

Asia patent trends in 2022: SEP rates, court changes and more

Patent lawyers from China, India, Japan, South Korea and Singapore talk about SEPs, pharma patents and other matters they're keeping an eye on this year. *By* [Sukanya Sarkar](#)

Asian countries topped the charts for worldwide patent filings in 2020 according to WIPO's latest report, so it's probably not surprising that counsel are keeping their eyes peeled for developments in the patent litigation space on the continent this year.

Senior intellectual property sources in China, India, South Korea and Singapore tell *Managing IP* that they're watching for fair, reasonable, and non-discriminatory (FRAND) determinations from Chinese courts, how other countries use policy and other tools to fight China, and developments on artificial intelligence (AI) inventorship.

They're also monitoring shifts in pharmaceutical litigation across different countries and various rule changes in the Indian courts – and more still.

SEP and FRAND

Let's start with FRAND and, perhaps the biggest disruptor in that space, China.

China, a major market comprising standard essential patent (SEP) implementers and owners, particularly in the 5G space, was criticised after its domestic courts issued back-to-back anti-suit injunctions in 2020.

On top of that, China's Supreme People's Court

affirmed in *Sharp v Oppo* in August 2021 that Chinese courts had jurisdiction to set global FRAND rates.

Considering these developments, it's more than likely that China will make waves in SEP disputes in 2022, according to counsel.

As Douglas Clark, principal at Rouse in China, puts it: "China will be one of the major battlefields worldwide for SEP disputes."

A few SEP disputes, including *Sharp v Oppo*, were settled between parties last year, but the Chinese courts will have several opportunities to set global FRAND rates in 2022. Once one does, counsel will have to navigate the aftermath.

Clark points out that a lot of questions will need to be answered. "Are courts in other countries going to ignore China's decision and hold that it can't set a global FRAND rate? Are they going to grant injunctions irrespective of China's decision? How are parties going to deal with these issues?"

Indian courts, at least, have made it clear that they don't like anti-suit injunctions. In *InterDigital v Xiaomi* in May, the Delhi High Court ruled that it was impermissible for a court in one jurisdiction to enjoin a party before it from pursuing its cause before a competent forum in another country.

Clark predicts that India will be one of the major jurisdictions to stand up against China once it sets a global FRAND rate.

"India is important for the Chinese handset manufacturers – it's not a market they can afford to leave. That's why there's going to be a major battle between the two jurisdictions," he says.

As far as anti-suit injunctions are concerned, Chinese courts laid low in 2021 after granting several the previous year. This reserve may have been a reaction to the flak the courts received from other courts in Germany and India, and perhaps to the EU raising concerns through a formal request to the World Trade Organization as well.

In any case, Clark predicts that Chinese courts will essentially replace anti-suit injunctions with global FRAND rates in 2022.

Stanley Lai, head of Allen & Gledhill's IP practice in Singapore, says competition law might come into play this year too, and that stakeholders should watch out for its increasing role in correcting SEP licences and negotiations that don't follow FRAND terms.

For example, the Competition Commission of India is already looking at cases on several SEP licences to check if the patent owners are exerting monopoly power.

Many of the cases, filed by smartphone makers, alleged that the licenses offered to them did not meet FRAND commitments.

Major markets

China isn't the only Asian jurisdiction counsel are watching closely – there's also India and Indonesia and, to a lesser extent, Japan.

India is slowly emerging as an important venue for global patent litigation, particularly when it comes to SEP issues, because of the sheer size of the market and the country's patent reforms.

The Delhi High Court, which receives the largest number of IP disputes in the country, is finalising rules governing patent suits and the court's intellectual property division – a development that is expected to make the court and the country more attractive for patent litigation.

Pankaj Soni, partner at Remfry & Sagar in India, says foreign players have started to realise that India is a favourable venue for securing injunctions.

"While the US will remain the preferred venue for securing damages, quick injunction grants and the size of the Indian market have caused stakeholders to take India seriously," he says.

A resurgence in COVID cases in India, however, may delay adjudication of such disputes, he warns, and stakeholders shouldn't expect any major decisions in the first half of 2022.

Indonesia, with a market of close to 300 million people, is also slowly picking up pace in the patent litigation space and could soon emerge as an important player. The favourable litigation environment there, comprising specialist judges and provisions for speedy disposal of commercial cases, is attracting foreign players.

