defect in the source. However, because he/she did not know and should not know the existence of such a defect, the consideration paid by the user to the manufacturer, importer, or seller of the infringing product is presumed to be the consideration paid to obtain the lawful patented product. [18] Meanwhile, it is also presumed that the patentee has consented to license the use of the infringing product by the user. The reasons for this presumption are that the infringing product has been used, and the patentee’s losses are actually generated. The bona fide user has paid a reasonable price but obtained a product with a defective right, so the user has also suffered a certain loss. It is not in accordance with the principle of fairness to compel a bona fide user to stop using the product or to compel the patentee to give up the pursuing of recovery from the bona fide user. Therefore, for the concept of minimizing the loss, it can be presumed that the patentee and the bona fide

user have reached the sale of the agreement. At this time, the consideration paid by the user should also be obtained by the patentee. The manufacturer, importer or seller of the infringing product possess a reasonable price paid by the bona fide user, which is actually a kind of unjust enrichment. [19] Then, the patentee can claim the right to return his money from the actual recipient (that is, the manufacturer, importer and seller of the infringing product) of the consideration based on unjust enrichment.

5. Conclusions

The bona fide acquisition system can maintain the stability and security of the order of transactions so that intellectual property rights can generate trust benefits in the market transactions. Therefore, the legislation should also reasonably protect the order of intellectual property transactions. Previously, there are objections whether intellectual property rights can be obtained in goodwill in theory. The focus of the dispute often lies in that the intellectual property right is an intangible property right but its object is an *res incorporale*, which can not produce publicity. However, although intellectual property right is an intangible property right, the product to which it is attached is a tangible object, which can determine the status and attribution of the right based on the principle of publicity and trust. At the same time, the protection of the bona fide relative person on the reliance interest should not make a difference because the object of the transaction is an *res incorporales* or a tangible object.

The legal norms in the field of patent have special characteristics because of the protection of objects. As the most important form of responsibility in the field, "compensation for losses" and "cessation infringement" often carry the expectations of all parties for the outcome of most of infringement disputes. In addition, "cessation infringement" is a kind of responsibility which has a great impact on the order and efficiency of market transactions. Therefore, it is more necessary for the legislator and the adjudicator of the cases to make a prudent choice. Under the situation of the judgment and balance of the interests of the patentee and bona fide infringer, to clarify the "lawful source" and the counterargument of the "fair consideration" around the good faith acquisition system and to conduct the necessary and reasonable application for non-cessation

infringement responsibility are the inevitable requirement to stimulate the economy and legal vitality.

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