Clark says: "We're seeing Indonesia as an emerging market across the board in our firm. We have already filed some actions there, but there's going to be explosive growth in Indonesia in the future."

Japan, on the other hand, has been behind the curb with SEP litigation. Japanese courts haven't ruled on any major SEP disputes since *Apple v Samsung* in 2014.

Although Sharp filed three patent infringement suits against Tesla Motors Japan in 2020 before the Tokyo District Court, these cases were settled quickly and the court didn't have a chance to issue any rulings on the merits.

Clark says: "I don't think Japan is going to be a major destination for global litigation this year, because the courts invalidate a lot of patents and the damages aren't so great."

But Takanori Abe, managing partner at Abe & Partners in Japan, says counsel should watch out for SEP case developments in the automobile space in Japan, because more and more carmakers are starting to employ mobile technology there and the country could soon face a swathe of connectivity cases.

“It will be interesting to see whether Japanese courts will follow the precedents of the Mannheim District Court and the Munich District Court in Germany – which restrained Daimler from infringing Nokia and Sharp’s SEPs – given that both Germany and Japan are automobile kingdoms,” he says.

Pharma predictions

While Japanese courts have historically granted low damages in patent litigations, below 100 million yen (\$0.9 million), that trend is slowly shifting.

Kowa, a pharmaceutical originator, successfully obtained an injunction for the drug pitavastatin from the Tokyo District Court in 2015 against Towa, a generic manufacturer in Japan. The decision was later upheld by the Intellectual Property High Court of Japan.

Kowa filed several related lawsuits against Towa between 2018 and 2021 seeking a total of 18.8 billion yen (\$1.6 billion) in damages, which, if granted, would be the first-ever patent case in Japan with such high damages. The case is likely to set the tone for future battles between originators and generics.

Abe at Abe & Partners says: “This is a huge damage and, if granted, it will significantly affect generics business in Japan, which is not doing well.”

In India, stakeholders should expect to see courts slowly and gradually move away from the so far generics-friendly ecosystem established, say sources.

Soni from Remfry & Sagar says: “A lot of negative sentiment had built up among innovators, who felt that courts in India favoured generics, which deterred them from filing litigations there.”

“This is now changing, and judges are moving towards adjudicating cases on merits rather than public interest. Consequently, pharmaceutical innovators have now started gaining confidence in India’s patent litigation system.”

As Indian courts shift towards a middle ground, courts in South Korea are doing the same.

John Kim, partner at Lee & Ko in South Korea, says: “South Korea is looking to play both sides – innovators and generics – and balance the US model against the Indian model, which is not an easy task.”

Kim notes, however, that South Korea and most other Asian countries aren’t ready to introduce eye-watering damages in patent litigation just yet – at least, not at the same scale as the US.

“Most pharmaceutical litigations in Asia will continue to revolve around injunctions, and not damages.”

Lai at Allen & Gledhill says patent litigation in the COVID space will become more important in Asia in the coming months, whether for testing, vaccines or treatment.

“As more biosimilars and generics come into existence, it will be interesting to see how patent proprietors will further devise infringement strategies to delay or prevent premature market entry in different jurisdictions.”

UPC and more

Counsel say certain global developments will create a ripple effect in patent litigation in Asia, and vice versa.

One of the most important will be the creation of the Unified Patent Court, part of Europe’s patent harmonisation project. The court is likely to come into being this year or in early 2023 – and once it does and starts issuing Europe-wide orders, it will cause a stir among SEP owners in China, say sources.

Clark from Rouse explains: “When the UK sets a global FRAND rate, a party in Asia that isn’t happy with that rate can simply leave the UK market. However, it may not be that easy to leave the entire European market, because that would cause significant revenue loss.”

He says stakeholders from other countries will use UPC injunctions as the main tool to fight China.

China will still have plenty of sway, of course. Sources point out that the country’s stance on SEPs (including its decision to set global FRAND rates) is likely to have caused other countries such as the UK and Japan to initiate SEP policy reviews.

Clark says: “Governments have suddenly woken up and realised that they can’t let China be the de-facto centre of royalties and standards, and that they need to work out policies to solve the problem or at least ensure the rates are fair.

“Companies are going to put pressure on diplomats and lawmakers to resolve the global FRAND setting problem because it’s not sustainable in the long term to have courts in different places giving contrary orders.”

Undoubtedly, interesting times are ahead for patent litigators in Asia. They’re right to keep their eyes peeled.